

THE ROAD FROM PARIS TO SUSTAINABLE DEVELOPMENT

INTEGRATING HUMAN RIGHTS AND GENDER EQUALITY INTO EU EXTERNAL CLIMATE POLICIES



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Integrating human rights and gender equality into EU external climate policies

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Final report

This publication builds on previous reports of the foundation, namely :

— *The Road from Paris to Sustainable development : Effectively integrating human rights and gender equality into climate actions of EU Institutions.*

— Case Study Mexico :
Extractivism and renewable energies : human rights violations in the context of socio-environmental conflicts. Illustration using wind farms in San Dionisio del Mar, Oaxaca, by Dr. Armelle Gouritin

— Case Study Kenya :
Geothermal Energy and Indigenous Communities: The Olkaria Projects in Kenya, by Dr. Ben R.Ole Koissaba

— Case Study Indonesia :
Effectively integrating human rights and gender equality into EU climate actions. A case study of palm oil for biofuels in Indonesia, by Sisilia Nurmala Dewi, Arimbi Heroepoetri, Stephen Leonard.

The final report is an updated version of previous research and reports commissioned by HBS EU and aims to wrap up the major findings from the general report and the country case studies, as well as formulate policy recommendations.

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PREFACE

Since the adoption of the Post-2015 Sustainable Development Goals (SDGs) there has been growing recognition that **climate change and sustainable development are closely linked**. As part of a broader, inclusive agenda on sustainable development, climate change is being increasingly integrated into the EU's development strategy in order to simultaneously manage co-benefits and trade-offs between climate and development priorities. But the SDG agenda also demands commitment from the EU to ensure that its internal policies and decisions will have a positive impact on international sustainable development. The simultaneous implementation of the Sustainable Development Agenda and the Paris Climate Agreement will provide a **unique opportunity to advance policy coherence** at all levels.

By considering human rights and a gender-responsive approach in planning, designing and implementing climate action, policymakers can avoid harmful unintended consequences while maximising the social benefits of their programmes and projects. Community initiatives can be of particular value in this regard. Evidence demonstrates that rights-based climate policies strengthen the effectiveness of climate action. At the same time, there have already been well-documented cases of human rights violations in the name of climate action.

States are therefore required to ensure that their responses to climate change are consistent with their human rights obligations under domestic and international law including also the protection of economic, social, and cultural rights. This basic assumption was acknowledged in 2010 when the Parties to the UN Framework Convention on Climate Change (UNFCCC) emphasised the **importance of respecting human rights in all climate change-related actions**.

Guidance is needed on how human rights and gender equality can be systematically considered in the design of climate action so that climate responses deliver climate justice and ensure a just transi-

tion, and co-benefits for sustainable development can be reaped. Civil society groups also call for the integration of human rights into the international climate regime as a cross-cutting issue in the implementation of the UNFCCC. However, such a human rights based approach to climate change has not yet been operationalised. The EU claims leadership on the global fight against climate change as well as on the international protection of human rights and is striving for better policy coherence in its domestic and external policy agenda.

However, so far, **the EU has not been at the forefront of promoting policy coherence when it comes to the integration of human rights into its climate change policies**. In its updated Action Plan on Human Rights and Democracy (2015-2019), the EU failed to include an explicit objective to pursue a human rights-based approach in its climate change-related activities. The upcoming review and update of several overarching EU policy processes in the next years, such as the Multiannual Financial Framework (MFF) post 2020, the Europe 2020 strategy, and the European Parliament resolution on women, gender equality and climate justice of January 2018 provide opportunities to integrate recommendations for better policy coherence in line with the Sustainable Development Agenda. In concrete terms, the EU should apply human rights throughout the various stages of climate responses (including planning, funding, implementation, monitoring, and evaluation) and consider the adoption of accountability mechanisms such as institutional safeguards that respect and promote human rights and gender equality in all climate actions. The EU should also integrate the human rights dimension into its external climate policy and integrate human rights criteria into the impact assessment of both its mitigation and adaptation policies.

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INTRODUCTION

Written by Sébastien Duyck
& Dr. Armelle Gouritin

For a long time, the issue of climate change has been approached primarily from an environmental rather than a social perspective. As climate effects on communities have been increasingly felt around the planet during the past decade the perception of impacts on communities has increased around the planet. Governments and stakeholders have grown increasingly aware that climate change not only constitutes a critical environmental issue but also adversely affects communities and threatens to undermine human rights and development.

Since 2005, increasing impacts have provided numerous examples of the negative implications of climate change for the enjoyment of human rights. From Pacific Islanders forced to leave their low-lying ancestral atolls to Sub-Saharan and Andean communities suffering from desertification, the recent years have demonstrated that no region of the world is immune to these negative impacts.

As governments have begun to undertake policies to reduce emissions of greenhouse gases and support the resilience of local communities and infrastructures, a second dimension of the relationship between climate change and human rights has emerged.¹ The scale of policies and actions required to address climate change creates additional risks of human rights violations, especially when policies are designed and implemented inadequately.

In particular, policies requiring vast amounts of

land are likely to have an adverse impact on neighbouring communities unless local people are fully included in the planning of projects and sharing of benefits. Recent examples of conflicts between project developers and local communities or indigenous peoples have highlighted the importance of these risks, in particular in relation to large-scale energy projects and industrial plantations designed for the production of agrofuels (also referred to as “biofuels”).

Furthermore, the adverse impacts of climate change are felt differently by different segments of the population. In particular, women are often impacted more severely by climate change than men as women constitute the majority of the world's poor and are often more dependent on natural resources for their source of livelihood. Because of unequal access to resources and decision-making, as well as traditional gender roles, women also constitute the majority of casualties in the context of extreme weather events.²

The stronger representation of men among decision-makers in economic sectors related to climate actions (e.g., the transport and energy sector) and the limited amount of gender-disaggregated data on the impact of climate change and climate policies constitute factors which, among others, reinforce this phenomenon. Addressing gender issues specifically in climate responses is therefore key to ensuring that the policies that are implemented address gender inequalities and effectively empower

1 See, for instance, Office of the UN High Commissioner for Human Rights (2009). Report on the relationship between climate change and human rights, UN Doc. A/HRC/10/61, § 65-68.

2 See, for instance, World Health Organisation (2014). Gender, Climate Change and Health, URL: <http://www.who.int/globalchange/GenderClimateChangeHealthfinal.pdf>

both men and women to contribute to climate actions and face the impacts of climate change.³

The risks associated with climate change and ill-designed policies call for the effective integration of human rights and gender equality into the design and implementation of climate policies. Systematic integration of these principles will require the involvement of all actors engaged in climate policy-making and policy implementation.

Against this background, human rights and gender equality are fundamental principles of the European Union and should be integrated into all policies of the EU, both internally and externally. However, only limited initiatives have been undertaken in order to assess to what extent this integration has taken place in the context of climate policies and to map opportunities for strengthening this integration.⁴ The present report seeks to provide an overview of the implications of EU policies for the promotion and respect of human rights and gender equality in the context of climate change.

In order to provide a review of the EU's involvement and its institutions, this report examines the specific roles played by the EU and its institutions.⁵

The focus on specific roles – rather than policy areas – aims to address the roles and involvement of the EU from a systematic perspective. The roles identified in this report highlight the multitude of interactions between EU policies and the promo-

Mapping human rights and gender equality obligations in the framework of climate actions

Substantive rights

- Prohibition of inhuman or degrading treatment or punishment Prohibition of discrimination
- Freedom of expression
- Freedom of association
- Right to life
- Right to health
- Right to a healthy/balanced environment (including the right to environmental protection)
- Right to the integrity of the person
- Right to liberty and security
- Right to dignity
- Right to property
- Right to private and family life
- Right to water
- Right to food
- Right to land
- Right to housing
- Right to (cultural) identity

Procedural rights:

- Access to (environmental) information
- Participation in the decision-making process (including the free and informed prior consent – FPIC)
- Access to (environmental) justice (including right to a fair trial)

³ See, for instance, UNDP (2013). Overview of Linkages between Gender and Climate Change, UNDP Policy Brief 1 on Gender and Climate Change in Asia and the Pacific. See also Schalatek, L.; Bird, N. (2016): The Principles and Criteria of Public Climate Finance - A Normative Framework, URL: <http://www.odi.org/sites/odi.org.uk/files/resource-documents/11018.pdf>, p.3.

⁴ For the most relevant review, see Cournil, C.; Tabau, A.-S. (2012). Human Rights and Climate Change: EU Policy Options, Report to the European Parliament, URL: [europa.eu/RegData/etudes/etudes/join/2012/457066/EXPO-JOIN_ET\(2012\)457066_EN.pdf](http://europa.eu/RegData/etudes/etudes/join/2012/457066/EXPO-JOIN_ET(2012)457066_EN.pdf).

⁵ This report does not address the role of Member States as such or the private sector in terms of applying a rights-based approach and mainstreaming gender in EU climate action. On the private sector and climate change, see among others another report of the Heinrich Böll Foundation: Heinrich Böll Foundation, European Center for Institutional and Human Rights (2017). Tricky Business: Space for Civil Society in Natural Resource Struggles, chapter 10, URL: https://www.boell.de/en/2017/12/07/tricky-business?dimension1=division_demo.

tion of human rights and gender equality in the context of climate change. Consequently, challenges and opportunities are identified in relation to each of these roles. Since a systematic analysis of all relevant EU policy areas would not be feasible within the scope of the present report, this holistic approach makes it possible to outline cross-cutting patterns that can be tracked independently from the policy areas under which EU policies fall.

The research presented in this report is based on semi-structured interviews conducted with a diverse range of expert stakeholders who are involved in some of the aspects of European climate and development policies.⁶ These interviews were complemented by a desk study of primary sources (mainly EU policy documents), secondary literature (including academic articles and civil society briefings commenting on EU policies) and three case studies conducted in Mexico, Kenya and Indonesia. Additional interviews were conducted in the framework of the case studies.

Based on the findings of the first expert interviews carried out in 2016,⁷ the study identifies five main roles that the EU plays in global climate actions and have potential implications for human rights and gender equality domestically and abroad: the EU as a domestic policy maker, the EU as a consumer of international goods, the EU as an international negotiating actor, the EU as a participant in international carbon markets, and the EU as an international donor.

Although this approach does not cover all possible interactions between EU policies and the promotion of human rights and gender equality in the context of climate change, the stakeholders and civil servants interviewed identified these five roles as particularly relevant.⁸ These five roles illustrate the complexity of the relations between decisions and actions adopted by the EU institutions, together with the promotion and respect of human rights and gender equality in the context of climate change actions.

While the present report focuses on the integration of human rights and gender in individual climate-related decisions and actions decided by EU institutions, the overall level of ambition of EU climate policy also has a significant impact on the protection of human rights globally. The more temperatures rise as a consequence of anthropogenic emissions, the more severe the human rights implications of climate change will be.⁹ Consequently, states must adopt adequate emissions reduction policies in order to limit their contribution to the increase of temperatures. The International Covenant on Economic, Social and Cultural Rights requires, for instance, each State to take actions “*to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means*”.¹⁰ Obligations to protect human rights in the context of climate change thus require the EU institutions to adopt an adequate level of mitigation policies in order to reduce its greenhouse gas emissions and contribute effectively to

6 Fourteen expert interviews were conducted in spring 2016 with civil society representatives from environmental, developmental, gender and faith-based organisations, academic researchers and governmental representatives. For an overview, please see Annex 3, List of Civil Society Experts interviewed for Part I, chapters 1 – 4.

7 See Annex 3, List of Civil Society Experts interviewed for Part I, chapters 1 – 2.

8 Additional roles could include the EU as an exporter of technologies or as a source of investments in infrastructures in third countries.

9 Human Rights Council (2015). Joint statement by UN Special Procedures on the occasion of World Environment Day, June 5, 2015, URL: <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=16049&LangID=E>

10 United Nations (1966). International Covenant on Economic, Social and Cultural Rights, Part II, Article 2, URL: <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx>.

global efforts aimed at avoiding the most dangerous impacts of climate change.

The report begins with a first part dedicated to the policy and legal frameworks that apply in the field of human rights and gender in the context of climate actions. The first chapter of this part offers a brief analysis of the current state of integration of human rights and gender equality into climate policies at the international level (Part I, chapter 1). The overview of the international framework in the first section of this chapter sets the stage for an EU-focused analysis and will provide a benchmark against which current EU policies and processes will be assessed. The second section considers more specifically the legal and policy frameworks adopted at the EU level to promote the integration of human rights and gender equality that applies to climate actions. Chapter 2 of the first part offers practical illustrations of the four external key roles played by the EU and previously identified as having particular implications for the promotion of human rights and gender equality in the context of climate change (the EU as an international negotiating actor, as a consumer of international goods, as a participant in international carbon markets and as an international donor and lender).

The second part proposes three case studies conducted in Mexico on wind farms (Part II, chapter 1), in Kenya on geothermal projects (Part II, chapter 2), and in Indonesia on the oil palm industry (Part II, chapter 3). Each case study provides specific and detailed policy recommendations.

Subsequently, a third part proposes policy recommendations targeted at the EU institutions to promote the integration of human rights and gender considerations into climate policies (Part III, chapter 1). These policy recommendations draw upon the previous chapters of the report and highlight opportunities to strengthen policy coherence in EU climate policies and address specific challenges identified in relation to the four EU external roles considered in this report. The policy recommendations are followed by conclusions to the report (Part III, chapter 2).

PART I: Policy and legal frameworks

By Sébastien Duyck, Dr. Armelle Gouritin



1. Human rights and gender equality in Climate Actions: Legal and Policy Framework

Human rights obligations defined under international law, EU law and national constitutional provisions – including obligations with respect to women's rights – apply to all policies and issues and are thus unquestionably relevant in the context of climate change. All states have the duty to fulfil their respective human rights obligations when taking climate actions. As climate change requires cross-sectoral policies and innovative responses, the effective integration of human rights necessitates specific approaches when designing and implementing climate-related policies. Addressing these obligations at all levels of the policy-making process makes it possible to strengthen synergies between climate actions and human rights as well as prevent potential adverse impacts before they occur. Such policy-based approaches can complement existing human rights mechanisms that traditionally seek to remedy situations in which infringements on human rights have already occurred.

Against this background, the international and EU levels are subsequently presented from a legal and policy framework perspectives.

1.1 International level

1.1.1 Recognition of the interplay between human rights and climate change

UN bodies and experts have contributed during the past decade to articulating the relationship between existing human rights obligations and climate change. Since 2008, the Human Rights Council has adopted several resolutions on human rights and climate change, emphasizing the implications of human rights obligations for national climate policies and international cooperation.¹¹ The Human Rights Council has established special procedures that have also contributed to spelling out these interlinkages: for instance, highlighting the importance of the rights of indigenous peoples, the right to food and access to clean drinking water, and the right to shelter in the context of climate change.¹²

For a long time, however, the UN climate negotiations remained oblivious of the human rights implications of climate change and climate policies. Neither the 1992 UN Framework Convention on Climate Change, nor its 1997 Kyoto Protocol referred to human rights, and neither international treaty contained specific references to broader social issues.

Following the increasing recognition of the human rights dimensions of climate change, the Cancun Agreements adopted at the 2010 climate conference contained the first references to human rights adopted in the context of climate change negotiations. These references addressed both the direct impacts of climate change on human rights as well as the need for governments to

11 For more information concerning the role of the Human Rights Council and the relevant resolutions adopted, see Human Rights Council (2017). Resolutions, URL: <http://www.ohchr.org/EN/Issues/HRAndClimateChange/Pages/HRCClimateChangeIndex.aspx>.

12 See, for instance, UN Special Rapporteur on the Issue of Human Rights Obligations relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment (John Knox)(2016). Annual Report to the Human Rights Council, URL: http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/31/52.

respect human rights when implementing climate policies – in particular in the context of efforts to Reduce Emissions from Deforestation and Forest Degradation (REDD+).¹³

However, little progress towards the effective integration of human rights into climate policies has been observed during the following years. On the contrary, the body established by the Kyoto Protocol to supervise the Clean Development Mechanism explicitly refused to consider evidence of human rights violations when deciding whether to approve projects to generate emission reductions credits.¹⁴ Consequently, some projects with reported human rights impacts were incentivised under the Kyoto Protocol.

Furthermore, since 2010, few national governments appear to have taken specific steps to integrate human rights considerations into the implementation of their obligations under the UNFCCC. A review of national communications submitted to the climate secretariat shows that very few governments have reported specific steps or policies adopted by their countries to promote human rights in the context of climate actions.¹⁵

To remediate the limited progress achieved through the references inserted in the Cancun Agreements, many countries and civil society actors have advocated for the inclusion of an operative reference to human rights in the provisions of the Paris Agreement. Prior to the Paris Conference, 24 governments from developing countries highlighted their commitments to take human rights into

consideration in the implementation of their commitment under the future Agreement. Additionally, 32 countries (including 12 EU member states) signed a voluntary pledge – the Geneva Pledge For Human Rights In Climate Action – committing to better integrate human rights and climate change in international negotiations.¹⁶

During the final hours of the Paris climate conference, governments agreed to the inclusion of a reference in the preamble of the agreement to the need to take human rights into account in the context of climate actions. However, some countries refused to include a reference to human rights in the operative section of the Agreement. While the inclusion of the reference to human rights in the preamble provides a strong mandate for effective integration of human rights in the implementation of the Paris Agreement, the UN climate negotiations have yet to provide guidelines and support for parties to promote this effective integration. In 2016, only one decision adopted by the parties to the UNFCCC effectively built on the reference contained in the preamble of the Paris Agreement to provide an explicit mandate to a specific body – in this case, the Paris Committee on Capacity Building – to integrate human rights considerations in its work.

It remains to be seen whether the Paris rulebook¹⁷ will endorse a rights-based approach. The rulebook is expected to be adopted in 2018, during the 24th Conference of the Parties to the UNFCCC (COP-24).

13 UNFCCC(2010). UNFCCC COP Decision 1/CP.16, "The Cancun Agreements: Outcome of the work of the Ad Hoc Working Group on Long-term Cooperative Action under the Convention" UN Doc. FCCC/CP/2010/7/, preamble to § 88 and appendix 1.

14 Schade, J.; Obergassel, W. (2014). Human Rights and the Clean Development Mechanism, Cambridge Review of International Affairs 27 (4), URL: http://epub.wupperinst.org/files/5732/5732_Schade.pdf.

15 Mary Robinson Foundation for Climate Justice (2016). Incorporating Human Rights into Climate Action, URL: <http://www.mrfcj.org/wp-content/uploads/2016/05/Incorporating-Human-Rights-into-Climate-Action-Version-2-May-2016.pdf>.

16 Ministerio de Relaciones Exteriores y Culto – Costa Rica (2017). Geneva Pledge For Human Rights In Climate Action, URL: <http://www.rree.go.cr/?sec=politica exterior&cat=medio ambiente y desarrollo sostenible&cont=974>.

17 The Paris rulebook refers to the elements foreseen in the Paris Agreement and Decision Text.

References to human rights in outcomes of UN climate negotiations

Cancun Agreements (2010)

Preamble: Noting resolution 10/4 of the United Nations Human Rights Council on human rights and climate change, which recognizes that the adverse effects of climate change have a range of direct and indirect implications for the effective enjoyment of human rights and that the effects of climate change will be felt most acutely by those segments of the population that are already vulnerable owing to geography, gender, age, indigenous or minority status, or disability [...] *Paragraph 8:* Parties should, in all climate change related actions, fully respect human rights.

Paris Agreement (2015)

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

Decision on the implementation of the framework for capacity building (2016)

Also invites the Paris Committee on Capacity-building, in managing the 2016–2020 work-plan:
To take into consideration cross-cutting issues such as gender responsiveness, human rights and indigenous peoples' knowledge.

Additionally, several areas of implementation of the UNFCCC are directly relevant to the promotion of and respect for human rights.¹⁸ Article 6 of the UNFCCC and article 12 of the Paris Agreement establish the general commitment of parties to promote and enhance public participation and public access to information. The Warsaw International Mechanism for Loss and Damage established in 2013 was created to develop recommendations for integrated approaches to avert, minimize and address climate-related human displacement. Other workstreams and institutions established through the UNFCCC, such as the Nairobi work programme on impacts, vulnerability and adaptation, and activities related to agriculture and food security, also have the potential to consider the human rights implications of climate change and promote rights-based responses.

1.1.2 Promotion of gender equality in the context of climate change

Specific obligations to promote gender equality were elaborated in the 1979 legally-binding Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). With 189 parties, the CEDAW provides an international bill of women rights and requires governments to take action to promote and protect the rights of women, including the passage of adequate legislation. Many of the provisions of the CEDAW are directly relevant in the context of climate change (for instance, the reference to equal rural development and access to resources) and the adoption of climate policies (for example, provisions related to participation in decision-making and implementation of relevant policies).

Principle 20 of the 1992 UN Rio Declaration on Environment and Development emphasises the key role of women in sustainable development and

18 Duyck, S.; Lador, Y. (2016). Human Rights and International Climate Politics - Human Rights into Climate Actions After Paris: Opportunities for the UNFCCC, the Human Rights Institutions and the G-20, Friedrich Ebert Stiftung Briefing Paper, URL: <http://library.fes.de/pdf-files/iez/12893.pdf>.

the need to guarantee their full participation. This principle was further elaborated in the commitments contained in Agenda 21, as well as through a chapter dedicated to “global action for women towards sustainable and equitable development” (chapter 24).

These commitments were reflected in the Beijing Declaration adopted at the 1995 Fourth World Conference on Women and in the related Platform for Action. The Beijing Platform for Action addresses specifically the promotion of gender equality in the context of environmental policies. The Platform includes strategic objectives that aim at promoting the effective participation of women in decision-making related to the environment (objective K.1), integrating gender concerns in sustainable development policies (K.2), and strengthening the assessment of impacts of development and environmental policies on women (K.3).

Gender equality constitutes an integral component of Agenda 2030 and the Sustainable Development Goals (SDGs). Goal 5 focuses specifically on the achievement of gender equality and the empowerment of all women and girls, with targets related to participation in decision-making and access to land and economic resources, among other matters. Additionally, Agenda 2030 recognises the promotion of gender equality as a cross-cutting theme.¹⁹ Goal 17.18 explicitly emphasises the need for gender disaggregated data for the purpose of monitoring the implementation of the SDGs. In total, 24 targets and 46 indicators for the SDGs contain explicit gender components.

Building on these international developments, the importance of considering the gender dimensions of climate change has been increasingly recognized in the UN climate negotiations process since 2001.

The 2010 Cancun Agreements provide a general recognition that “gender equality and the effective participation of women are important for effective climate action on all aspects of climate change”.²⁰ Seven additional references contribute to the promotion of gender equality mainstreaming in specific areas of implementation of the UNFCCC including Adaptation, REDD+, Technology Transfer, and Capacity Building. During the 2012 Doha Climate Conference, the parties agreed to include gender as a standing item on the agenda of the annual Conference Of the Parties (COP). Consequently, the Lima Work Programme on Gender was adopted in 2014. The two-year-long Work Programme mandates specific activities to promote gender-responsive climate policy and requests the secretariat to undertake additional initiatives to support the integration of gender considerations into the implementation of the Convention. Additionally, an increasing number of thematic decisions adopted by the COP since 2001 have included specific references to gender.

The preamble of the Paris Agreement stresses the need to promote gender equality and the empowerment of women. This legally binding agreement also emphasizes explicitly the importance of gender-responsive policies in relation to adaptation and capacity-building. However, references to gender equality were deleted from the Agreement’s articles addressing mitigation, finance and technological support, despite the specific implications of the above-mentioned provisions concerning women.

At the 22nd Conference of the Parties to the UNFCCC (COP-22) held in Marrakesh in November 2016, governments agreed to continue and enhance the Lima Work Programme on Gender for an additional period of three years and mandated the UNFCCC secretariat to elaborate a gender action

19 UN (2015). General Assembly Resolution 70/1: “Transforming our world: the 2030 Agenda for Sustainable Development”, UN Doc. A/RES/70/1, § 20.

20 UNFCCC (2010). COP Decision 1/CP.16, “The Cancun Agreements: Outcome of the work of the Ad Hoc Working Group on Long-term Cooperative Action under the Convention”, UN Doc. FCCC/CP/2010/7/Add.1, § 7.

Gender balance, participation and women's leadership

To achieve and sustain the full, equal and meaningful participation of women in the UNFCCC process.

Coherence

To achieve and sustain the full, equal and meaningful participation of women in the UNFCCC process.

Gender-responsive implementation and means of implementation

To ensure the respect, promotion and consideration of gender equality and the empowerment of women in the implementation of the Convention and the Paris Agreement.

Monitoring and reporting

To improve tracking in relation to the implementation of and reporting on gender-related mandates under the UNFCCC.

Capacity-building, knowledge sharing and communication

To enhance the understanding and expertise of stakeholders on the systematic integration of gender considerations and the application of such understanding and expertise in the thematic areas under the Convention and the Paris Agreement and in policies, programmes and projects on the ground.

The 2017 UNFCCC Gender Action Plan: five priority areas
(Source: own illustration, based on the Gender Action Plan).

plan. They also issued a systematic request to all bodies constituted under the UNFCCC to include information in their regular reports on the integration of a gender perspective.²¹

The Gender Action Plan was adopted at the 23rd Conference of the Parties to the UNFCCC (COP-23) held in Bonn in November 2017. This key document contains five priority areas and foresees 16 corresponding activities.²²

The adoption of the Gender Action Plan is an achievement, but it remains to be seen whether it will be successfully implemented. Several factors could impede the Plan from achieving its goals, such as the limited financing that is available in this respect and the voluntary aspect of the Plan. In addition, the integration of gender mainstreaming integration in the Paris rulebook at the 24th Conference of the Parties to the UNFCCC remains to be seen and evaluated.

1.2 European Legal, Policy and Institutional Framework

While the international norms and obligations highlighted in the previous section apply to the European Union and its member states, the EU has also reiterated its own commitments to the effective integration of human rights and gender across all its policies. The EU has positioned itself as a frontrunner of policy coherence for development and has established procedures and mechanisms in order to promote this approach in its external action.

This section provides a brief assessment of the EU's commitments to mainstreaming human rights and gender as cross-cutting issues in its policies before considering more broadly the EU commitment

21 UNFCCC (2016). UNFCCC/CP/2016/10/Add.2, Decision 21/CP.22, "Gender and climate change", URL: <http://unfccc.int/resource/docs/2016/cop22/eng/10a02.pdf>.

22 UNFCCC (2017). FCCC/SBI/2017/L.29, "Gender and climate change", URL: <http://unfccc.int/resource/docs/2017/sbi/eng/l29.pdf>.

to policy coherence, with a particular emphasis on the processes and mechanisms integrated in EU decision-making processes to ensure the effective promotion of this approach to its external action.

1.2.1 Commitment of the EU to mainstreaming Human Rights

Legal basis for Human Rights in EU law

The EU founding treaties define human rights as a core value of the European Union (Treaty on the European Union - TEU, article 2) and stipulate EU commitment to consider the relevance of human rights with regards to the extraterritorial effects of EU policies (TEU, articles 3(5) and 21, and TFUE, articles 208, 209 and 212).

Additionally, the EU has adopted the EU Charter of Fundamental Rights, which further elaborates EU obligations in relation to human rights. The Charter acquired legal binding force with the Lisbon Treaty. The Court of Justice of the European Union has ruled that the provisions of the Charter are legally binding on all EU institutions and bodies.²³

Eventually, the Council of Europe's human rights law also affects EU law.²⁴ In that respect, EU institutions will be fully bound by Council of Europe human rights law requirements once the EU has acceded the European Convention for the Protection of Human Rights and Fundamental Freedoms.²⁵

EU approaches to externally foster human rights

The EU has adopted a number of approaches in order to promote human rights beyond its territory. In particular, the EU has undertaken several steps in order to ensure that its own external action would respect and strengthen human rights. The EU seeks the inclusion of a human rights clause in all the political framework agreements signed with third countries to establish human rights as an essential element of the agreement. The Commission also appointed an EU Special Representative for Human Rights.

In June 2012, the Foreign Affairs Council adopted a Strategic Framework for Human Rights and Democracy. The implementation of this framework is guided by an Action Plan on Human Rights and Democracy adopted by the Foreign Affairs Council.

Following the adoption of the Agenda for Change and the Strategic Framework on Human Rights and Democracy in 2012, the EU committed to move towards a Rights-Based Approach for development cooperation. The European Commission produced a toolbox to assist its staff with the implementation of a Rights-Based Approach.

A second Action Plan on Human Rights and Democracy, containing 34 objectives accompanied by 114 specific actions and measures was adopted in 2015. Aiming to "foster a comprehensive agenda to promote Economic, Social and Cultural Rights", the Action Plan specifically calls on the European External Action Service (EEAS), the Commission

23 European Court of Justice (2012). European Court of Justice of 19 July 2012 in the Case C130/10, Parliament v. Council (Al Qaeda), URL: <http://curia.europa.eu/juris/liste.jsf?num=C-130/10>.

24 European Parliament, Council and Commission (2012): EU Charter of Fundamental Rights, Preamble and Articles 52(3) and 53, and TEU, Article 6, URL: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12012P/TXT>.

25 Gouritin, A. (2013) : L'impact de l'adhésion de l'UE à la Convention européenne des droits de l'Homme sur le lien entre droits de l'homme et politiques climatiques de l'UE, in: Cournil, C. ; A.-S. Tabau, A.-S. (Eds): Changements climatiques et droits de l'Homme : les options politiques de l'Union Européenne, Bruylant, Oct.2013,, pp. 243-270.

and the Member States to “step up efforts to protect Human Rights Defenders (...) in the context of inter alia ‘land grabbing’ and climate change”.²⁶ The Action Plan also includes a requirement for the EU institutions and the Member States to pursue a human rights-based approach to development, including in relation to Agenda 2030.

1.2.2 Commitment of the EU to Gender Mainstreaming

The founding treaties also establish gender equality as a core value of the European Union (TEU, article 2). The promotion of gender equality is also defined in both treaties as a core objective of the European Union and of its institutions (TEU, article 2 and Treaty on the Functioning of the European Union - TFEU, article 8). These provisions are relevant both internally and in relation to the external action of the union. Gender considerations have progressively been integrated to EU external policy. Already in 2000, the Cotonou Agreement governing the relations between the EU and 79 African, Caribbean and Pacific countries identified gender issues as a cross-cutting principle for the implementation of the agreement, as well as a focus area for cooperation (article 1 and 31).

The adoption of the European Consensus on Development in 2005 confirmed that gender equality constitutes one of the fundamental principles underpinning EU development policy: *“The promotion of gender equality and women’s rights is not only crucial in itself but is a fundamental human right and a question of social justice, as well as being instrumental in achieving all the MDGs (...)”*.²⁷

Following the adoption of the Consensus on

Development, the EU institutions adopted a number of policy documents to promote the effective integration of gender equality and women’s empowerment in EU development cooperation. The Commission adopted a 2007 Communication on Gender Equality and Women’s Empowerment in Development Cooperation, which were endorsed by the related EU Council. The 2010 Council Conclusions on the MDGs included an Action Plan on Gender Equality and Women’s Empowerment. Building on these policies, in 2010 the Commission prepared an EU Plan of Action on Gender Equality and Women’s Empowerment in Development.

In 2015, the Council adopted a new version of the Gender Action Plan to cover the period up to 2020. This updated version of the Plan of Action aims at promoting gender equality and the empowerment of girls and women as principles of EU external action through four pivotal areas.

As one of the first steps to promote the new Gender Action Plan, in March 2016 the Commission released an internal guidance note on the EU Gender Action Plan 2016 –2020²⁸ aimed for the Directorate-General EuropeAid Development & Cooperation (DG-DEVCO) and European External Action Service staff working within Delegations, as well as DG-DEVCO staff based in Brussels. This guidance note highlights key aspects of the Gender Action Plan, provides resources for its effective integration in EU policies and identifies key responsibility for its implementation. As it targets EU civil servants and provides tools relevant to their work, this guidance note could potentially contribute significantly to the effective integration of gender in EU actions in third countries. Altogether, the role of the EU delegation has increased with the adoption of the Lisbon treaty, the diplomatic missions of the

26 Council of the European Union (2015). Council Conclusions on the Action Plan on Human Rights and Democracy 2015 – 2019, Annex “EU Action Plan on Human Rights and Democracy, Objective 17 C, p.16, URL: https://ec.europa.eu/anti-trafficking/sites/antitrafficking/files/action-plan-on-human-rights-and-democracy-2015-2019_en.pdf.

27 European Commission (2006). European Consensus on Development, Section 4.4/19. Gender Equality, p.16, URL: https://ec.europa.eu/europeaid/sites/devco/files/publication-the-european-consensus-on-development-200606_en.pdf.

EU now being mandated to act as EU delegations representing EU institutions in third countries.

The adoption of the European Parliament Resolution of 16 January 2018 on women, gender equality and climate justice²⁹ represents significant progress in terms of gender mainstreaming. In its Resolution, the European Parliament recalls that “the EU has a clear legal framework that requires it to respect and promote gender equality and human rights in its internal and external policies (...) EU climate policy can have a significant impact on the protection of human rights and the promotion of genderresponsive climate policies globally.” It also fleshes out the differential approach to climate change and women. Quite importantly, it links the differential approach with human rights by noting that “whereas climate change impacts exacerbate gender inequalities in relation to discrimination, threats to health, loss of livelihood, displacement, migration, poverty, human trafficking, violence, sexual exploitation, food insecurity, and access to infrastructure and essential services; whereas there is a need for a gender-responsive approach that links the analysis of climate impacts to a critical reflection on consumption patterns and their impact on climate change.” A particular emphasis is devoted to women’s unequal participation in climate-related decision-making process.

With a view to advancing a gender-responsive climate policy, the Parliament has put forward a number of proposals. Those proposals range from the integration of the gender impacts of the Commission’s trade and foreign development policies, providing data on the issue (“subsequent EU Nationally Determined Contributions (NDCs) include consistent reporting on the gender equality and human rights dimensions” and “Calls on the Commission and the Member States to report on

gender and human rights impacts and climate action in their Universal Periodic Review reports to the UN Human Rights Council”) to the adoption of a gender-responsive, human rights-based approach in the work of the UNFCCC Task Force on climate displacement” and other institutions that deal with disaster response.

More particularly linked with the report’s case studies, the Parliament calls for:

- Stronger women’s empowerment measures (with a strong focus on women’s participation in the decision processes)

- Better developed and integrated EU gender sensitive indicators;

- Better EU institutional coordination on this issue (see the section below on policy coherence): the Commission is called upon “to take the initiative to produce a comprehensive communication with the title ‘Gender equality and climate change – building resilience and promoting climate justice in mitigation and adaptation strategies’, with a view to addressing its strong institutional commitment to GEWE and the current weaknesses in institutional coordination”; the Parliament’s committees are called upon “to enhance gender mainstreaming when working within their areas of competence on the cross-cutting issues of climate change, sustainable development and human rights”; and the Parliament calls for “gender equality-focused training for EU officials, especially for those dealing with development and climate policies”; and

- More gender oriented financing, with the EU urged “to make development aid conditional on the inclusion of human rights-based criteria, and to establish new gender-sensitive climate change policy criteria”.

28 Council of the European Union (2015). Council Conclusions on the Gender Action Plan 2016-2020, URL: <http://www.consilium.europa.eu/en/press/press-releases/2015/10/26-fac-conclusions-gender-development/>.

29 European Parliament (2018). European Parliament resolution of 16 January 2018 on women, gender equality and climate justice, URL: <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P8-TA-2018-0005&language=EN&ring=A8-2017-0403>.

1.2.3 Process of adoption of initiatives and institutional arrangements in terms of policy coherence for development

In this report, a special attention is given to the Commission's capacity to initiate policies and legislative initiative. The traditional decision making process for the adoption of initiatives by the EU Commission consists of a few key stages, several of which offer an opportunity for the promotion of policy coherence and, more specifically, the respect for human rights and gender equality into EU Climate Actions. More particularly, processes allowing the consideration of potential impacts of the initiative under consideration on the one hand, and those enabling relevant actors outside of and within the Commission on the other hand, can contribute to this objective.

Assessing Climate Actions, human rights and gender equality in legislative process

The first step in the EU decision-making process involves a public consultation open for any stakeholder in order to gather expertise and comments on the proposal for a EU policy. These consultations offer an opportunity for members of the civil society to highlight, among other elements, the expected impacts of upcoming policies and to anticipate and seek to mitigate these potential adverse effects.

Another stage of the initiative offers a point of entry for human rights and gender equality in EU's initiatives: Impact Assessments. Established in 2003, they constitute the main political tool currently available to ensure that EU institutions consider comprehensively the economic, social and environmental impacts

of their initiatives. The Impact Assessments must be conducted prior to the adoption of any EU decision that is expected to have significant economic, social or environmental impacts. They cover the broad range of internal and external implications of the contemplated policy. As such, their preparation provides a strong tool to promote policy coherence for development.³⁰

More specifically, conducting Impact Assessments related to EU climate actions' impact on human rights and gender equality is relevant under at least four headings. First, the Impact Assessments requirement does not just apply to legislative initiatives. The requirement to perform an IA also applies to other (non-legal) decisions. This includes, among other items, financial decisions, those being critical for climate actions' impact on human rights and gender equality (as seen at more length in section 3.5 of the report). Second, since 2009, the guidelines for the preparation of the Impact Assessments include a particular requirement that the Impact Assessment considers impacts of EU initiatives on developing countries. Third, Impact Assessments are specifically concerned with human rights requirements and gender equality. The EU Commission itself issued a "Fundamental Rights check-list".³¹ Bearing in mind for the sake of this report that human rights and equality between men and women potentially affected by climate actions are guaranteed by the Charter.

In this context, the EU Commission itself issued a "Fundamental Rights check-list" of significant importance for the human rights and gender dimensions of EU climate actions.³² Fourth, qualitative assessments of past IAs revealed that these processes often failed to assess potential impacts in a comprehensive manner, particularly in relation to external impacts.³³

30 Given the central role played by the IAs in the EU decision-making process, the EU Commission established a dedicated supervisory body with the mandate to review the quality of the impact assessments. In 2014, this body was replaced by a Regulatory Scrutiny Board, which benefits from a more independent nature than its predecessor.

31 European Commission(2010). Strategy for the effective implementation of the Charter of Fundamental Rights by the European Union, Brussels, 19 October 2010, COM573 final, p. 5. To avoid any confusion, this check-list is meant to be applied to all initiatives, including those where an IA is not conducted.

Against this background, changes occurred with the launch of the European Commission's Better Regulation package released in 2015. Out of the 59 tools identified in the "Better Regulation Toolbox", tools #24 and 30 could more particularly bring about solutions to the problems identified in past IAs. Tool #24 (guidance on how to consider fundamental and human rights – including in third countries – when conducting impact assessments) notes that cost and benefit analysis are not adequate to assess potential human rights impacts. Tool #30 identifies options and methodologies to ensure that the potential impacts of EU policies on developing countries can be adequately considered during the Impact Assessments. In particular, the tool emphasises the importance of considering the differentiated positions of developing countries and the necessity of taking into account the potential impacts on Least Developed Countries and other countries most in need.

It remains to be seen whether the implementation of the Better Regulation Agenda and its associated tools will adequately address the concerns highlighted earlier by the qualitative assessments.

Institutional arrangements: hypothetical guarantees for Climate Actions' coherence

The EU has been among the first institutional actors promoting the concept of policy coherence for development. The adoption of the Maastricht Treaty in 1992 provided the EU with an explicit legal basis for the adoption of coherence policies.

A wealth of sub-organs of the key EU institutions contribute to some extent to decision-making related to EU policies and programmes potentially impacting human rights and gender equality in climate actions and third countries. The table below provides an overview of those:

European Commission
<ul style="list-style-type: none"> ■ DG Climate Action (CLIMA) ■ DG International Cooperation and Development (DEVCO) > PCD Unit ■ DG Trade (TRADE)
European Union External Action Service
<ul style="list-style-type: none"> ■ European Union External Action Service ■ EU Delegations in Third Countries
European Parliament
<ul style="list-style-type: none"> ■ Development Committee <ul style="list-style-type: none"> > Standing rapporteur on PCD ■ Environment, Public Health and Food <ul style="list-style-type: none"> > Safety Committee ■ Foreign Affairs Committee <ul style="list-style-type: none"> > Human Rights Sub-committee ■ Women's Rights and Gender Equality Committee

EU Institutions with relevance for the integration of human rights and gender equality in EU climate actions

32 European Commission(2010). Strategy for the effective implementation of the Charter of Fundamental Rights by the European Union, op. cit.

33 CONCORD Denmark (2015). The European Commission's Impact Assessments continuously neglect obligations to Developing Countries, URL: http://globaltfokus.dk/images/Politik/Rapporteur/IA_analysis_2015.pdf; CONCORD and the Federation International des Droits de l'Homme (FIDH) (2015). The European Commission's "Better Regulation Package" Will It Serve Poverty Eradication And Human Rights?, Spotlight Report Policy Paper, URL: <http://library.concordeurope.org/record/1636/files/DEEEP-REPORT-2016-010.pdf>; and Adelle, C.; Jordan, A. (2014). Policy Coherence for Development in the European Union: Do New procedures Unblock or Simply Reproduce Old Disagreements? Journal of European Integration 36(4): 375-91. In addition, the European Parliament also voices concerns in this respect and more particularly regarding human rights concerns. European Parliament (2016). Motion for a European Parliament Resolution on the EU 2015 Report on Policy Coherence for Development, (2015/2317(INI)), adopted on 20 May 2016, point 10.

Along with a wealth of sub-organs that contribute to some extent to decision-making related to EU policies and programmes that potentially impact human rights and gender equality in climate actions and third countries, and with a view to further promoting policy coherence in EU policy-making, the Commission also relies on internal inter-service consultations. The consultations seek to gather formal input on a specific proposal from other Directorate-Generals not directly involved with the policy under preparation, but the policy area that might be impacted by this initiative. Theoretically, this process should enable all relevant services of the commission to share expertise and anticipate potential externalities before the adoption of any new initiative. In practice, however, limited resources constrain the capacity of all relevant DGs to play an active role in all inter-services consultations related to issues that they are mandated to address. Also, the status and scope of these documents have been reduced over time, thus reducing the potential impacts of the main findings contained in these publications.

In addition to these processes, EU institutions also established internal arrangements to monitor and promote policy coherence. The Commission has established a Policy Coherence for Development Unit within the Directorate General for International Cooperation and Development (DG DEVCO). The Policy Coherence for Development Unit is responsible for the production of a biennial report on Policy Coherence for Development. These reports have been published by the Commission since 2007 and are meant to offer a comprehensive assessment of the work of the EU in this field.

Additionally, the EU Parliament has also highlighted its interest to play a role in the promotion and the review of Policy Coherence for Development. In 2010, its Development Committee appointed its own standing rapporteur on Policy Coherence for Development. Its role is to liaise with the Commission and with national parliaments on this issue and to produce a periodic report with a view to complementing those provided by the Commission. In this regard, the European Parliament's Report on the EU 2015 Report on Policy Coherence for Development is critical towards the Commission's Report and the Policy Coherence for Development's state-of-play.³⁴

Eventually, similar mechanisms exist in the context of the European External Action Services. Article 3 of the Decision establishing the organisation and functioning of the European External Action Services³⁵ requires inter-institutional dialogues (cooperation, consultation, and support). This requirement concerns the General Secretariat Council, the Commission, the European Parliament, the other institutions, agencies and bodies of the Union, and "service-level arrangements with relevant services of the General Secretariat of the Council, the Commission, or other offices or inter-institutional bodies of the Union."³⁶

34 See European Parliament (2016). Motion for a European Parliament Resolution on the EU 2015 Report on Policy Coherence for Development, (2015/2317(INI)), adopted on 20 May 2016, point 2 (references omitted).

35 Council of the European Union (2010). Council Decision of 26 July 2010 establishing the organisation and functioning of the European External Action Service (2010/427/EU).

36 Ibid., Article 3(3).

2. Key roles played by the EU in climate justice

2.1 Overview of the four key external roles

Building on the normative context provided in the previous chapters, this chapter reviews the extent to which the EU has lived up to these commitments when taking climate-related actions.

Rather than focusing on specific policy areas based on the institutional structure of the European Union or the division of its competences, this report takes the approach of considering specific external roles played by the EU when responding to climate change. While additional roles might be suggested, the four EU external roles addressed in this report were identified on the basis of expert stakeholders' interviews as those most likely to have significant implications for the promotion of human rights.



Firstly, the EU and its member states play a significant role in contributing to the shaping of international climate governance through their negotiating positions in global forums, in particular in relation to the UN climate negotiations (“the EU as an international negotiating actor”). Secondly, the EU plays a strong role in global supply chains through its consumption of specific goods, such as wood products and biofuels, regulated partly under climate policies, (“the EU as a consumer of interna-

tional goods”). Thirdly, private actors based in the EU play an important role in international carbon trading mechanisms. Consequently, EU regulations can impact the types of projects and activities promoted through such schemes (“the EU as a participant in international carbon markets”). Fourthly, development and climate funding provided by the EU to third countries can have significant positive as well as adverse implications for the communities concerned by those projects, which depends on the safeguards and criteria adopted by EU institutions and host country governments (“the EU as an international donor and lender”).

— External Role 1: The EU as an international negotiating actor assesses how the EU has advocated for gender equality and a rights-based approach to climate actions under the UN Framework Convention on Climate Change (UNFCCC). While not all aspects of international climate policy are addressed under this framework, the UNFCCC remains the prime forum for shaping climate governance, and the EU, as one of the most influential international actors, bears significant weight for the outcome of this process.

— External Role 2: The EU as a consumer of international goods focuses on the implications of specific EU domestic policies that have been adopted as a response to climate change and that have a strong impact on global supply chains. Given the size of the EU domestic market, such decisions can lead to significant developments in countries that contribute to the provision of goods used by the Union to meet its climate goals.

— External Role 3: The EU as a participant in international carbon markets reviews the participation of the EU in the carbon trading mechanisms established under the Kyoto Protocol. These mechanisms have been denounced for their failure to address human rights issues adequately. The EU has a strong role to play to consider the implications of its participation as the majority of the carbon credits traded are purchased in order to comply with the emission trading scheme.

External Role 4: The EU as an international donor and lender examines how the EU integrates human rights and gender in projects supporting third countries in the context of climate finance. It also briefly addresses the involvement of the EU as a decision maker shaping the procedures and safeguards of key international funds to which it contributes.

The four EU external roles and their opportunities and challenges in terms of a rights based approach and gender mainstreaming are detailed at more length in the subsequent sections.

2.2 The EU as an international negotiating actor

As a major international actor, the EU plays an important diplomatic role in shaping international climate governance through its engagement in the international climate negotiations. However, the ability of the EU to advocate strongly for specific

thematic issues in climate negotiations is often impaired by the diversity of views among its member states. In this context, early coordination among EU delegations is critical to ensure that the EU can adequately support the principles to which it is strongly committed in the negotiations.

The European Union has supported the integration of human rights on several occasions in the climate negotiations. For instance, the EU referred to human rights in five of its formal written submissions to the climate negotiations. In particular, the EU has been a proponent of the integration of safeguards and grievance mechanisms in the mitigation instruments established under the UNFCCC, including the Clean Development Mechanism (CDM) and REDD+.

During the negotiations leading to the COP-21, the EU provided only a limited support to proposals aiming to integrate human rights in the Paris Agreement. After having initially taken a strong position on the issue, the EU then moved to embrace



Picture: Icaro Cooke Vieira / CIFOR

EU leadership advocating for a right-based approach to the SDGs

EU climate diplomacy could learn from the experience of the negotiations leading to the adoption of the Sustainable Development Goals. In the SDG process, the EU adopted a strong position advocating in favour of a human rights-based approach to sustainable development. In this context, rights-based approaches were not merely mentioned in EU communication, but were also included as one of the core elements of its vision for the SDG framework. This strong position contributed to ensuring that the final document explicitly highlighted the importance of human-rights based approaches. This experience offers a good practice of how the EU has successfully integrated human rights in its position related to another major international negotiating process.

only preambular language, refusing to endorse calls for a stronger reference in the operative provisions of the agreement, although some of its member states supported this proposal.

The ability of the EU to play a more supportive role is currently constrained by the lack of adequate coordination between the EU delegations, particularly ahead of the climate negotiating sessions. As a consequence, it is often difficult to reach consensus among delegations on expressing stronger support, as some of the delegations prefer to focus primarily on addressing other aspects of the negotiations.

In their political statements on the climate negotiations, the EU institutions have paid different levels of attention to this issue. In the past, the European Parliament (EP) demonstrated the strongest support by referring to this issue in most of its annual resolutions adopted since 2007 prior to each COP. The EP called, for instance, for stronger consideration of human rights in the procedures of the CDM (2010, 2011, 2014) and in relation to the Paris Agreement (2015). While the Council had remained silent on this issue prior to the COP-21, the first explicitly referred to it in its conclusions on Climate Diplomacy adopted in February 2016, emphasising that “the EU will continue to advocate

for the promotion and protection of human rights also in the context of climate change and climate diplomacy”.

The references contained in these documents should provide a mandate for a more proactive EU role in future negotiations to ensure that human rights are duly integrated with its positions in the climate negotiations process. Such a position would better reflect the EU commitment to policy coherence, as reflected in its Action Plan on Human Rights and Democracy. The EU Commission and the EEAS could play a significant role by ensuring the participation of a human rights expert in the process in order to support the EU delegation and the member states.

The EU could also consider signing the Geneva Pledge for Human Rights in climate actions that was launched in 2015. The Pledge stipulates the integration of human rights and climate expertise in international forums and was already signed by twelve EU member states.³⁷ A stronger involvement of the Commission and the European External Action Services, together with a more proactive role by these member states, might enable the EU to better reflect human rights considerations in its negotiating positions.

37 These twelve member states are: Belgium, Finland, France, Germany, Ireland, Italy, Luxembourg, Netherlands, Romania, Slovenia, Sweden and the United Kingdom of Great Britain and Northern Ireland. See <http://climate-rights.org/our-work/unfccc/geneva-pledge/>.

As far as gender equality is concerned, the EU has played a more proactive role to promote the integration of gender considerations in the climate negotiations. For many years, the EU has been at the forefront of countries supporting this agenda under the UNFCCC, both as a specific workstream and towards its effective integration in various areas of work under the Convention.

The EU delegations established an EU gender team, including the gender experts of each delegation, to tackle the gender issue. The gender team enables delegations to exchange information more effectively on this subject. Additionally, the EU Commission has been involved in gender-related discussions with the participation of a dedicated expert. This stronger coordination mechanism could serve as a model for the development of greater institutional capacity in relation to human rights.

2.3 The EU as a consumer of international goods

The focus of the subsequent sections is on international goods that are addressed in the case studies, namely biofuels and palm oil.

2.3.1 Biofuels

Due to the size of its market, decisions impacting demands on the EU internal market can have strong external impacts by driving imports and thus providing an incentive for the production and exploitation of specific goods in third countries. EU climate and energy policies can, accordingly, have significant external implications, particularly when the availability of goods is limited domestically. Through its climate-related policies, the EU

has impacted two global supply chains that are particularly exposed to being related to human rights infringements against local communities and peoples.

First, international demand for biofuels might be linked with instances of land grabbing in locations where land has been taken away from local communities in order to establish large plantations for biofuel crops.

Second, the conversion of productive land to biofuel crops has caused the diversion of agricultural production away from supplying food markets. Consequently, the reduced supply has undermined food security in some regions of the world through its impact on the determination of food prices.

Whereas other factors (such as unfavourable weather and high oil prices) play determining roles in the food crisis, the upward pressure on prices caused by the diversion of food into fuels aggravates these trends and can thus further exacerbate the food crisis. Recognizing the implications of biofuels on food prices and availability, the UN Special Rapporteur on the Right to Food and the High-Level Panel of Experts on Food Security and Nutrition have both recommended the abandon of specific targets for the consumption of biofuels.³⁸ This mechanism is amplified by the fact that land reconverted for the production of biofuels often belongs to the most productive agricultural land. Researchers have estimated that the lands currently used for the production and export of biofuels and other cash crops could contribute to feeding several hundreds of millions of people if reconverted to food crops.³⁹

As part of its 2020 Climate and Energy Package, the EU required that renewable sources consti-

38 UN Special Rapporteur on the right to food (Olivier De Schutter) (2009). Report to the Human Rights Council: Crisis into opportunity: reinforcing multilateralism, UN Doc. A/HRC/12/31, and High-level Panel of Experts on Food Security and Nutrition (2013). Biofuels and food security, HLPE Report No. 5.

39 Rulli, M.C.; D'Odorico, P. (2014). Food appropriation through large scale land acquisitions, *Environmental Research Letters* 9(6).



tute at least 10% of all transport fuels consumed by 2020.⁴⁰ This target, contained in the 2009 Renewable Energy Directive, constituted a significant increase from the previous objective provided by the 2003 Biofuel Directive, requiring blending of at least 5.75% of renewable fuels in EU's transport sector by 2010.

While the EU institutions were concerned about potential adverse implications of the new target adopted in 2009, the criteria included in the Directive only focused on the prevention of environmental degradation, for instance excluding biofuels produced on biodiverse lands. The Directive failed to address the potential social implications of the new target – despite initial consideration of the inclusion of social criteria.⁴¹ The sustainability criteria adopted in 2009 do not address land rights issues explicitly, but rather focus on ensuring the reduction of greenhouse gases and on conserving biodiversity.

This policy led to significant impacts in third countries as the EU became a major importer of biofuels, with imports of biodiesel and bioetha-

nol representing respectively 22.6% and 29.2% of the EU consumption in 2012. The imports of biofuels to the EU raised several concerns for their adverse social implications in third countries. The Commission commissioned a report in 2013 to assess the impact of biofuels production on developing countries from the point of view of Policy Coherence for Development.⁴² The report highlighted that the imports of biofuels into the EU had the potential to trigger a wide range of human rights adverse impacts, including rights to food, access to clean water, land rights and free prior and informed consent for Indigenous Peoples. Additionally, the report also emphasized that the changes in land use resulting from the production of biofuels were often associated with a weakening of women's rights (as many customary land systems are unfavourable to women).

Building on the sustainability criteria, the 2015 Directive is mainly focused on reducing the carbon intensity of biofuels and thus does not consider the land tenure and other rights-related issues potentially linked with the biofuels.⁴³ This demonstrates the dramatic impacts that EU energy policy can have on communities living in third countries. It also highlights the weaknesses of the EU decision-making procedures with regards to impact assessments and policy coherence. The measures adopted by the EU to remedy the negative impacts created by its biofuels policies were implemented only reactively, without being integrated into the initial design of the new policies.

The inclusion of biomass combustion to meet the EU's renewable energy targets for 2020 raises similar issues with those of the biofuels target. EU

40 European Parliament; Council of the European Union (2009). Directive 2009/28/EC of 23 April 2009 on the promotion of the use of energy from renewable sources [...].

41 Lendle, A.; Schaus, M. (2010). Sustainability Criteria in the EU Renewable Energy Directive – Consistent with WTO Rules, ICTSD information note No. 2, September 2010.

42 Diop, D. et al. (2011). Assessing the impact of biofuels production on developing countries from the point of view of Policy Coherence for Development, Final report for the European Commission, URL: https://ec.europa.eu/europeaid/sites/devco/files/study-impact-assesment-biofuels-production-on-development-pcd-201302_en_2.pdf.

43 European Parliament; Council of the European Union (2015). Directive (EU) 2015/1513 of 9 September 2015

member states can complement their indigenous renewable production by importing biomass, such as wood pellets, from third countries. Those imports can have severe extraterritorial impacts, both environmental and social.

Turning to the most recent developments in terms of biofuels from a rights-based and gender perspective, some are falling short while others are providing significant improvements.

In its proposal for a Winter Energy Package, adopted in November 2016, the European Commission proposes “to extend the existing EU sustainability criteria to cover all types of bioenergy” in its Communication “Clean Energy for all Europeans”.⁴⁴ In that respect, *“a new approach for forest biomass is proposed, which builds upon existing legislation on sustainable forest management and adequate accounting of greenhouse gas emissions from the land use and forest sector in the country of origin of the biomass. Developments in biomass production and use for energy will be monitored and reviewed through the Energy Union Governance.”*⁴⁵ Regarding the possible negative effects of the inclusion of biomass to meet the EU’s renewable energy targets, the Commission does not mention the possible extraterritorial effects, not to mention human rights or gender equality problems. It limits the scope to mentioning “solid biomass currently used for heat and power in the EU which is overall climate friendly”,⁴⁶ but acknowledges that “there are concerns that if the level of use continues to increase, the climate effects might deteriorate. Ensuring climate benefits in the long

term will require, in particular, limiting additional pressure on forests”.⁴⁷ The concerns identified by the Commission, however, do not induce a shift in its strategy. Also, the Commission puts forward that “only efficient conversion of biomass to energy should receive public support, be it in the form of financial support or preferential access to the grid”, so as to take stock of wood’s possible “higher added value than just energy”.⁴⁸ Still, no more details or criteria are mentioned by the Commission. All in all, the Commission falls short in providing criteria that would guarantee the full respect of human rights requirements and gender equality in the context of biomass’ inclusion to meet the EU’s renewable energy targets.

Regarding the recast of the Renewable Energy Directive, at the time of writing the Proposed Directive was referred back to the responsible European Parliament Committee with a view to pursuing the negotiations between the European Parliament and the Council. The Proposed Directive as amended by the Parliament⁴⁹ contains a number of elements relevant for this report, namely the human rights and gender dimensions in the context of biofuels. Those elements moving towards a rights-based approach applied to climate actions in terms of biofuels.

They include:

■ The Union’s criteria on sustainability and cutting greenhouse gas emissions as given in the Proposed Directive must be fulfilled, and are minimum standards.

44 European Commission (2016). European Commission to the European Parliament, the Council, the European Economic and Social Committee, the Committee of the Regions and the European Investment Bank, Clean Energy for All Europeans, COM/2016/0860 final, Brussels, 30.11.2016, under point 3.

45 Ibid.

46 Ibid.

47 Ibid.

48 Ibid.

49 European Parliament (2018). Amendments adopted by the European Parliament on 17 January 2018 on the proposal for a directive of the European Parliament and of the Council on the promotion of the use of energy from renewable sources (recast) (COM(2016)0767), URL: <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P8-TA-2018-0009>.

— A number of the sustainability criteria are directly relevant in the context of this report. The sustainability criteria (Article 26) encompass the protection of pastoral lands, forests, biodiversity, agricultural feedstock (soil quality and soil organic carbon), peatland, wetland, grassland.

— The Proposed Directive provides a number of safeguards in terms of human rights in general, land rights and indigenous peoples: Article 11 provides the requirement that joint projects relating to the production of electricity from renewable energy sources involving one or more third countries must “take place in full respect of international law, “with a particular focus on human rights law.” The Country “in whose territory the installation is to become operational” must produce a written acknowledgement of the requirement for respect of international law and human rights. This requirement may prove particularly important in preventing human rights abuses in the context of biofuels production. This is particularly true for indigenous peoples when it comes to their mere legal recognition as indigenous peoples and their access to lands and land-based resources (as the case studies illustrate).

— Indigenous peoples’ rights to land and land-based resources is additionally supported by Article 26(5), which requires, among others, evidence of a permit or equivalent legal right to harvest.

— However, the recast process of the renewable energy Directive misses an opportunity to clearly spell out the requirement to adequately consult indigenous peoples on projects that affect them and the quality requirements of such



consultation process. The Proposed Directive merely provides in Recital 16(f) that “The planning of the infrastructure needed for electricity generation from renewable sources should take into account policies relating to the participation of those affected by the projects, including any indigenous populations, paying due respect to their land rights.” This is clearly insufficient when considering the many problems that occur in practice in terms of consultation with indigenous peoples (including their free, prior and informed consent). The three case studies conducted in the framework of this report illustrate this point.⁵⁰

All in all, the Proposed Directive offers a number of safeguards that support a rights-based approach in the conduct of biofuels production. However, the Proposed Directive falls short in mainstreaming a gender approach applied to biofuels. The Proposed Directive merely mentions a “lack of opportunities for women” in the context of energy use in developing countries (Recital 28(d)) but does not provide any mechanism to endorse or flesh out gender equity. This is quite at odds with the European Parliament Resolution of 16 January 2018 on women, gender equality and climate justice.

50 Still, a solution might lie in the requirement that the Commission shall monitor “the origin of biofuels and bioliquids, and biomass fuels consumed in the Union as well as the impact of the production of renewable energy from those and other sources, including impact as a result of displacement, on land use in the Union and the third countries of supply” and “any associated positive and negative effects on food security and on competing material uses” (Article 30). If the Commission took this monitoring obligation seriously, taking due account of international and human rights law, the practical problems that occur in the implementation of international and human rights law that guarantee indigenous peoples’ rights could be tackled.

According to the Proposed Directive as it stands at the time of writing, palm oil based biofuels and bioliquids would be phased out in 2021.

Human rights and gender impacts of the palm oil industry are studied in more detail in the following subsection.

2.3.2 Palm Oil

On a global level, the main producers of palm oil are Malaysia and Indonesia and the production of palm oil has been constantly rising.⁵¹ Globally, the EU is one of the main consumers of palm oil.⁵² In 2014, 45% of the palm oil imported in the EU was used for transport purposes.⁵³ Palm oil as a biofuel is a means for the EU to fulfil its renewable energy targets in the transport sector.⁵⁴ Various certification schemes are meant to favour the producers of palm oil who, in theory, respect various criteria and principles aimed at endorsing the sustainable development principles.

The human rights' implications of palm oil plantations are well documented. Several actors have been regularly raising awareness about those implications.⁵⁵ They are: forced labour, child labour, violations of indigenous peoples' rights (right to land), deterioration of the environment and biodiversity loss (including deforestation), right to food, right to

life and right to health.

Against this background, the EU has adopted various measures aimed at avoiding the human rights abuses linked to the oil palm production.

First, the Environment, Public Health and Food Safety Committee (ENVI) of the European Parliament adopted a Report on palm oil and deforestation of rainforests on March 3, 2017.⁵⁶ The Report acknowledges the problems generated by the exploitation of palm trees in terms of human rights violations. Among others, the European Parliament underlines the link between palm oil exploitation and deforestation and environmental deterioration,⁵⁷ and the fires that contribute to global warming.

The main problem identified in the Report and supported by other actors is the difficult identification of the actors in the supply chain: "... whereas companies trading in palm oil are generally unable to prove with certainty that the palm oil in their supply chain is not linked to deforestation, peat-land drainage or environmental pollution, and to demonstrate that it has been produced in full respect of fundamental human rights and adequate social standards."⁵⁸ The Report also very strongly criticizes the certification schemes mentioned above. The European Parliament underlines that

51 UNCTAD (2016). Huile de Palme, Un profil de produit de base par INFOCOMM. Fonds de la CNUCED pour l'information sur les marchés des produits de base agricoles, URL : http://unctad.org/fr/PublicationsLibrary/INFOCOMM_cp08_PalmOil_fr.pdf, pp. 7-9. (only available in French)

52 In 2015, 8 827 000 tons of palm oil have been imported in the EU. See the EU vegetable oil and protein meal industry association: Fediol (2016). Vegetable Oils Production, Imports, Exports and Consumption, URL: <http://www.fediol.be/data/1471594102Stat%20oils%202015%20total%20only.pdf>.

53 European Parliament (2017). Report on Palm oil and deforestation of rainforests adopted by the Environment, Public Health and Food Safety Committee (ENVI) on March 3rd 2017, under "G".

54 As exposed in the section on biofuels, renewable sources constitute at least 10% of all transport fuels consumed by 2020 (2009 Renewable Energy Directive).

55 See for example The Greens/European Free Alliance (2012). Don't get bio fooled, URL: <http://www.greens-efa.eu/en/article/news/dont-get-bio-fooled/>; Greenpeace (2016): Cutting Deforestation Out Of Palm Oil Company Scorecard, URL: <http://www.greenpeace.org/international/en/publications/Campaign-reports/Forests-Reports/Cutting-Deforestation-Out-Of-Palm-Oil/>; or Greenpeace (2016). 4 stories of Indigenous Peoples' struggle for climate justice, URL: <http://www.greenpeace.org/international/en/news/Blogs/makingwaves/4-stories-of-indigenous-peoples-struggle/blog/57235/>. See also Schuster Institute for Investigative Journalism at Brandeis University (2014). Palm Oil Controversies, Human Rights abuses and controversies, URL: <http://www.schuster-instituteinvestigations.org/palm-oil-controversies-forced-labor-child-labor>

those do not “effectively prohibit their members from converting rainforests or peatlands into palm plantations.”⁵⁹

Human rights considerations drive the proposals of the European Parliament.⁶⁰ The proposals more directly linked with the present report are :

- Alignment of palm oil trees supply chain conditions and criteria with the FLEGT and Timber Regulations.

- The Commission should “include binding commitments in sustainable development chapters of its trade and development cooperation agreements with a view to preventing deforestation, in particular, an anti-deforestation guarantee in trade agreements with palm oil producing countries, and providing strong and enforceable measures to tackle unsustainable forestry practices in palm oil producing countries.”⁶¹

- The Commission and member States should “ensure that the environmental prob-

lems related to deforestation caused by palm oil are also addressed in the light of the objectives set by the EU Biodiversity Strategy to 2020, which should be an integral part of the Union's external action in this area.”⁶²

For the sake of the present report, it is worth pointing out that the European Parliament puts forward a notion of sustainability that encompasses human rights requirements. This is the way forward, if the EU is seriously moving towards the integration of human rights and gender requirements into its external policies.

Second, in the Proposed Renewable Energy Directive (recast) as it stands at the time of writing,⁶³ the “contribution from biofuels and bioliquids produced from palm oil shall be 0% from 2021”.⁶⁴ In other words, the proposal foresees a phase out of palm oil for biofuels by 2021.

Those aspects are developed at more length in the Indonesian case study (chapter 3 of the report's second part).

56 European Parliament (2017). Report on Palm oil and deforestation of rainforests adopted by the Environment, Public Health and Food Safety Committee (ENVI), 4 April 2017, URL : <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P8-TA-2017-0098&language=EN&ring=A8-2017-0066>

57 Preamble of Report from 3 March 2017, under “E”: “whereas precious tropical ecosystems, which cover a mere 7% of the Earth's surface, are under increasing pressure from deforestation, and the establishment of palm oil plantations is resulting in massive forest fires, the drying up of rivers, soil erosion, peatland drainage, pollution of waterways and overall loss of biodiversity, which leads to the loss of many ecosystem services and is having a major impact on the climate, the conservation of natural resources and, lastly, the preservation of the global environment for present and future generations.”

58 Ibid., under “C”.

59 Ibid., under “8”.

60 See for example Ibid., under “Ea”: “Whereas there are very worrying reports that a large part of the global production of palm oil is in breach of fundamental human rights and adequate social standards, that child labour is frequently occurring, and that there are many land conflicts between local and indigenous communities and palm oil concession holders.”

61 Ibid., under “9”.

62 Ibid., under “14”.

63 European Parliament (2018). Amendments adopted by the European Parliament on 17 January 2018 on the proposal for a directive of the European Parliament and of the Council on the promotion of the use of energy from renewable sources (recast) (COM(2016)0767), URL: <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P8-TA-2018-0009>.

64 European Parliament (2018). 2016/0382(COD) – 17/01/2018 Text adopted by Parliament, partial vote at 1st reading/single reading, URL: <http://www.europarl.europa.eu/oeil/popups/summary.do?id=1519347&t=e&l=en>.

2.4 The EU as a participant to international carbon markets

Initiated in 2005, the EU Emissions Trading Scheme (ETS) constitutes a core pillar of EU climate policy. The EU-ETS aims at promoting cost-effective emissions reductions by allowing companies to purchase and sell allowances to meet their individual emissions targets. The scope of the EU-ETS covers about 45% of all emissions from the EU. While an increasing number of countries are establishing similar trading mechanisms at the national (e.g. Switzerland, Australia, New Zealand) or subnational level (e.g. California, Beijing, Quebec), the EU-ETS remains by far the largest emissions-trading scheme.

Shortly after its establishment, the Commission decided to link the EU-ETS with the international trading mechanisms established under the Kyoto Protocol, thereby allowing operators to acquire emissions reductions units resulting from projects implemented in other countries.⁶⁵ Articles 6 and 12 of the Protocol establishes a Joint Implementation Mechanism and a Clean Development Mechanism (CDM), the latter allowing developed countries to meet their mitigation target by acquiring emissions reductions units resulting from projects implemented in developing countries.

According to the Kyoto Protocol, the CDM aims at promoting sustainable development in developing countries, while potentially lowering the cost for developed countries to meet their mitigation objectives. The CDM is overseen by an Executive Board and is governed by the Modalities and Procedures adopted in 2001 as a part of the Marrakesh Accords.

Project developers wishing to generate and sell emissions reductions units must follow a project cycle, which is designed to guarantee respect for the rules of the CDM.⁶⁶ This project cycle involves a range of actors besides the project developer: the Designated National Authority (a national authority responsible for confirming that a project is in line with the national development priorities), a Designated Operational Entity (a third-party certifier), and the CDM Executive Board.

Since the establishment of the CDM, the mechanism has been denounced for its failure to exclude projects linked to allegations of human rights violations.⁶⁷ Indeed, its modalities and procedures aim primarily at accounting adequately the amount of emissions that have been reduced by the project. Those do not mention human rights. Whereas projects must contribute to sustainable development, the validation of this requirement is left solely to the host government. In the past, the Board refused to consider evidence that specific projects infringed the human rights of local communities and peoples. A new procedure established in 2015 requires the board to forward such information to the relevant UN and national human rights institutions.

Similarly, while local public consultations are required prior to the registration of any project, there are no minimum standards defined in relation to these consultations. Studies have demonstrated that the consultations undertaken in relation to many projects fail to meet basic international standards.⁶⁸ Finally, the mechanism lacks a proper grievance mechanism that would enable impacted local communities to seek a remedy. As a consequence, mitigation projects violating human rights might be registered under the CDM, thereby allow-

65 European Parliament; Council of the European Union (2014). "Linking Directive", Directive 2004/101/EC of the European Parliament and of the Council, L 338/18.

66 The rules are available on the website of the CDM Rulebook.

67 Schade, J.; Obergassel, W. (2014). Human Rights and the Clean Development Mechanism, Cambridge Review of International Affairs 27(4), URL: http://epub.wupperinst.org/files/5732/5732_Schade.pdf.

68 See for instance Öko-Institute (2007). Is the CDM fulfilling its environmental and sustainable development objectives? An evaluation of the CDM and options for improvement, Report prepared for WWF, URL: <https://www.oeko.de/oekodoc/622/2007-162-en.pdf>.

ing these projects to generate additional revenues through the emission of reduction credits.

The decision of the EU to link its domestic ETS with the CDM had a very significant impact on the mechanism overall, creating a strong demand for the credits generated. Indeed, it provided an incentive to a great number of private actors to purchase these units that would have otherwise been primarily available to national governments. To date, EU-ETS installations represent over half of the total demand for CDM credits.⁶⁹

The EU has been under pressure to remedy this situation and the European Parliament called repeatedly the other institutions to address these violations and prevent that credits associated with human rights violations be traded on the EU-ETS. As a response, the EU is advocating in the climate negotiations the strengthening of the relevant modalities and procedures of the CDM. However, these attempts have remained largely unsuccessful so far.

Since the creation of the EU-ETS, the EU has established qualitative restrictions, mainly on the basis of environmental concerns. Credits generated from the Land Use, Land-Use Change and Forestry (LULUCF) and nuclear power sectors have been banned already at the time of the Linking Directive. Those related to large hydro projects (in excess of 20 MW) are accepted only if the generating project complies with the environmental and social standards included in the World Commission on Dams guidelines. Finally, additional restrictions apply for the third phase of the EU-ETS (2013-2020): credits generated after January 1, 2013 are only accepted if they originate from a project based in a Least Developed Country. All projects related to

industrial gas processes are excluded. Some individual member states have adopted more stringent requirements. Belgium, for instance, requires that all credits used by its installations comply with the Gold Standard – a rigorous certification standard for carbon offset projects.

The relevance of the CDM for the EU is fading progressively. For the current commitment period (2013-2020), the EU capped the number of credits generated by the CDM that could be used in the EU-ETS. Consequently, there is only limited incentive for private actors included in the EU-ETS to participate in the CDM. Furthermore, the EU was expected to de-link its domestic market from international schemes, demanding that emissions targets can be met only through domestic action during the fourth phase of the EU-ETS (2021-2030).⁷⁰ This has been confirmed in a provisional agreement between the European Parliament and the European Council in November 2017.⁷¹

However, specific sectors of the EU economy might still drive the EU demand for international credits. The new market-based mechanism established by the International Civil Aviation Organisation to ensure the compensation of some emissions generated by airlines – in which EU-based airlines are also expected to participate – will generate significant demand in international carbon credits markets.

The EU role in shaping the modalities of the future carbon market could be exercised either directly during the UNFCCC negotiations, or indirectly by setting additional criteria over the credits accepted for compliance with EU obligations. While the prospects for the CDM remain unclear

69 Kossoy, A. et al. (2015). *State and Trends of Carbon Pricing*, World Bank.

70 Council of the European Union (2017). EU environment ministers reached on 28 February 2017 an agreement in support of the revision of the ETS Directive for the period after 2020, URL: https://ec.europa.eu/clima/news/eu-emissions-trading-system-council-deal-paves-way-negotiations-parliament_en.

71 European Parliament : Council of the European Union (2018). Directive 2018/410 of the European Parliament and of the Council of 14 March 2018 amending Directive 2003/87/EC to enhance cost-effective emission reductions and low-carbon investments, and Decision (EU) 2015/1814, URL: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32018L0410>

at this stage, the experience generated through the CDM is expected to inform the establishment of a new market-based mechanism – the Sustainable Development Mechanism (SDM) – mandated under the Paris Agreement.⁷² The SDM is the new mitigation mechanism established under the Paris Agreement to allow any party to support the reduction of emissions in another country in order to meet its own climate commitment. The parties to the Paris Agreement will need to elaborate the modalities and procedures for this new mechanism before an assessment can be made of its potential implications for human rights. Human rights experts have already emphasised the importance of learning from the pitfalls of the CDM and the importance of strong social safeguards.⁷³ These issues have, however, not been discussed during the early rounds of negotiations on this issue in 2016. The EU failed to mention this crucial requirement when highlighting its views on the design of the new mechanism.⁷⁴

The Mexican and Kenyan case studies elaborate with further details on the CDM and expected SDM (chapters 5 and 6 of the report).

2.5 The EU as an international donor and lender

The last role of the EU that is analysed in this report refers to the EU as an international donor and lender, and how the EU can generate violations of human rights and gender equality in the context of this role.

The “no harm principle” in the context of climate finance is defined in another report of the Foundation: “Do no harm - Some climate related investments may harm sustainable development objectives as well as violate human rights. Public funding for climate change should avoid such investments, including the provision of financial

72 UNFCCC (2015). Paris Agreement, URL: http://unfccc.int/paris_agreement/items/9485.php, Article 6(4):

“A mechanism to contribute to the mitigation of greenhouse gas emissions and support sustainable development is hereby established under the authority and guidance of the Conference of the Parties serving as the meeting of the Parties to this Agreement for use by Parties on a voluntary basis. It shall be supervised by a body designated by the Conference of the Parties serving as the meeting of the Parties to this Agreement, and shall aim:

a - To promote the mitigation of greenhouse gas emissions while fostering sustainable development;

b - To incentivize and facilitate participation in the mitigation of greenhouse gas emissions by public and private entities authorized by a Party;

c - To contribute to the reduction of emission levels in the host Party, which will benefit from mitigation activities resulting in emission reductions that can also be used by another Party to fulfil its nationally determined contribution; and

d - To deliver an overall mitigation in global emissions.”

73 Ibid: Human Rights and Safeguards in the New Climate Mechanism established in Article 6, § 4 of the Paris Agreement; Letter by John H. Knox, United Nations Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, to the Subsidiary Body for Scientific and Technical Advice, 3 May 2016.

74 Slovak Republic; European Commission (2016). On Behalf Of The European Union And Its Member States, Submission On The Mechanism Established By Article 6, Paragraph 4 Of The Paris Agreement, Bratislava, 7 October 2016.

75 Schalatek, L; Bird, N. (2016). The Principles and Criteria of Public Climate Finance – A Normative Framework, HBS & ODI, URL: <https://www.odi.org/sites/odi.org.uk/files/resource-documents/11018.pdf>, p. 3.

76 Council of the European Union (2015). Council conclusions on climate finance, 10 November 2015, URL: <http://www.consilium.europa.eu/en/press/press-releases/2015/11/10-conclusions-climate-finance/>.

77 On the link between climate change and gender, see Schalatek, L.; Nakhooda, S. (2016). Gender and Climate Finance, Heinrich Böll Stiftung, URL: <https://www.odi.org/sites/odi.org.uk/files/resource-documents/11046.pdf>.

78 Official Journal of the European Communities (2000). PARTNERSHIP AGREEMENT between the members of the African, Caribbean and Pacific Group of States of the one part, and the European Community and its Member States, of the other part, signed in Cotonou on 23 June, URL: https://ec.europa.eu/europeaid/sites/devco/files/cotonou-agreement-2000_en.pdf.

support for private sector investments and fund-of-fund intermediation. Areas of special concern include investments with a focus on traditional fossil fuel exploration and use, large hydro dams or nuclear power generation.”⁷⁵ Against this background, the focus in subsequent developments will lie on the shortcomings of EU mechanisms and processes in terms of human rights and gender equality. Some policy recommendations will follow.

The EU is the world’s leading aid donor. In 2014, 14.5 billion euros were allocated by the EU and its Member States to climate finance.⁷⁶ This leading position contrasts with the pitfalls of the EU regarding human rights and gender equality safeguards and criteria.⁷⁷

The policy recommendations expressed in this report address both EU internal climate funding policy and positions that the EU should advocate at the international level, in view of its leading position. As illustrations of the proclaimed human rights and gender equality’s pre-eminence in EU cooperation policies, the so-called Cotonou

Agreement (in which the European Development Fund is established),⁷⁸ Regulation 233/2014 establishing a financing instrument for development cooperation for the period 2014-2020⁷⁹ and Regulation 236/2014 laying down common rules and procedures for the implementation of the Union’s instruments for financing external action⁸⁰ have very clear and strong language in terms of human rights protection and gender equality requirements within the EU’s cooperation policy and instruments.⁸¹

In a nutshell,⁸² the EU’s climate finance goes mainly through five channels: the Global Energy Efficiency and Renewable Energy Fund,⁸³ the Global Climate Change Alliance,⁸⁴ the European Development Fund⁸⁵ (including the European Union ACP Energy Facility⁸⁶), the Electrification Financing Initiative,⁸⁷ and the Global Public Good and Challenges.⁸⁸

The Global Climate Change Alliance, Global Energy Efficiency and Renewable Energy Fund,

79 Official Journal of the European Communities (2014). Regulation (EU) No 233/2014 of the European Parliament and the Council of 11 March 2014 establishing a financing instrument for development cooperation for the period 2014-2020, URL: https://eeas.europa.eu/sites/eeas/files/regulation_eu_no_2332014_of_the_ep_and_the_council_establishing_a_financing_instrument_for_development_cooperation_2014-2020_0.pdf.

80 Official Journal of the European Communities (2014). Regulation (EU) No 236/2014 of the European Parliament and the Council of 11 March 2014 laying down common rules and procedures for the implementation of the Union’s instruments for financing external action, URL: https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/pdf/financial_assistance/ipa/2014/236-2014_cir.pdf.

81 As for the Cotonou Agreement, see European Commission (2000). ACP – The Cotonou Agreement, Preamble, Articles 1, 8(3) and (4), 9, 13, 23(b), 25(1), 26(a), 27(b), 30(3), 31, 33(1), 46, 48(1), 50, 51, 54(1), 72(2), 84(e), 96. As for Regulation 233/2014, see Preamble (5, 6, 7, 11, 12, 15, 18, and Articles 2(1)(b)(ii), 3(1), 3(2) (c), 3(3), 3(7), (8)(b), 5(3)(a), 10(5), 11(5), 12(1), 12(2), 15(2) (Annexes omitted).

82 For a more detailed overview, see the Heinrich Böll Stiftung website “Climate Funds Update”, URL: <http://www.climatefundsupdate.org>.

83 Global Energy Efficiency and Renewable Energy Fund (2017): GEEREF, URL: <http://geeref.com>.

84 Global Climate Change Alliance (2017): GCCA, URL: <http://www.gcca.eu>.

85 European Commission (2017): European Development Fund (EDF), URL : http://ec.europa.eu/europeaid/funding/funding-instruments-programming/funding-instruments/european-development-fund_en.

86 European Commission (2017): ACP - multi-country cooperation – Energy, URL : http://ec.europa.eu/europeaid/regions/african-caribbean-and-pacific-acp-region/acp-multi-country-cooperation/energy_en.

87 Electrifi (2017): Electrification Financing Initiative, URL: <http://electrifi.org>.

88 European Commission (2017): Development Cooperation Instrument (DCI), URL : <https://ec.europa.eu/europeaid/node/7432>; European Commission (2014): Commission Implementing Decision adopting a Multiannual Indicative Programme for the Thematic Programme ‘Global Public Goods and Challenges’ for the period 2014-2020. C(2014)5072, URL: https://ec.europa.eu/europeaid/commission-implementing-decision-adopting-multiannual-indicative-programme-thematic-programme-global_en

Electrification Financing Initiative and Global Public Goods and Challenges Programme all lack a rights based approach endorsed by criteria or a check-list. As for the gender equality issue, the Global Energy Efficiency and Renewable Energy Fund is the only mechanism that acknowledges the challenge. However, there are only two criteria that address gender issues, but they do not include human rights.⁸⁹ The four mechanisms should adopt an enforceable rights-based approach that would be supported by criteria and a checklist.

Turning to the general conditions of the European Development Fund, the Financial Agreement's hypothetical suspension is foreseen "if the Beneficiary breaches an obligation relating to respect for human rights, democratic principles and the rule of law and in serious cases of corruption".⁹⁰ Two remarks can be made. First, gender equality is not specifically mentioned. The EU should fill that gap. Also, the suspension is hypothetical ("may be suspended in the following cases) and the EU should modify the phrasing and replace "may" with "shall", in order to turn the suspension into an obligation. This would better reflect the Cotonou Agreement and Regulation 233/2014.

Another set of concerns is raised by the blending instruments. The blending principle is a combination of EU grants with loans or equity from public and private financiers.⁹¹ The underlying idea is that "EU grant element can be used in a strategic way to attract additional financing for important investments in EU partner countries by reducing exposure to risk."⁹² According to the Commission, the EU grant can take diverse forms that will depend on the case at hand.⁹³ The use of the blending principle has raised very serious concerns in civil society.

For example, the EU-based NGO Eurodad has put forward multiple concerns that refer to, among other items, the blending mechanisms' compliance with development objectives, the risk to a developing country's ownership, and loopholes in terms of transparency and accountability.⁹⁴ Of particular concern in the report, the claim that blending mechanisms lack transparency and are unaccountable, is extremely relevant.

The bottom line is that no proper transparency mechanisms and accountability can induce the risk of human rights violations and infringements of the gender equality requirement. It can also generate impunity in cases of human rights violations.⁹⁵

The European Investment Bank is a key player in terms of climate finance. About 25% of the bank's total lending is devoted to climate finance, and this

89 GEEREF (2015): GEEREF Impact Methodology, Pillar 3: Sustainable Development, Impact criteria, Permanent female jobs created and Temporary female jobs created, URL: <http://geeref.com/assets/documents/GEEREF%20Impact%20Methodology%20June%202016.pdf>

90 European Commission (2012): Financing Agreement – EDF, Financing Agreement 15(2) (Annexes omitted), Articles 1, Article 23(1), URL: https://ec.europa.eu/europeaid/sites/devco/files/general-conditions-financing-agreement-2012-edf_en.pdf.

91 Web page of the European Commission on Innovative Financial Instruments (blending), https://ec.europa.eu/europeaid/policies/innovative-financial-instruments-blending_en, available on March 4th 2017. Such blending mechanisms include the Electrification Financing Initiative and the Climate Finance Initiative.

92 Ibid.

93 Ibid. Those forms are: (1) Investment grant & interest rate subsidy - reducing the initial investment and overall project cost for the partner country, (2) Technical assistance - ensuring the quality, efficiency and sustainability of the project, (3) Risk capital (i.e. equity & quasi-equity) - attracting additional financing, and (4) Guarantees - unlocking financing for development by reducing risk.

94 European Network on Debt and Development (Eurodad) (2013). A dangerous blend? The EU's agenda to 'blend' public development finance with private finance, URL: <http://eurodad.org/Entries/view/1546054/2013/11/07/A-dangerous-blend-The-EU-s-agenda-to-blend-public-development-finance-with-private-finance>.

share is expected to grow over the coming years with a \$100 Billion Investment Planned Over Next Five Years.⁹⁶ It is committed to the “effectiveness and transparency of climate action.”⁹⁷ However, its activities attract strong criticism from a rights-based approach and gender equality perspective. Its complaints mechanism also comes under fire. The Kenyan case study illustrates those criticisms and the challenges faced by the EIB as a lender and its complaints mechanism in terms of a rights-based approach and gender equality.

Eventually, the EU and EU Member States are critical players in international funds, due to the volume of funds to which they are committed. This critical role contrasts with the human rights and gender concerns generated by the funded projects, and the expected role of the EU in advocating for human rights and gender mainstreaming. REDD+ is a good example.

The European Commission claims it commits approximately 25 million a year to initiatives piloting REDD+ in Asia, Africa and Latin America.⁹⁸ Against the huge sums involved, the literature and NGOs have severely criticised the REDD+ activities

for their potential (and demonstrated) negative impact on human rights, and more specifically for indigenous peoples’ rights and land rights:⁹⁹

“The programme has been severely criticised by NGOs and scholars. Basically, these contend that governments have such appetite for financial aid that they may deprive indigenous and local communities of their rights in relation to lands covered by forests in order to receive financial aid. They also shed light on the fact that despite having set up their REDD+ strategies, the governments do not sufficiently consult local and indigenous communities”¹⁰⁰

Several concrete cases illustrate the human rights’ violations caused by REDD+. Guyana is one of those.¹⁰¹ In this Guyana case, Guyana’s legislation’s inadequacy in terms of consultation together with the absence of recognition of 11 communities’ formal recognition of their land rights have been denounced. Despite those shortcomings, the Forest Carbon Partnership Fund approved Guyana’s Readiness Preparation Proposal. Another example is Indonesia, where the Committee for the Elimination of Racial Discrimination rules

95 Concretely, Eurodad mentions human rights and gender equality requirements in its recommendations towards a “full and independent review of the effectiveness of existing blending mechanisms”, and monitoring and evaluation methods of the poverty impact analyses of the facilities, and monitoring “should include interests and views of the concerned population/citizens to ensure local ownership of the project and to prevent human rights violations and social damage.” European Network on Debt and Development (Eurodad) (2013). “A dangerous blend? The EU’s agenda to ‘blend’ public development finance with private finance”, p. 25, URL: <http://eurodad.org/files/pdf/1546054-a-dangerous-blend-the-eu-s-agenda-to-blend-public-development-finance-with-private-finance.pdf>.

96 UNFCCC (2017). European Investment Bank Pledges Continued Climate Leadership, URL: <http://newsroom.unfccc.int/climate-action/european-investment-bank-pledges-continued-climate-leadership-on-climate-finance/>.⁹⁷ For a more detailed overview, see the Heinrich Böll Stiftung website “Climate Funds Update”, URL: <http://www.climatefundsupdate.org>.

97 European Investment Bank (2018). “Together on Climate”, URL: <http://www.eib.org/projects/priorities/climate-and-environment/climate-action/together-on-climate.htm>

98 European Commission (2018). “EU financing for REDD+”, URL: https://ec.europa.eu/clima/policies/forests/deforestation_en

99 For an overview of the critics and literature references, see Gouritin, A. (2016). EU Environmental Law, International Environmental Law, and Human Rights Law: confirmation, complement and conflicts. The Case of Environmental Responsibility. BRILL, International Environmental Law Series, January 2016, pp. 9-10.

100 Ibid., p. 9.

101 On the Guyana case, see Lemaitre, S. (2011). Indigenous Peoples’ Land Rights and REDD: A Case Study, RECIEL, Vol. 20 (2), pp. 150–162.

that “the REDD+ process was in violation of the Convention against the Elimination of Racial Discrimination.”¹⁰²

In light of those problems, the EU should proactively advocate for the introduction of human rights and gender safeguards, criteria and mechanisms to monitor their respect into all the projects it finances, including through international funds.

¹⁰² Dooley, K.; Saskia, O. (2011). Building on Forest Governance Reforms through FLEG: The Best Way of Controlling Forests' Contribution to Climate Change?, *RECIEL*, Vol. 20 (2), pp. 169 – 170.

PART II:

Case studies

1. Human rights violations in the context of socio-environmental conflicts : Wind farms in San Dionisio Del Mar, Oaxaca (Mexico)

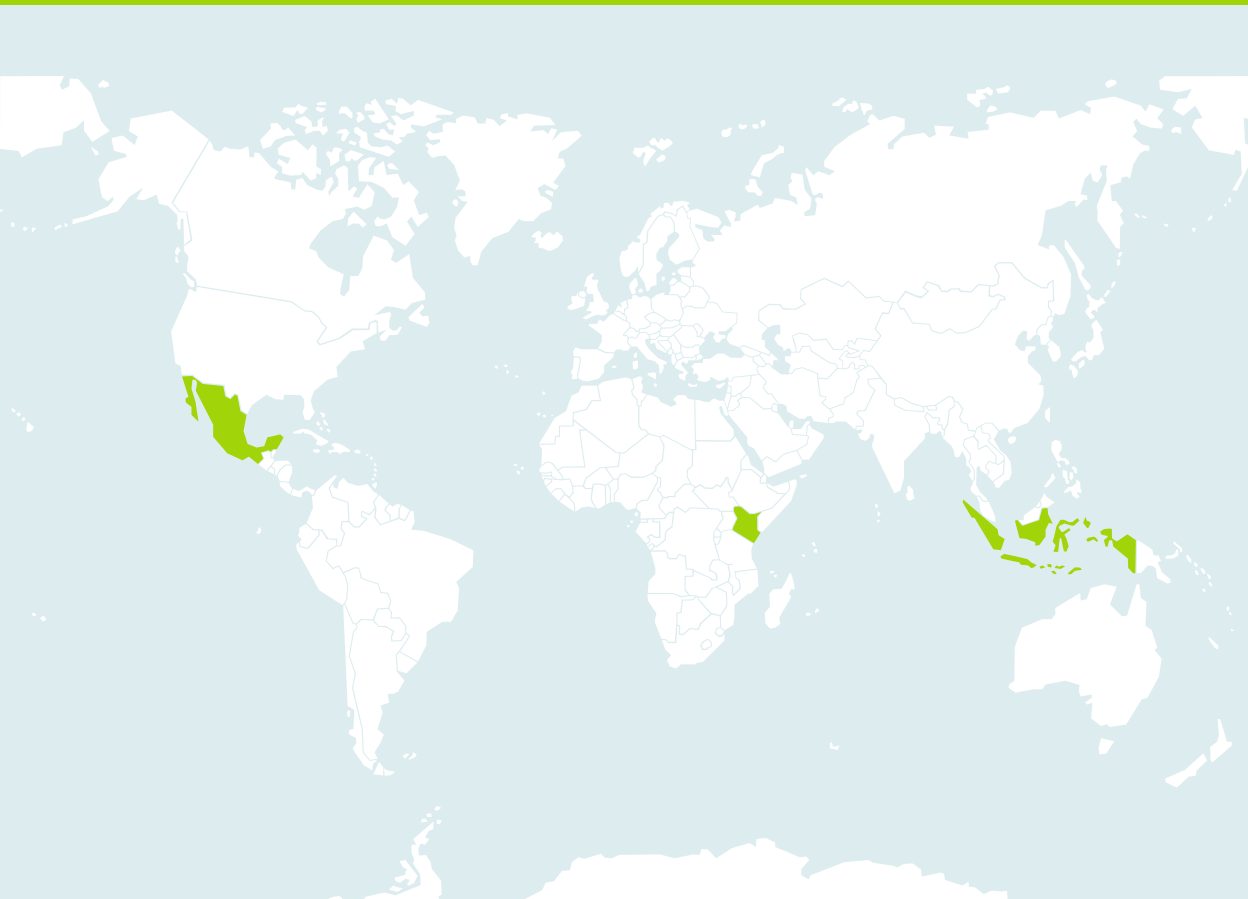
by Dr. Armelle Gouritin

2. A case study of Olkaria geothermal projects in Kenya

by Dr. Ben R. Ole Koissaba

3. A case study of palm oil for Biofuels in Indonesia

by Sisilia Nurmala Dewi, Arimbi Heroepoetri and Stephen Leonard



PART II: Case studies

1. Human rights violations in the context of socio- environmental conflicts: Wind farms in San Dionisio del Mar, Oaxaca (Mexico)

By Dr. Armelle Gouritin



Picture: Sarai Bautista Mulia

With a view to illustrating and informing the general report, this chapter focuses on the planning and design of renewable energy projects as a way to fulfil domestic climate commitments. More specifically, it addresses wind farms projects in Oaxaca and related infringements of the rights of indigenous peoples.

The case study report adopts a five-step approach. Firstly, it provides an analysis of the Mexican context in which EU climate policies indirectly impact human rights. Secondly, an overview of the specific case being examined, the *San Dionisio del Mar* case, gives the reader a clear view of the factual circumstances relating to infringements of indigenous peoples' rights. Thirdly, the EU's indirect impact on human rights is addressed and explored in the *San Dionisio del Mar* case and subsequent similar cases of infringements of indigenous peoples' rights. The fourth step is to examine proposals for preventing similar human rights violations in future. And finally, these proposals are summarized as policy recommendations.

The case study draws on a wide range of sources, from legal norms to newspaper articles, academic articles and official reports at EU, regional and international level.

1.1 Policy Context

1.1.1 Ever increasing extractivism in Mexico and accompanying socio-environmental conflicts

In the context of this case study, the notion of extractivism is understood broadly as the "large volumes of natural resources' appropriation or in natural resources' exploitation."¹⁰³ This definition also encompasses renewable energy and more particularly wind farms, which act as an illustration for this case study. Indeed, wind farms exploit wind, which is a natural resource.

Several Latin American countries have been driving for an extractivism development model since the 1980s. Mexico is one of those countries.¹⁰⁴

In the literature devoted to extractivism in Latin American countries, Colombia and Mexico are qualified as orthodox countries,¹⁰⁵ as opposed to other countries such as Argentina, Bolivia, Ecuador and Venezuela. The latter are qualified as post-neoliberal countries.¹⁰⁶ The extractivism development model (in both orthodox and post-neoliberal countries) generates many socio-environmental conflicts.

The roots of the many socio-environmental conflicts linked with extractivism projects that occur in

103 Veltmeyer, H. and Petras, J. (2015). El neoextractivismo. ¿Un modelo posneoliberal de desarrollo o el imperialismo del siglo XXI?, Ediciones Culturales Paidós, Editorial Crítica, Introduction, p. 38. On the notion of neoextractivism, see Ibid., pp. 52-53

104 Gallardo Robles, L.-J. (2016). La defensa del Chuchutsipi: la lucha de las comunidades Totonocas por la vida, Master thesis in social anthropology, Centro de Investigaciones y Estudios Superiores en Antropología Social, Mexico. Translation by the author, copy with the author. p. 15. See also Veltmeyer, H. and Petras, J. (2015), op. cit., Introduction, p. 17.

105 In the sense that their approach to extractivism remains under the logic of the Washington consensus.

106 Veltmeyer, H. and Petras, J. (2015) op. cit., Introduction, p. 28.

107 Walter, M., "Conflictos ambientales, socioambientales, ecológico distributivos, de contenido ambiental... Reflexionando sobre enfoques y definiciones", CIP-ECOSOCIAL – Boletín ECOS no 6, febrero-abril 2009, URL: http://www.crana.org/themed/crana/files/docs/252/180/20_09_conflictos_ambientales_enfoques_definiciones.pdf, p. 5, translation by the author. The definition of socio-environmental conflicts is highly debated, the definition provided here is only meant to provide the reader with background information.

Mexico are not to be found exclusively in the extractivist projects as such. The roots are to be found in the structural problems Mexico is facing (including poverty, inequality, exclusion, distinct world views and development notions, corruption, information opacity). In this tense context, extractivism projects are triggers for conflicts.

From the political ecology perspective, environmental conflicts can be defined as :

“the deployment of (conflictual) interaction dynamics, generation of alliances and value accession, in the occurrence of conflicts caused by the control over goods and resources, pollution, or, more generally the power to generate or impose definitions of reality.”¹⁰⁷

1.1.2 Policy context of socio-environmental conflicts in Mexico

Against the background of Mexico's support for the extractivist development model and the socio-environmental conflicts that go with it, a few elements need to be stressed in order to understand the context of those conflicts. Firstly, human rights

defenders and environmental activists are in a critical situation. Secondly, the 2013 energy reform is driven by contradictions. It is both pushing for the production of renewable energy and paving the way for greater access to lands and territories for the installation of renewable projects, and guaranteeing mediation and participatory institutions in that respect. Thirdly, consultation with indigenous peoples is currently a much-debated issue.

Critical situation of human rights defenders and environmental activists

Human rights defenders in general and environmental activists in particular suffer a very critical situation in LAC.¹⁰⁸ This is also true for Mexico, where not only are their actions criminalized¹⁰⁹ and defamed, but they also face threats, violence and murders.

The latest reports in that respect are alarming: between 2010 and 2015, aggression against environmental defenders increased by 990%.¹¹⁰ In 2016, threats and intimidation represented the majority of those assaults (24% and 19%), followed by criminalization (18%), physical assaults (15%), and illegal custody (11%).¹¹¹ As much as 43% of the attacks are carried out by state officials.¹¹²

108 See Global Witness (2016). En terreno peligroso. URL : <https://www.globalwitness.org/en/reports/terreno-peligroso/>.

109 For a definition of the criminalization process of human rights defenders see Protection International (2016): Criminalización de Defensoras y Defensores de Derechos Humanos. URL: https://protectioninternational.org/wp-content/uploads/2016/01/PI_Criminalisation_Spanish_PrintReady1.pdf, p. 4. And Ibid. p. 41 for an illustration of environmental rights defenders' criminalization in Mexico. See also Montalvo, T.-L. (October 2015, 10). En México se usa la ley para perseguir a defensores de derechos humanos y no para apoyar sus causas, Animal Político. URL : <http://www.animalpolitico.com/2015/10/en-mexico-se-usa-la-ley-para-perseguir-a-defensores-de-derechos-humanos-y-no-para-apoyar-sus-causas/> and Montalvo, T.-L. (2016, February 25). Defensores de la tierra, criminalizados por autoridades estatales: Informe, Animal Político. URL: <http://www.animalpolitico.com/2016/02/defensores-de-la-tierra-criminalizados-por-autoridades-estatales-informe/>.

110 Centro Mexicano de Derecho Ambiental (CEMDA) (2015). Informe sobre la situación de los defensores ambientales en México 2015. URL: http://www.cemda.org.mx/wp-content/uploads/2011/12/Informe-defensores-2014-2015_final2.pdf, p. 9. On aggression in the particular context of extractivist projects such as mining and oil exploitation, see De la Fuente López, A. and Olivera Villa, B. (Coord.), FUNDAR (2017). Las actividades extractivas en México: Estado actual. Anuario 2016. URL: <http://fundar.org.mx/mexico/pdf/Anuario2016corr.pdf>, pp. 181-184.

111 Centro Mexicano de Derecho Ambiental (CEMDA) (2016). Informe sobre la situación de los defensores ambientales en México URL: <http://www.cemda.org.mx/wp-content/uploads/2011/12/Informe-defensores-ambientales-2016.pdf>, p. 19-20.

112 Ibid., p. 20.

Against this background, the conflicts that surround extractivist projects such as renewable energy production can take on a dramatic dimension, while renewable energy has been pushed forward by the ambivalent 2013 energy reform.

Mexican energy reform

The 2013 Mexican energy reform is to be taken into account in the context of this report as the reform of the peripheral state, i.e. the state where natural resources are located.¹¹³ Our case study illustrates renewable energy in Mexico, the natural resources and lands that enable the production of wind power. As a peripheral state, Mexico has paved the way not only for international direct investments, but also for the exploitation of renewable energy. The latter aspect is crucial with a view to taking stock of the incentives for developing renewable energy that are directly relevant to the case of wind farms in San Dionisio del Mar, Oaxaca. The 2013 energy reform perfectly illustrates the role of Mexico in easing access to natural resources and lands in order to develop renewable energy projects.¹¹⁴

The energy reform comprises a legislative package (including constitutional changes) that substantially changes Mexican law in terms of energy management.¹¹⁵ In the context of the report, the reform is ambivalent. On the one hand, it favours renewable energy generation that can potentially restrict the rights of indigenous peoples. On the other hand, it puts forward participatory processes and social impact assessments.

Of interest for this report, it favours the generation, transformation, transmission and distribution of renewable energy. As illustrated by the case study, socio-environmental conflicts mainly occur at the (prospected) generation stage. Wind farms are considered “clean energies” and are favoured by the reform.¹¹⁶ The specificities of wind farms and renewable energy projects as extractive projects should not be forgotten. Unlike other extractive projects, they aim at contributing to climate change mitigation and fulfilling the Nationally Determined Contributions (NDCs) under the United Nations Framework Convention on Climate Change (UNFCCC).¹¹⁷ Wind farm projects that need large spaces and territories are megaprojects.¹¹⁸

113 On the notion of peripheral state, see Veltmeyer, H. and Petras, J. (2015), *op. cit.*, Introduction, pp. 15-16.

114 It should be kept in mind that the legal framework which results from the energy reform is not the only way Mexico has eased access to natural resources and lands. The country also mobilizes other forms to encourage renewable energies, such as recourse to the public force if socio-environmental conflicts hamper the smooth development and running of the energy projects (as seen above in the context of human rights violations and as will be illustrated in the study of the wind farms case in San Dionisio del Mar, Oaxaca).

115 On the energy reform, see Mexican Government, *Reforma energética*, URL: <http://reformas.gob.mx/reforma-energetica/que-es>. For a critical assessment of the reform, see Correa Sánchez, N., FUNDAR (2016). *Defensa del territorio frente a proyectos del sector eléctrico en México*, URL: <http://www.fundar.org.mx/mexico/pdf/Territorio.pdf>.

116 Wind energy is expected to represent more than one third of the “clean energies” produced in Mexico. See Secretaría de Energía (2017). *Programa de Desarrollo del Sistema Eléctrico Nacional (2017-2031)*, URL: <https://www.gob.mx/sener/acciones-y-programas/programa-de-desarrollo-del-sistema-electrico-nacional-33462>.

117 Those are -51% black carbon emissions and -22% greenhouse gases emissions, 2020-2030. See Mexican Government, *Intended Nationally Determined Contributions, Mexico*. URL: https://www.gob.mx/cms/uploads/attachment/file/162973/2015_indc_ing.pdf.

118 How to define “megaprojects” is still debated. The elements usually taken into account are large investment commitment, complexity, long-lasting impact on the economy, the environment and society (see Brookes, Naomi J. and Locatelli, Giorgio (2015). *Power plants as megaprojects: Using empirics to shape policy, planning, and construction management, Utilities Policy*, Vol. 36, pp. 57-66). In the context of this report, the large-scale dimension in terms of land is the crucial element.

"The electrical industry is a public utility. It shall proceed in terms of occupation or superficial affectation or the constitution of services necessary with a view to supplying the Public Service of Transmission and Distribution of Electric and to building electricity generation plants in those cases where, due to the characteristics of the project, a specific location is required (...) The Federation, governments of the States, of the Distrito Federal (Mexico City), municipalities and localities shall contribute to the development of electricity generation, transmission and distribution projects, through proceedings and coordination bases that ease and guarantee the granting of permits and authorizations in the exercise of their power."¹²⁵

The reform eases access to land with a view to generating electricity. Electricity generation takes precedence over other uses of land.¹¹⁹ Also, the groups that want to install energy production projects can have recourse to several legal ways to force access to land in the case of unsuccessful negotiations with persons who have interests or property rights over the land (private persons, communities, *ejidos*,¹²⁰ or indigenous peoples).¹²¹ This is a very powerful tool in terms of Mexico pushing for investment in renewable energy projects.

Another aspect of the reform is somewhat contradictory with the first aspect discussed above: it puts forward the respect for

- human rights, sustainable development and environmental protection,¹²²

- consultation of communities and indigenous peoples where the project is aimed at being installed,¹²³ and

- social impact assessment.¹²⁴

However, it is possible to question the legitimacy and fairness of the consultation process. As seen above, the project developers are able to make use of legally endorsed mechanisms that can force access to land, even if those who have interest in or ownership of the land disagree with the project. It may call into question the interest and relevance of participating in such a consultation process from the perspective of the communities and indigenous peoples.

Indigenous peoples' rights in the context of extractivism

Indigenous peoples are in a particularly vulnerable situation in the context of extractive projects in LAC countries: their socio-economical vulnerability goes together with the willingness of extraction project developers to access their territories, while they have to suffer the environmental damage that results from those projects. They are at the forefront

119 Mexican Government (2014). Decreto por el que se expiden la Ley de la Industria Eléctrica, la Ley de Energía Geotérmica y se adicionan y reforman diversas disposiciones de la Ley de Aguas Nacionales, Diario oficial de la Nación, Article 71.

120 A particular type of agrarian community.

121 Ibid., Articles 71, 79-89. On this issue, see Correa Sánchez, N., FUNDAR (2016), op. cit., pp. 30, 32-35.

122 Ibid., Articles 4, 117-118.

123 Ibid., Article 119. This is somewhat awkward, as the mere adoption process of the energy reform is heavily criticized for having denied the consultation process and human rights' screening. See Correa Sánchez, N., FUNDAR(2016), op. cit., pp. 12-13.

124 Mexican Government (2014). Decreto por el que se expiden la Ley de la Industria Eléctrica, la Ley de Energía Geotérmica y se adicionan y reforman diversas disposiciones de la Ley de Aguas Nacionales, Diario oficial de la Nación, Article 71.

125 Ibid.

of the socio-environmental conflicts generated by extractive projects.¹²⁶ This role falls under the label “ecology of the poor”, as they defend the natural resources upon which they depend to survive.¹²⁷

Access to land is of particular relevance in the Mexican context for the installation of wind farms. As is the case with other extraction projects, wind farms need large spaces. Access to land for extraction purposes that are distinct from former purposes (for example agriculture or sacred sites) is described as “political ecology of territorial transformation”.¹²⁸ As an example, the portion of land allocated to mining activities in Mexico amounts to

more than 25% of the national territory.¹²⁹ It illustrates territorial transformation, “conflicts for production of territories”¹³⁰ and “land hoarding”.¹³¹

Access to land was a cornerstone issue in the Mexican revolution, and it still largely explains the current legal framework in terms of access to land and the peculiarities of land tenure. Agrarian communities have a set of rights and corresponding procedures aimed at guaranteeing their lands’ effective enjoyment. Indigenous peoples’ rights are also of utmost importance in the context of extraction projects, for their territories are often targeted in order to install extraction projects. The many

Indigenous peoples’ vulnerability

Their vulnerability relates to a number of factors, including access to water, sewerage systems, electricity, education, health, land, and low incomes.

Women are particularly vulnerable

The particular problems faced by indigenous women are poverty (including energy poverty), which is all the more important for widows or abandoned women, health (the amplifying factors are pregnancy, delivery, and heavy work), access to education, access to economic activity and employment (mainly due to the changes in indigenous society induced by the integration of indigenous peoples within the nation state, difficult access to the resources employed in craft production, and low production rates because of scarce lands, water and environmental degradation), low incomes, and poor political participation.¹³³

126 Veltmeyer, H. and Petras, J. (2015), op. cit., Introduction, pp. 13-14 and 55.

127 On this notion and its application to indigenous peoples, see Tetreault, D.-V., “México: La ecología política de la minería”, in Veltmeyer, H. and Petras, J. (2015), op. cit., p. 275.

128 Veltmeyer, H. and Petras, J. (2015), op. cit., Introduction, p. 33.

129 Tetreault, D.-V., op. cit., p. 263.

130 In Spanish, “conflictos por la producción de los territorios”, *ibid.*, p. 259.

131 *Ibid.*, p. 63.

132 According to the latest data available, indigenous peoples represent between 11% and 15% of the Mexican population. See Aristegui noticias (2016, August 9). 15% de la población mexicana es indígena; la mayoría viven en pobreza. URL: <http://aristeguinoicias.com/0908/mexico/15-de-la-poblacion-mexicana-es-indigena-la-mayoria-viven-en-pobreza/>.

133 Comisión Nacional para el Desarrollo de los Pueblos Indígenas, Indicadores Socioeconómicos de los Pueblos Indígenas de México (2015), 2017, URL: <https://www.gob.mx/cdi/articulos/indicadores-socioeconomicos-de-los-pueblos-indigenas-de-mexico-2015-116128>, Calfio Montalva, M. and Fernanda and Velasco, L., “Mujeres indígenas en América Latina: ¿brechas de género o de etnia?”, in *Pueblos indígenas y afrodescendientes de América Latina y el Caribe: información sociodemográfica para políticas y programas*, Comisión Económica para América Latina y el Caribe (CEPAL), 2006, URL: http://repositorio.cepal.org/bitstream/handle/11362/4043/S2006017_es.pdf?sequence=1&isAllowed=y, pp. 501-520.

indigenous peoples present in the Mexican territory¹³² are in a vulnerable situation, and women in indigenous communities are even more vulnerable. A whole set of civil, political, social, cultural and human rights are guaranteed to them. Of relevance for this report, access to indigenous peoples' territories and their right to be consulted before a project is implemented are regulated in international, regional and national law.

The case study focuses on the violation of indigenous peoples' rights in the context of renewable energy projects, and illustrates those violations conducted by EU companies with a specific case : wind farms in San Dionisio del Mar, Oaxaca.



1.2 Case study: wind farms in Oaxaca.

Background information on the *San Dionisio del Mar* case

From the outset, it is worth mentioning that wind farms are a “capital-intensive activity”,¹³⁴ as they depend more on the exploitation of natural resources than on labour. This capital-intensive activity is highly developed in the Tehuantepec Isthmus in the State of Oaxaca. Oaxaca is a Mexican State where numerous wind farms are in operation or in the pipeline.¹³⁵ In 2014 Oaxaca produced 90% of Mexico's wind energy.¹³⁶ The isthmus is an excellent location for wind farms because of its topography, it is called the “gold wind”.¹³⁷

San Dionisio del Mar is the case chosen in order to illustrate the main conflicts. The more recent and dramatic *Juchitán de Zaragoza* case would have been a very good case to illustrate the purpose of

134 On the notion, see Veltmeyer, H. and Petras, J. (2015), op. cit., “¿Un nuevo modelo o imperialismo extractivo?”, p. 55.

135 Citlalli L. (2017, March 5). De eólicas, 90 % de inversiones en Oaxaca, Noticias, Voz e Imagen de Oaxaca, available on 23 September 2017 at < <http://www.nvinoticias.com/nota/53072/de-eolicas-90-de-inversiones-en-oaxaca>>. See also NOTIMEX (2017, May 12). Tendrá Oaxaca el parque de energía eólica más grande de América Latina, Excelsior. URL: <http://www.excelsior.com.mx/nacional/2017/05/12/1163075#view-1>. Bautista Mulia, S. (2016): Confrontación de dos ideas de desarrollo. El posicionamiento de los ikoojt frente al Megaproyecto Eólico del Istmo de Tehuantepec, Tesis presented with a view to obtaining the bachelor degree, Universidad Nacional Autónoma de México, Facultad de Ciencias Políticas y Sociales, Centro de Estudios Sociológicos. Copy with the author, p. 59.

136 NOTIMEX (2014, September 8). Oaxaca produce 90% de energía eólica de México, El Economista. URL: <https://www.eleconomista.com.mx/empresas/Oaxaca-produce-90-de-energia-eolica-de-Mexico-20140908-0145.html>. See also Ródríguez, O. (2017, March 17). SENER lanzará licitación para generar energía eólica en Oaxaca, Milenio. URL: http://www.milenio.com/estados/sener_lanzara_la_licitacion-generar_energia_eolica_en_Oaxaca_0_921508023.html, and Citlalli, L., (March 2017, 26): Aseguran inversión de 4 mil mdd para eólicas en el Istmo, Noticias, Voz e Imagen de Oaxaca. URL: <http://www.nvinoticias.com/nota/55057/aseguran-inversion-de-4-mil-mdd-para-eolicas-en-el-istmo>.

137 Hurtado Sandoval, A. (2015). Wind Energy Development in Mexico. A case study of the potential for local socio-economic benefits in Mareña, Thesis for the fulfillment of the Master of Science in Environmental Management and Policy, International Institute for Industrial Environmental Economics, Lund, Sweden. URL : <https://lup.lub.lu.se/student-papers/search/publication/5049119>, pp. 40-42.

the report,¹³⁸ but preference has been given to the *San Dionisio del Mar* case.

The latter illustrates that human rights violations can occur in the context of wind farm installations, even if the wind farm project has been stopped. In other words: a wind farm project does not have to actually be installed and running for human rights violations to occur. These can occur as early as during the very first installation prospects. Also, the *San Dionisio del Mar* case happened just before the energy reform. It can reasonably be expected that socio-environmental conflicts and related human rights violations have even been amplified, since the energy reform makes it easier for the development of renewable energy projects on the one hand while creating or consolidating consultation mechanisms whose poor implementation can generate human rights violations on the other.¹³⁹ In the end, the *San Dionisio del Mar* socio-environmental conflict was identified as the pioneer case in terms of social resistance to a wind project in the Isthmus that halted the project. This case has been identi-

fied as the starting point for the communities of the Isthmus to (successfully) organize themselves and stop wind farm projects.¹⁴⁰

A brief summary of the *San Dionisio del Mar* case follows in order to ease the reader's understanding of the subsequent sections. In 2004, Preneal (a Spanish transnational company) signed a 30-year renewable agreement with the local authorities in *San Dionisio del Mar* and *Santa María del Mar* with a view to installing wind farms (132 wind turbines).¹⁴¹ The energy produced by the wind farms had the capacity to generate 396 MW annually¹⁴² and the potential to replace around 879,000 tons of CO₂.¹⁴³ Moreover, the project was meant to be bought by an operating company of Heineken and subsidiaries of the largest Coca-Cola bottler in the region.¹⁴⁴

In 2011, Preneal sold the project for 63,200,000 euros to *Mareña Renovables* (an international consortium).¹⁴⁵ In 2011, the Mexican National

"Recognizing the urgent need to respect and promote the inherent rights of indigenous peoples, which derive from their political, economic, and social structures and from their cultures, spiritual traditions, histories, and philosophies, especially their rights to their lands, territories, and resources

Recognizing also that respect for indigenous knowledge, cultures, and traditional practices contributes to sustainable and equitable development and proper management of the environment."

American Declaration on the Rights of Indigenous Peoples, 2016, Preamble

138 On the Juchitán case, see Chaca, R. (2016, July 22). En la mira, parque eólico número 28, Noticias, Voz e Imagen de Oaxaca. URL: <http://www.nvinoticias.com/nota/22786/en-la-mira-parque-eolico-numero-28>.

139 The Juchitán case is a good illustration of the amplification phenomena.

140 CODIGODH (2014, July 10). Juchitán y el impacto de megaproyectos eólicos. URL: <https://codigodh.org/2014/07/10/juchitan-y-el-impacto-de-megaproyectos-eolicos/>.

141 In 2011, the Preneal project was bought by the *Mareña Renovable Company*. Rojas, R. (February 2013. 18). No instalará *Mareña Renovables* parque eólico en *Dionisio del Mar*, La Jornada. URL: <http://www.jornada.unam.mx/2013/02/18/sociedad/039n1soc>.

142 Ibid., p. 43.

143 Hurtado Sandoval, A. (2015), op. cit., p. 42.

144 Ibid., p. 44.

145 With this operation, Preneal realized a benefit of more than 1 000 million Mexican pesos, Rosa Rojas, "No



Picture : Sarai Bautista Mulia

Regulatory Energy Commission (*Comisión Reguladora de Energía* – CRE) granted Mareña Renovables permission to initiate the construction of the wind farm.¹⁴⁶ From the start, some members of the communities (*ikjoots* and *Binniza* peoples) began to mobilize against the project because of its perceived environmental and social impacts. They were worried about the project's effect on the environment in general, fishing activity (essential for them), the noise caused by wind farms and the degradation of spiritual sites.

Those who resisted the installation of the wind farms suffered several threats from governmental authorities.¹⁴⁷ In November 2012 and February 2013, government authorities also unsuccessfully made use of public force in order to break the siege set up by the resisting communities.¹⁴⁸ Those attempts occurred even though a temporary suspension of the project had been granted by a decision of a court of justice ("*suspensión provisional del amparo*"). The definitive suspension was granted in 2015.

Adding to the threats and use of public force mentioned above, two others aspects are relevant for the report. Generally speaking, the project has generated large and long-lasting internal conflicts between members of the community and community authorities.¹⁴⁹ The fracture between the community members and community authorities was particularly heightened by a corruption scandal. This scandal concerns the mayor of San Dionisio del Mar who allegedly received 1.12 million euros but kept this sum for himself and a few other persons.¹⁵⁰ The consultation process has also been strongly criticized for not respecting the requirements that apply. The deficiencies in the consultation process are detailed at more length in the next section.

In face of the communities' opposition, (late) political support for the communities in February of 2013 and legal sentences against it, the project was eventually abandoned by the Mareña Renovables company in November of 2014. The company nevertheless plans another wind farm

146 Bautista Mulia. S.(2016), op. cit., p. 61.

147 Ibid, p. 66.

148 Ecoosfera (2016, January 27). ¡Excelentes noticias! San dionisio del mar festeja autonomía contra empresa eólica. URL: <http://ecoosfera.com/2016/01/excelentes-noticias-san-dionisio-del-mar-festeja-autonomia-contra-empresa-eolica/>.

149 Among others, see Briseño, P. (2017, March 17). Desconocen a edil de San Dionisio del Mar, Organización Radiofónica de Oaxaca, Noticias., URL:<http://www.ororadio.com.mx/noticias/2017/03/desconocen-a-edil-de-san-dionisio-del-mar/>. See also Bautista Mulia, S. (2016), op. cit., pp. 63-64.

150 Rojas, R. (2014, June 9). Muerto, el proyecto eólico en San Dionisio, Oaxaca: De Telegraaf, La Jornada. URL: <http://www.jornada.unam.mx/2014/01/09/sociedad/035n1soc>.

project in nearby communities, where it also faces hostile and divided communities. The project's resettlement also generates a socio-environmental conflict that is mentioned in subsequent sections where relevant (i.e. when analogous to or different from the *San Dionisio* case). The author believes that these mentions help the reader to have a full picture of the structural problems of wind farm projects in the area.

1.3 The *San Dionisio* case and the EU dimension

This section is aimed at identifying the EU's room for manoeuvre in terms of the prevention of human rights violations. The policy recommendations directed at the EU flow from this identification and are reported in the subsequent section.

To this end, the human rights violations that occurred in the *San Dionisio* case are reported (1.3.1) and followed by the identification of the EU's dimension of the case (1.3.2). The identification of human rights violations and the EU's dimension allow an analysis of the current shortages in terms of a preventive rights-based approach to cases similar to *San Dionisio* (1.3.3).

1.3.1 Indigenous peoples' right to consultation

Indigenous peoples' right to consultation in order to obtain their free, prior and informed consent

is an application of the right to participation and is firmly settled in international, regional and national law (see table below). Indigenous peoples' right to consultation must be read in conjunction with indigenous peoples' substantive rights. Indigenous peoples' right to consultation is a guarantee for the effective enjoyment of their substantive rights such as the right to gender equality, cultural identity and integrity, to freely exercise their own spirituality and beliefs, to health, the protection of a healthy environment, association, assembly, and freedom of expression and thought, land, territories and natural resources, the protection of cultural heritage and intellectual property, development, peace, security and protection, as well as the right to freely exercise their own spirituality and beliefs.¹⁵¹ This is also firmly anchored in international and regional law.¹⁵²

Against this background, indigenous peoples' right to consultation has been violated in the *San Dionisio* case. In addition to the corruption scandal mentioned above, the Preneal company used an attendance list signed by community members in 2004 as a document that demonstrated the community's agreement to the wind farm project.¹⁵³ Also, the community members did not have access to full and accurate information, which amplified opposition to the project.¹⁵⁴ The information was filtered (and allegedly retained) by the community authorities¹⁵⁵ before the community took the decision on territorial affectation according to its governance rules. It includes information on the environmental and social impacts.¹⁵⁶ National adjudicative bodies recognized the violation in two decisions in 2012 and 2015.

Mexico's implementation of indigenous peoples' right to consultation is highly problematic. It

151 American Declaration on the Rights of Indigenous Peoples (2016), respectively Articles 6, 13, 16, 18, 19, 20, 25, 28, 29, and 30.

152 See the table below, and more particularly the case law of the Inter-American Court of Human Rights.

153 Bautista Mulia, S.(2016), op. cit., pp. 60, 69.

154 On lack of information as generating opposition to the Project, see *ibid.*, p 115.

155 *Ibid.*, pp. 63, 74, 76-77, 88, 95-96, 99.

is a structural problem identified, inter alia, by the UN Special Rapporteur on the situation of human rights defenders, Michel Forst.¹⁵⁷ The cases subsequent to *San Dionisio* illustrate this structural problem.¹⁵⁸ The *Juchitán de Zaragoza* case is the first consultation case subsequent to the Energy Reform and presented by the Mexican Government as a “model” for forthcoming consultations. Still, the Zapoteca indigenous people in the *Juchitán de Zaragoza* case¹⁵⁹ and various international instances raise very serious concerns in terms of the violation of the right to consultation in this specific “model” case.¹⁶⁰

With a view to formulating the policy recommendations directed at the EU that flow from the case study, identifying the EU’s dimension of the case study is a necessary step. This identification is done in the subsequent sub-section.

“Indigenous communities protecting their traditional lands, eyed for the development of mega-projects and the exploitation of natural resources, have often faced criminal charges for protesting against those projects, even if meaningful and prior consultation with them are clearly lacking. (...) In all the states I visited, I was dismayed by the number of on-going conflicts that are the direct consequences of the lack or misuse of consultations processes with indigenous communities. In many occasions, consultations are a simple formality for projects that have already started to be implemented. I strongly encourage the Mexican authorities to guarantee the free, prior and informed consent of indigenous communities as stated in ILO (*International Labour Organization*) - convention 169. Consultation processes should be meaningful in order to guarantee the protection and respect of the rights of indigenous communities, in full compliance with United Nations Declaration on the rights of indigenous peoples.”

Office of the High Commissioner on Human Rights, “End of mission statement by the United Nations Special Rapporteur on the situation of human rights defenders, Michel Forst on his visit to Mexico from 16 to 24 January 2017.”

156 Ibid., pp. 79-82.

157 UN, Office of the High Commissioner on Human Rights (2017, January 24). End of mission statement by the United Nations Special Rapporteur on the situation of human rights defenders, Michel Forst on his visit to Mexico from 16 to 24 January 2017 URL: <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=21111&LangID=E>.

See also ProDESC (no date): El derecho a la consulta de comunidades y pueblos indígenas, una deuda histórica del gobierno mexicano. URL: <http://www.prodesc.org.mx/index.php/2014-04-21-22-19-12/2014-04-21-23-13-29/537-el-derecho-a-la-consulta-de-comunidades-y-pueblos-indigenas-una-deuda-historica-del-gobierno-mexicano> and Torres, M. (2018). Prior Consultation and Extractivism in Latin America, in Woertz Eckart (coord.), *Crisis and Conflict in the Agrarian World: An Evolving Dialectic*, Centre for Agriculture and Biosciences International-CABI (forthcoming).

158 Among others, see Manzo, D. (2017, April 22). Prevalece impunidad en comunidades indígenas que defienden su tierra, reproduced on the website of the ProDESC reproduced on the website of the ProDESC at <http://www.prodesc.org.mx/index.php/2014-04-21-22-19-12/prodesc-en-medios/notas/531-prevalece-impunidad-en-comunidades-indigenas-que-defienden-su-tierra>. Some proposals to solve the structural problems are put forward, see among others : Centro de Colaboración Cívica (2016). Mapa de aprendizajes, preocupaciones y retos para la implementación de la consulta indígena en México, copy with the author.

159 See ProDESC(no date). Caso de la Comunidad indígena zapoteca de Juchitán, Oaxaca, URL: <http://www.prodesc.org.mx/index.php/2-uncategorised/384-caso-de-la-comunidad-indigena-zapoteca-de-juchitan-oaxaca>.

160 See UN, Office of the High Commissioner on Human Rights (2017, June 8). Informe del Grupo de Trabajo de la ONU sobre empresas y derechos humanos acerca de su misión a México. URL: http://www.hchr.org.mx/index.php?option=com_k2&view=item&id=982:informe-del-grupo-de-trabajo-de-la-onu-sobre-empresas-y-derechos-humanos-acerca-de-su-mision-a-mexico&Itemid=281, para. 105.

Indigenous peoples' right to consultation in international, regional and national law

INTERNATIONAL LAW	REGIONAL LAW / ORGANIZATION OF AMERICAN STATES	NATIONAL LAW (FEDERAL LEVEL)
<p>Indigenous and Tribal Peoples Convention, No.169 (1989)</p> <p><i>International Labour Organization (ILO)</i></p> <p>Mexico ratified the Convention on 5 September 1990</p> <ul style="list-style-type: none"> Article 6 Article 7 Article 15 Article 17 	<p>American Declaration on the Rights of Indigenous Peoples (2016)</p> <ul style="list-style-type: none"> Article 21(2) Article 23 Article 29(4) 	<p>Political Constitution of the Mexican United States</p> <ul style="list-style-type: none"> Article 2 Article 26
<p>United Nations Declaration on the Rights of Indigenous Peoples (2007)</p> <ul style="list-style-type: none"> Article 11 Article 19 Article 27 Article 28(1) Article 32(2) 	<p>Case law of the Inter-American Court of Human Rights</p> <ul style="list-style-type: none"> Mayagna (Sumo) Awas Tingni Community vs. Nicaragua, 2001, Serie C No. 79. Yakye Axa Indigenous Community Vs. Paraguay, 2005, Serie C No. 125. Yatama vs. Nicaragua, 2005, Serie C No. 127. Pueblo Saramaka vs. Surinam, 2007, Serie C No. 172. Pueblo Saramaka vs. Surinam, 2008, Serie C No. 172. Comunidad Indígena Xákmok Kásek vs. Paraguay, 2010, Serie C No. 214. Pueblo Indígena Kichwa de Sarayaku vs. Ecuador, 2012, Serie C No. 245. Comunidades Afrodescendientes desplazadas de la Cuenca del río Cacarica (operación Génesis) vs. Colombia, 2013, Serie C No. 270. Pueblos Indígenas Kuna de Madungandí y Emberá de Bayano y sus miembros vs. Panamá, 2014, Serie C No. 284. Comunidad Garífuna de Punta Piedra y sus miembros vs. Honduras, 2015, Serie C No. 304. Comunidad Garífuna Triunfo de la Cruz y sus miembros vs. Honduras, 2015, Serie c No. 305. Pueblos Kalíña y Lokono vs. Surinam, 2015, Serie C No. 309. 	<p>Law on Planning</p> <ul style="list-style-type: none"> Article 1(IV) Article 14 Article 20
		<p>Law on the national Commission for Indigenous Peoples' Development</p> <ul style="list-style-type: none"> Article 3(VI)
		<p>Law on the Electricity Industry</p> <ul style="list-style-type: none"> Article 119
		<p>Regulation of the Law on the Electricity Industry</p> <ul style="list-style-type: none"> Articles 89-92

Right to consultation: a firm recognition at international, regional and national (federal) level (elaborated by the author)

1.3.2 The EU's indirect impact in the San Dionisio case

The EU has been indirectly involved in the San Dionisio case. With a view to identifying the EU's potential responses in terms of climate justice, it is necessary to spell out this indirect involvement.

Companies in EU Member States that are seeking to develop wind farms in the Tehuantepec Isthmus and currently running such projects are extremely active (most notably French and Spanish companies).¹⁶¹ These wind farm projects are registered under the UN Clean Development Mechanism of the UNFCCC system.¹⁶² In this capacity they generate international credits, the so-called "Certified Emissions Reductions" (CERs).¹⁶³ The link between the international credits and the EU on the one hand, and the future carbon market and the EU on the other is further elaborated in Part I, chapter 2 section 4 of the report. The findings of this section do not need to be reproduced here.

More specifically, three instances have been discerned in which Member States and the EU could play a role in the governance, set-up and implementation of wind farm projects under the CDM mechanism. These concern the following EU and Member States competences: Member States' competence in terms of CDM projects, the EU's competences concerning the EU-ETS' governance, and the EU's competences in international negotiations regarding governance of the CDM and the Sustainable Development Mechanisms (SDM) mandated under the Paris Agreement.

Member States are responsible for the authorization they grant to public or private entities that wish to participate in CDM projects and the link between the EU-ETS and the CERs.

The EU as a participant in international carbon markets. While the EU could shape the EU-ETS scheme as a domestic policymaker,¹⁶⁴ it also plays a crucial role in agreements with other carbon markets.

The EU as an international negotiating actor. The EU has competencies to negotiate and conclude agreements between the Union and third countries or international organizations in some areas (Treaty on the functioning of the EU, Article 218). It applies in the field of climate change and agreements that refer to mutual recognition with other greenhouse gas emissions trading schemes (EU-ETS Directive, Article 25).

Identifying firstly the human rights violations that occurred in the context of a wind farm project registered under the CDM mechanism and secondly the EU's dimension of the case study makes it possible to perform a critical analysis of the current mechanisms in terms of a preventive rights-based approach from the perspective of the EU and its roles identified in the general report: the EU as a domestic and international player. This critical analysis is performed in the subsequent sub-section.

161 See the map available at Chaca, R.(2016), op. cit.

162 Business and Human Rights Resource Centre (2012). Mexico: Oaxaca Wind Farms impact indigenous peoples in Oaxaca, URL: <https://business-humanrights.org/en/mexico-oaxaca-wind-farms-impact-indigenous-peoples-in-oaxaca>.

163 All the CERs generated by Spanish projects in the wind farm sector in Mexico are on the positive list of the EU. As such they qualify as eligible International Credit Holdings (ICH) under the registry Regulation 389/2013. Information obtained through the European Commission's positive list available at https://ec.europa.eu/clima/policies/ets/markets_en#tab-0-1, and crossed with the projects' references available on the UNFCCC website, available at <http://cdm.unfccc.int/Projects/projsearch.html>.

164 European Commission competences include monitoring, verification and accreditation, imposing operating bans, developing guidelines, running the registry, and reporting project activities.

1.3.3 Current shortages in terms of a preventive rights-based approach to CDM projects

Preventive rights-based approach in the context of the EU-ETS

No safeguards and/or exclusion list apply to wind farm projects such as San Dionisio. Unlike hydropower projects, no special guidelines have been adopted in the field of wind farm or solar energy projects.

Hydropower projects have been severely criticized for the many adverse environmental and social impacts they generate. Accordingly, the EU has provided for special safeguards in the EU-ETS Directive (Article 11b(6)):

“In the case of hydroelectric power production project activities with a generating capacity exceeding 20 MW, Member States shall, when approving such project activities, ensure that relevant international criteria and guidelines, including those contained in the World Commission on Dams November 2000 Report ‘Dams and Development — A New Framework for Decision-Making’, will be respected during the development of such project activities.”

In light of the problems this specification has created in terms of harmonization and a common level playing field, the European Commission and EU Member States have developed a template that aims at harmonizing the compliance step within the EU.¹⁶⁵ The public or private parties that look for Member States’ approval of the project can use



Picture : Sarai Bautista Mulia

the template and explanatory note with a view to demonstrating compliance with the requirements. However, this is not compulsory. It remains a voluntary procedure and the final decision on the project’s compliance with Article 11b(6) remains with the Member State.

Several parts of the template are directly relevant to the weak governance of wind farm and solar panel projects in terms of human rights, and more particularly indigenous peoples’ right to consultation.¹⁶⁶ Such a template could be used as a basis for the development of a similar mechanism for wind farm or solar energy projects. The *San Dionisio* case illustrates the necessity for such a mechanism, which could prevent their right being violated.

165 European Commission and Member States (2008, November 17). Guidelines on a common understanding of Article 11b (6) of Directive 2003/87/EC as amended by Directive 2004/101/EC (non-paper). The guidelines are available at https://ec.europa.eu/clima/sites/clima/files/ets/markets/docs/art11b6_guide_en_0.pdf. The template is available at https://ec.europa.eu/clima/sites/clima/files/ets/markets/docs/art11b6_comp_temp_en_0.pdf.

166 Criteria 1. Gaining public acceptance, 3. Addressing existing (...) projects, 4. Sustaining rivers and livelihoods, 5. Recognizing entitlements and sharing benefits, 6. Ensuring compliance, 7. Sharing rivers for peace, development and security.

Preventive rights-based approach at the international level

The CDM mechanisms poorly prevent infringements of the rights of affected communities. Since 2015, the UNFCCC CDM has transmitted concerns about human rights violations to UN human rights bodies and the host country.¹⁶⁷ However, this mechanism has been strongly criticized for being inefficient.¹⁶⁸ Secondly, the local stakeholder consultation (LSC – in our case the San Dionisio del Mar Community) is necessary for the CDM project to be registered and is applied during the design and validation stages.¹⁶⁹ Other weak points of the mechanism include failing to provide criteria that flesh out the consultation requirement, and being limited to the first stages of a project.¹⁷⁰ Therefore, those mechanisms cannot be deemed adequate and clearly did not prevent the violation of the right of indigenous peoples to be consulted in the *San Dionisio* case. This case illustrates indigenous peoples' impossible reliance on existing mechanisms to prevent human rights' violations.

To conclude, there are currently no existing remedies, neither within the EU-ETS legal framework, nor within the UNFCCC process, to protect communities in third countries that could be potentially affected by a CDM wind farm project. Several proposals have been made to introduce a grievance or appeal mechanism.¹⁷¹ As the *San Dionisio* case

illustrates, potentially affected communities would have such a mechanism at their disposal in order to question any authorization and validation for a project that potentially infringes their rights or currently infringes their rights. So far and despite the documented proposals in that sense, no such mechanism has been settled.

The human rights violations that occurred in the *San Dionisio* case, clarification of the EU's dimension of the case and critical analysis of the current system from the perspective of a rights-based approach allow for the EU's room for manoeuvre to be identified in terms of policy recommendations. They are spelled out in the subsequent sections.

167 CDM (2015) Executive Board eighty-seventh meeting, CDM EB 87, Meeting Report, para. 52.

168 Among others, see MISEREOR, CIDSE and Carbon Market Watch (2016). Human Rights Implications of Climate Mitigation Actions, 2nd Ed. Available on 16 October 2017 at < <https://euagenda.eu/upload/publications/untitled-2780-ea.pdf>>.

169 CDM (2006). Report of the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol, CDM, Decision 3/C.MP.1, FCCC/KP/CMP/2005/8/Add.1, Annex: Modalities and Procedures for a clean development mechanism, 37(b), 40(a), and 40(c).

170 Among others, see MISEREOR, CIDSE and Carbon Market Watch (2016), op. cit., pp. 15 and 24-25.

171 Among others, see CIEL and Earthjustice (2011). Joint submission on the implementation of local stakeholder consultation and global stakeholder consultation during the validation process of the CDM. URL: https://cdm.unfccc.int/public_inputs/2011/eb62_02/cfi/0IF4MXF00HYLB6444AXOWS729TB0XX, p.6; and Asociación Interamericana para la Defensa del Ambiente, Center for International Environmental Law, Earthjustice, and International Rivers (2013). Submission on views regarding the revision of the CDM modalities and procedures. URL: <http://unfccc.int/resource/docs/2013/smsn/ngo/352.pdf>, p. 5; and Filzmoser, E., Voigt, J., Trunk, U., Olsen, K. H., & Jegede, A. O. (2015). The need for a Rights-based approach to the clean development mechanism, Centre for International Sustainable Development Law, pp. 8-9 and 14-16.

1.4 Policy recommendations

With a view to remedying the violations illustrated by the case study and prevent future conflicts, a rights-based approach should be endorsed by EU institutions for CDM projects that are linked with the EU-ETS, and more generally for future mutual recognition between the EU-ETS and actual or future international markets. The subsequent policy recommendations reflect this rights-based approach. This requirement applies in particular to large hydropower and wind farm projects, as they have a demonstrated record of impact in terms of human rights infringements. It should also apply to other renewable energy sources.

EU level: the EU-ETS

■ The EU should extend the aforementioned template and guidelines mechanisms that apply to large hydroelectric projects to all renewable energy projects such as wind farm or solar panel projects. The *San Dionisio* case, other projects mentioned in this report and the references therein illustrate that they have a demonstrated record of serious human rights infringements associated with their development.

■ The EU-ETS Directive should be modified to introduce a provision that would foresee the linking suspension in case of serious human rights infringements. In this context, the EU should perform a screening of all existing CDM wind farm projects in Mexico. In light of the structural problems identified in terms of indigenous peoples' right to con-

sultation, the linking of CER allowances with the EU-ETS should be put on hold until the European Commission identifies those problems on a case-by-case basis and is provided with documented guarantees that the structural problem has been addressed and there are no further infringements of indigenous peoples' right to consultation.

■ The EU should not limit its human rights screening to human rights as they are guaranteed in international or EU law. Due attention should be paid to human rights guaranteed at the regional and national level. Indigenous peoples' rights, and more particularly indigenous peoples' right to consultation, illustrates this requirement. While EU law does not recognize indigenous peoples' rights and international law does not provide clear and detailed requirements in terms of the quality of consultations, the Inter-American human rights protection system does provide for such detailed quality requirements and sets out practical guidelines in this respect.

International level: the EU as an international negotiating actor

■ The EU should keep pushing for the following changes to occur. Firstly, UNFCCC CDM mechanisms should not limit themselves to transmitting human rights violations concerns to UN human rights bodies and the host country.¹⁷² The interplay between UNFCCC CDM mechanisms and UN human rights bodies should be mutual. UNFCCC mechanisms should also integrate and address the numerous human rights violations that are documented to be direct-

ly caused by CDM projects. Secondly, the EU should keep pushing for the UNFCCC CDM mechanisms to address the serious human rights violations directly caused by CDM wind farms projects in Mexico. At least six such projects are currently registered as CDM projects.¹⁷³ Institutional changes are addressed in the subsequent sections. Thirdly, the UNFCCC system should provide the criteria and requirements that guarantee the effective local stakeholder consultation necessary for a CDM project to be registered. Fourthly, a grievance or appeal mechanism should be introduced within the CDM institutions.

Common to EU and international levels

— When screening national legislations and institutions, international and EU mechanisms should not limit themselves to identifying whether or not human rights are robustly guaranteed at the national level. International and EU mechanisms should devote strong attention to the practical functioning of national laws and institutions and ensuring that human rights are fully enjoyed by communities and private persons. The mechanisms aimed at guaranteeing the effective enjoyment of human rights in the context of energy projects should not be limited to the initial project development phase, but should rather extend from the very first development phases of the project to the running and end of exploitation phases, i.e. to the whole life cycle of the project.

1.5 Conclusions

Set against the particularly conflictual environmental and human rights abuses in Mexico, the wind farm projects that are run in Oaxaca by companies located in the EU and under the CDM schemes have indirectly impacted the rights of indigenous peoples in the particular case study. These involve a whole series of rights, and notably their right to be consulted. These infringements put at risk their mere existence as indigenous peoples.

A number of policy recommendations have been formulated. These relate to the three major roles of the EU as identified in the general report, namely the EU as a domestic policymaker with regard to the EU-ETS, the EU as an international negotiating actor and the EU as a participant in international carbon markets when it comes to the UNFCCC CDM mechanism, future linking between the EU-ETS, and the future market mechanisms similar to the CDM.

Although the case study focuses on the Mexican situation, several of its features reflect social and ecological conflicts that are typical of Mexico and Latin American countries. Therefore, the Mexican case and recommendations formulated in this context should be read in the broader context of Latin American countries. The intensive exploitation of natural resources that goes hand-in-hand with escalating social conflicts places indigenous peoples at the forefront of socio-environmental conflicts. The negative social and human rights impacts should be addressed by the EU not only on a case-by-case (or country-by-country) basis, but also on a sub-continental one.

172 CDM (2015). CDM Executive Board eighty-seventh meeting, CDM EB 87, Meeting Report, para. 52.

173 La Venta II (ref. 846), La Ventosa Wind Energy Project (ref. 11509), Oaxaca III Wind Energy Project (ref. 5676), Oaxaca II Wind Energy Project (ref. 5894), Oaxaca IV Wind Energy Project (ref. 6216), and Fuerza y Energía Bii Hioxo Wind Farm (ref. 7346).

PART II: Case studies

2.A Case Study of Olkaria Geothermal projects in Kenya

By Dr. Ben R. Ole Koissaba



Picture: Patrick Walsh

2.1 Introduction

The case study was carried out in Kenya between October 5th and 14th, 2017. The Kenyan case study looks at the extent to which human rights objectives and gender equality have been incorporated into EU external climate actions in Kenya, with a special focus on the implementation of several major geothermal projects. Finally, it provides recommendations on how EU external climate policy actions could be better aligned with the Sustainable Development Goals and involve civil society in the implementation of these projects. The decision to study the geothermal projects was driven by the European Union's support for Green Energy projects in Kenya, and the planned expansion of geothermal projects in Kenya as a means of accessing clean energy.

The key stakeholders interviewed for the Kenyan case study are Kenya Electricity Generating Company (KenGen); Geothermal Development Company (GDC); Akiira Power Generating Company; and the Narasha, Olkaria, Kedong, Olgumi, Suswa, and Rapland communities from Narok, Kajiado, and Nakuru Counties. Due to time constraints, information from the financiers, especially the European Investment Bank (EIB) and the World Bank, was obtained via a literature review. As the research progressed, it became clear that it was necessary to interview other stakeholders, including the National Land Commission, the county governments of Narok and Kajiado, and research institutions that have done or are doing geothermal research at Olkaria.

Climate change has been identified as a key



Picture : Jackson Ole Shaa

determinant and influencer of the enjoyment of human rights, such as the rights to health, life, adequate housing, and safe and adequate water and food, with women and children being particularly vulnerable to climate change impacts.¹⁷⁴ That is especially so if renewable energy projects are in areas inhabited by already marginalized and indigenous communities.

2.2 Country Policy Context

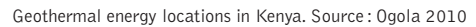
2.2.1 Energy and geothermal projects in Kenya: an overview

The energy sector and, ultimately, geothermal power projects are crucial for the Kenyan economy and the socio-economic development of the country as such. The exploration and exploitation of new sources of energy are therefore prioritized by the Kenyan National Energy and Petroleum Policy.¹⁷⁵ In 2015, Kenya's installed on-grid capacity was 2,295 MW from 42 plants, with geothermal producing 593 MW, hydro 827 MW, wind 26 MW, fuel oil 751 MW, biomass 38 MW, and gas turbines 60 MW. That capacity is expected to increase exponentially by 2020

¹⁷⁴ European Institute for Gender Equality (2012). Gender Equality and Climate Change. URL: <http://eige.europa.eu/rdc/eige-publications/gender-equality-and-climate-change-report>.

¹⁷⁵ ROK (2015). Draft National Energy and Petroleum Policy. Ministry of Energy https://www.ketraco.co.ke/opencms/export/sites/ketraco/learn/maps/Legal_Documents/National_Energy_and_Petroleum_Policy.pdf

The investments in 280 MW of geothermal energy in Olkaria I and IV could be attributed to Kenya's efforts to fulfill the objectives of its green energy growth program.¹⁷⁹ Geothermal energy in Kenya is governed by the Geothermal Resources Act. According to Waruru, Kenya has huge geothermal potential, with progress being made towards achieving production of 5,000 MW of power, over 70% of which will come from renewable sources by 2030.¹⁸⁰



In view of the great potential, the Ministry of Energy and Petroleum has paved the way for the

- 176 USAID Kenya & East Africa (May 2016). Development of Kenya's Power Sector 2015-2020. URL: https://www.usaid.gov/sites/default/files/documents/1860/Kenya_Power_Sector_report.pdf
- 177 Energy Regulatory Commission (2013). Kenya Updated Least Cost Power Development Plan Study Report 2011-2031. URL: http://www.erc.go.ke/index.php?searchword=LCPDP&searchphrase=all&Itemid=606&option=com_search.
- 178 Musembi, R (2014). GDC Strategy for Kenya. Progress and opportunities. Retrieved from: <http://geo-energy.org/reports/EAG/GDC%20USEA%20Presentation%20-%20Geothermal%20Road%20Show.pdf>
- 179 World Bank (2015, February 23). Kenya's Geothermal Investments Contribute to Green Energy Growth, Competitiveness and Shared Prosperity. URL: <http://www.worldbank.org/en/news/feature/2015/02/23/kenyas-geothermal-investments-contribute-to-green-energy-growth-competitiveness-and-shared-prosperity>
- 180 Waruru, M. (2016, June 15). Kenya on Track to More Than Double Geothermal Power Production. Renewable Energy World. URL: <http://www.renewableenergyworld.com/articles/2016/06/kenya-on-track-to-more-than-double-geothermal-power-production.html>.

exploration, development and production of geothermal, petroleum and coal by putting forth a comprehensive regulatory and institutional framework. In its Sessional Paper No. 4 of 2004 (National Energy Policy), the ministry laid down broad-based energy sector reforms that provided for the specific functions in the electricity sub-sector, as well as the consolidation of all energy laws under government-mandated regulatory commissions with strengthened functions. The National Energy Policy recommended the enactment of both the Energy Act and the Petroleum Act to fast-track prudent regulation, increase stakeholder participation, and enhance stakeholder interests, including boosting investor confidence.

The 2008 national development blueprint (Kenya Vision 2030) and the promulgation of the Constitution of Kenya in 2010¹⁸¹ made it necessary to review the energy sector and policies. The process concluded with the 2015 National Energy and Petroleum Policy.¹⁸²

The document sets out the national policies and strategies for the energy and petroleum sector.

Kenya has introduced major policy, regulatory and institutional changes to enhance energy access and promote investment in renewable energy and energy efficiency. Those strategies include Sessional Paper No. 4 and are governed by several statutes, namely Energy Act (No. 12 of 2006), Geothermal Resources Act (No. 12 of 1982), Feed-in Tariffs for Renewable Energy, electricity regulations and the Electric Power (Electrical Installation Work) Rules, Energy (Complaints and Dispute Resolution) Regulations, and the Energy (Electricity Licensing) Regulations.

The National Energy Policy and Kenya Vision 2030 recognize the impact of energy projects on

“The power companies operate like they are above the law, they have policies, but they do not respect them. Many times, when the community complains, KenGen uses the police to threaten the community”.

Jackson Ole Shaa, interview on October 10th, 2017.

the livelihoods of communities that will be affected by energy projects. However, both the National Energy Policy and Vision 2030 do not contain systematic, concise measures on how human rights, gender equality, and climate change will be addressed before, during and after projects are initiated. Similarly, the Environmental and Social Impacts Assessment guidelines provided by the National Environmental Management Authority do not use a human rights-based approach. They lack adequate safeguards for addressing human rights, gender equality and climate change.

Furthermore, despite the existence of regulatory requirements, a community human rights advocate expressed concern that mechanisms to enforce the regulations are either weak or non-existent. That abets corruption and compromises the regulatory mechanisms that have been put in place.¹⁸³

2.2.2 The human rights situation in Kenya and its implications for geothermal projects

Human rights in Kenya : a critical situation

Human rights in Kenya are addressed by Chapter 4 of the Constitution of Kenya. That chapter, which is commonly known as the Bill of Rights, guarantees every person the enjoyment of rights

181 Kenyan legislation is available at <http://kenyalaw.org/kl/>.

182 ROK (2015). Draft National Energy & Petroleum Policy. URL: http://www.erc.go.ke/images/docs/National_Energy_Petroleum_Policy_August_2015.pdf.

183 Interview with Jackson Ole Shaa on 10 October 2017 at Narasha.

and fundamental freedoms. The Bill also applies to all national laws and binds all state organs.

Despite being enshrined in the Constitution, respect for human rights and for the administration of justice is wanting. Authorities have been accused of using excessive force and intimidating communities perceived to be in the opposition, failure to effectively carry out investigations, and reprisals against NGOs that work on a range of issues related to human rights and advocacy.¹⁸⁴ The situation was further exacerbated by the political environment, with disputed elections in 2017.

According to interviews conducted during the case study, communities noted that the police were deployed to enforce displacements despite existing court orders. Human rights advocates from the community have also faced threats of arrest on several occasions.¹⁸⁵ In general, the government has repeatedly been accused of intimidating human rights defenders, journalists and communities that challenge projects like the geothermal projects in Kenya. Human Rights Watch further states that over the last five years the government has failed to investigate a range of human rights abuses across the country and has undermined the basic rights of self-expression.¹⁸⁶

Geothermal projects and their human rights implications

Despite the existence of laws meant to protect the persons affected by geothermal projects, a number of factors inhibit the communities from seeking redress. Firstly, geothermal projects are carried out under the notion of “national good”, hence local interests are treated as secondary. Secondly the projects are used as political tools by the sitting



Livestock deaths have been reported because of consuming toxic waste from geothermal plants.

governments, which limits the chances of aggrieved communities seeking recourse using local legal or administrative mechanisms because the projects are deemed to be government projects. It is also important to note that despite the Constitution of Kenya stipulating the rights that each citizen should enjoy, respect of the same by the government and independent power producers is lacking. The lack of awareness on how to seek redress on the part of the affected communities, exorbitant legal fees, and the time it takes for such cases to be adjudicated in courts are also inhibiting factors.¹⁸⁷

Geothermal development in Kenya is governed by several laws. Such laws include the Environmental Management and Co-ordination Act and the Geothermal Resource Act and its supplementary legislation. Other regulations include the Energy Act, the 2013 Wildlife (Conservation and Management) Act, the Forest Act, the Occupational Health and Safety Act, the Public Health Act, the Water Act, the Physical Planning Act, the County Governments Act and the Constitution of Kenya. Geothermal development is also guided by World Bank environmental and social safeguard poli-

184 Human Right Watch (2017). World Report 2017. URL: <https://www.hrw.org/world-report/2017>.

185 Interview with Jackson Ole Shaa on 10 October 2017

186 Human Rights Watch (2017). World Report 2017. URL: <https://www.hrw.org/world-report/2017>.

187 Koissaba, B.R. Ole (2014). Kenyan Government Manipulates Courts to Dispossess the Maasai of Their Lands. Cultural Survival. URL: <https://www.culturalsurvival.org/news/kenyan-government-manipulates-courts-dispossess-maasai-their-lands>

cies such as its operating procedures on environmental assessment, natural habitats, indigenous people and involuntary resettlement¹⁸⁸. In addition, Kenya is a signatory to various international treaties and protocols that govern the application of environmental norms and standards. Some of these treaties and conventions include the more recent Paris Agreement, the Ramsar Convention, the Convention on Biological Diversity, the Kyoto Protocol, and the Vienna Convention on the Protection of the Ozone Layer. Furthermore, the community stated that geothermal resources in Olkaria have been exploited with no regard for the health or the environment of local communities. Toxic waste from the power station in Naivasha have been emitted into the air and disposed of in local waterways, which has violated applicable international environmental standards and resulting in livestock deaths.¹⁸⁹

With regards to land rights, Article 62 of the Kenyan Constitution states that all land in Kenya belongs to the people of Kenya collectively as a nation, as communities and as individuals.¹⁹⁰ Land is classified as public land, private land and community land. Land management is governed by the Community Land Act, the Land Act, the Land Registration Act, and the National Land Commission Act. The Land Act regulates the administration and management of public and private land. The Land Registration Act introduced a cadastral system for all types of land. The Community Land Bill recognizes four classes of community land: communal land, family or clan land, reserve land, and any other category of land recognized

under this Act such as land under the Land (Group Representatives) Act. Such land may be held under customary tenure, freehold, leasehold, or any other tenure system recognized by written law.¹⁹¹

The Kenyan Constitution also provides for compulsory acquisition of land by the government for national interests. The Olkaria geothermal projects are located on the category of private land. The Constitution also provides for benefit-sharing through the Natural Resource (Benefit-Sharing) Bill. According to the Food and Agricultural Organization,¹⁹² “compulsory acquisition is the power of government to acquire private rights in land without the willing consent of its owner or occupant to benefit society. It is a power possessed in one form or another by governments of all modern nations”. The Bill elaborates systems and procedures that the State is required to follow in ensuring sustainable use and exploitation of resources, and the equitable sharing of the benefits accruing from the exploitation of the same. Benefit-sharing with communities can be an important precondition for economic survival and for improving the living conditions of communities. The Bill mentions the exploitation of a broad range of resources, including natural gas, forest, and water resources, all of which play a role in climate mitigation activities.¹⁹³

Geothermal projects and their gender implications

In Kenya, like many parts of Africa, women face myriad disadvantages in decision making, access to and control of economic assets.

188 World Bank (2018). Operations Manual. [online]. URL: <https://policies.worldbank.org/sites/ppf3/Pages/Manuals/Operational%20Manual.aspx>

189 Interview with Ole Tinkoi on 10 December 2017.

190 Ibid.

191 Customary tenure refers to land rights under African customary law. Freehold and particularly leasehold are common forms of tenure under the Group Ranch (Representative) Act. The distinction from private land is that the group holding the land complies with the definition of community given in the Constitution.

192 FAO (2008). FAO. Compulsory acquisition of land and compensation. Land Tenure Studies, p.5. URL: <http://www.fao.org/3/a-i0506e.pdf>

193 The Natural Resource (Benefit-Sharing) Bill is yet to be adopted and is still being debated by Parliament.

The Constitution (Article 27(3)) stipulates that “women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres”. It further provides that “every person has a right to acquire and own property” and prohibits Parliament from enacting any laws that would deprive someone of their right to own property or limit their right to enjoy that property.¹⁹⁴ The absence of mechanisms that address human rights and, by extension, the non-existence of human rights approaches and gender equality in energy projects has resulted in numerous problems and conflicts between the affected communities, between the communities and the implementation agencies, and for the funders of such projects.

Kenya's new Constitution has changed the structure of both political and government institutions. Key among its new provisions are clauses for greater political representation of women.¹⁹⁵ However, the Constitution is silent on many other facets of life in which women are inadequately involved, such as decision-making in national and multinational projects, including the current geothermal projects that are the subject of this study.

According to the Institute for Human Rights and Business, there are fewer women engaged at the project level within the extractive industry, re-

sulting in minimal economic activities that directly benefit women.¹⁹⁶

2.2.3 The Maasai historical land claims

The Olkaria Region is located within the Hell's Gate National Park, which was officially established in 1984.¹⁹⁷ The first geothermal station, Olkaria I, was built in 1981, but even after the region was designated a protected area, the exploitation of geothermal power in the region continued with the building of Olkaria II and III in 2000 and Olkaria IV in 2014.¹⁹⁸ Resettlements of the indigenous Maasai communities took place on several occasions over the last decades. The first resettlement occurred in 1984, while the latest took place in 2013 to make way for the Olkaria IV geothermal project. That has exacerbated a number of conflicts relating to land ownership and resulted in loss of life and property.

The conflicts have mainly been between the Maasai and the land-buying company, the Ngati Farmer Cooperative Society,¹⁹⁹ which acquired 16,000 acres from Maiella Limited²⁰⁰ in 1965.²⁰¹ According to Maasai elders from Narasha and Olkaria who were interviewed, the Maasai took the Ngati Farmer Cooperative Society to court to lay claim to the land. According to interviews during this case study, a case that was filed by the Maasai was decided in favor of the Maasai and 4,000 acres

194 ROK (2010). Constitution of Kenya 2010. URL: <http://www.kenyalaw.org>.

195 Okoth. J. (2017, July 10). Kenya's parliament continues to stall on the two-thirds gender rule. The Conversation [Online]. URL: <https://theconversation.com/kenyas-parliament-continues-to-stall-on-the-two-thirds-gender-rule-79221>

196 Kenya Human Rights Commission (2016). Human Rights and Business Country Guide - Kenya. URL: <https://www.hrbcountryguide.org/countries/kenya>.

197 Webkenya (2003). Safari Rift Valley - Hell's Gate National Park & Mt Longonot National Park. URL: http://www.webkenya.com/eng/safari/hells_gate.php

198 KenGen (2017). Geothermal Plants [online]. URL: <http://www.kengen.co.ke/content/geothermal-plants>

199 Upon attainment of independence the government mobilized communities from Central Kenya to form land-buying companies to buy land from British settlers who were leaving Kenya. Ngati Farmers was one of those companies.

200 Maiyela Limited is among the many companies owned by British settlers that sold their land to mainly Kikuyu land- buying companies, which were given loans and grants from the Settlement Fund Trustee by the government.

201 TJRC. (2014). Report of the Truth, Justice and Reconciliation Commission: Volume IIA. Nairobi, URL: <https://digitalcommons.law.seattleu.edu/tjrc/>

were returned to them.²⁰² Over 2,000 Maasai continued to live on the remaining 12,000 acres not awarded to them by the court. The Maasai refused to move, claiming ancestral ownership of the land. In 2013, more than 2,000 Maasai were forcibly evicted. The evictions were violent and involved massive destruction of property and loss of livestock.²⁰³ The European Investment Bank continued to finance the Olkaria projects, although the land on which the project is located has remained subject to a dispute over ownership and the Maasai are still settled on the land.

The second historical conflict driven by geothermal exploration involves the Kedong Ranch, managed by Kedong²⁰⁴ Ranch Ltd. Kedong Ranch took over 74,000 acres of ancestral Maasai land, although the Maasai still live and graze their animals on the land as squatters. Based on data acquired from interviews carried out for this case study on 13th of October 2017 with a representative of the Maasai living in Kedong,²⁰⁵ the Maasai went to court in 2010 but their case was delayed due to loss of court documents in the High Court. In February 2015, the High Court in Nakuru ruled that the Maasai were not legally occupying the land, arguing that since the Maasai are nomadic pastoralists, it is impossible for them to have been in one place continuously for a period of twelve years, which is the minimum period

a person is required to live on any land before they can claim ownership through adverse possession.²⁰⁶

2.3 Case study: the Olkaria Geothermal Projects

The Olkaria geothermal power generation project is touted as the largest such project in the world. Located approximately 120 km west of Nairobi, in Nakuru County, the Olkaria geothermal field covers approximately 80 sq. km and was gazetted as a Geothermal Resource Area in 1971.²⁰⁷ The Clean Development Mechanism (CDM) currently covers the four geothermal power stations in Olkaria and another project situated close to Longonot. Further expansion to Suswa is being considered. The Olkaria power plants and their extensions are the only active geothermal site at the moment.²⁰⁸

The EIB funding amounts to EUR 244,947,563 for the whole Olkaria geothermal project.²⁰⁹ In the context of this case study, the EIB and EU-based companies and funds have been involved in geothermal projects that have raised serious concerns

202 Interview with Ole Noosaron on 13 October 2017.

203 Koissaba, B. O. (2014, July 7). Maasai Protest New Land Concessions for Geothermal Extraction in Kenya [Center for World Indigenous Studies, online newspaper], URL: <https://intercontinentalcry.org/maasai-protest-against-new-land-concessions-geothermal-extraction-kenya-24504/>. See also: <http://youtu.be/la3c95KrMd8>.

204 Kedong is derived from the Maasai name "Ewuaso O Nkidongi", which is the name for the only river that crosses the plains and supported thousands of Maasai livestock during times of drought. The Maasai name for the area is "Ongata E Kitet" (the plains of Kitet).

205 Interviews with Ole Tinkoi and other Maasai representatives from Kedong during the case study.

206 High Court of Kenya at Nakuru (2015). Ruling on constitutional petition No. 57 of 2014. Kenya Law . URL: <http://kenyalaw.org/caselaw/cases/view/106776/>.

207 Kanyinke, S. (2013). Renewable Energy Projects and the Rights of Marginalised/Indigenous Communities in Kenya. International Work Group for Indigenous Affairs. Eks-Skolens Trykkeri, Copenhagen, Denmark. URL: https://www.iwgia.org/en/iwgia_files_publications_files/0725_REPORT21.pdf

208 Schade, J. (2017). Kenya 'Olkaria IV' Case Study Report: Human Rights Analysis of the Resettlement Progress, p. 5. Retrieved from: www.uni-bielefeld.de/soz/ab6/ag_faist/downloads/WP_151.pdf

209 European Investment Bank. Projects Financed Multi-Criteria Lists. URL: <http://www.eib.org/projects/loan/list/?from=1982®ion=6§or=1000&to=2017&country=KE>.



Community participation during the case study.

in relation to their human rights, climate change and gender equality impacts. Key areas of concern are project approvals, identification of the Maasai as indigenous people, land rights, and adequate consultations. In a recent report by the EIB Complaints Mechanism (EIB-CM), the EIB questions the effectiveness and the inclusiveness of the consultative procedures during the implementation of those projects.²¹⁰ That has led indirectly to human rights violations. Testimonies from the affected communities and especially the persons affected by the project attest to that failing.²¹¹

2.3.1 EIB's approval of financing the project

The financiers, including the European Investment Bank, approved the projects despite shortcomings pointed out in the Environmental and Social Impact Assessment and the Resettlement Action Plans. The 2012 Resettlement Action Plan and KenGen's Environmental and Social Impact

Assessment for the resettlement site were accepted without additional studies and consultations about the quality of the Rapland, which were strongly recommended by the 2012 Resettlement Action Plan.²¹² The lenders failed to comply with their follow-up obligations by approving the resettlement without requesting an enhanced Environmental and Social Impact Assessment. Further, the lenders did not consider the local tensions and the Environmental and Social Impact Assessment for Olkaria IV.²¹³ The financiers were also aware of the land conflicts over Olkaria and Kedong Ranch.

Consideration of the Maasai as an indigenous people

The Constitution of Kenya does not recognize the term indigenous people but uses the term "marginalized" groups to define groups of people who self-identify and consider themselves indigenous, including the Maasai. While there is no universal interpretation of the term "marginalized groups of people", the proposed definition by Special Rapporteur Capotorti is often viewed as authoritative. It defines a minority as "a group, numerically inferior to the rest of the population of a State, in a non-dominant position, whose members being nationals of the State possess ethnic, religious or linguistic characteristics differing from those of the rest of the population and show, if only implicitly, a sense of solidarity, directed towards preserving their culture, traditions, religion or language".²¹⁴ The Maasai argue that due to their culture and historical marginalization they meet the criteria of a marginalized group, and hence an indigenous people.

210 EIB-CM (2015). Conclusions Report Olkaria. URL: www.eib.org/attachments/complaints/sg-e-2014-07and-08-conclusions-report-en.pdf.

211 Tarazona, D. (2017, June 23). The forgotten struggle of Kenyan indigenous people. URL: <https://www.eibinafrica.eu/documentary-olkaria-geothermal-power-plant/>

212 GIBB Africa. (2012). Olkaria IV (Domes) Geothermal Project in Naivasha District: Resettlement Action Plan for Olkaria IV Power Station, URL: <http://documents.worldbank.org/curated/en/508361468046149605/pdf/RP8830v110P1030IA0IV0RAP0JULY002012.pdf>.

213 Ibid.

214 Capotorti, F. (1977). Study on the Rights of Persons belonging to Ethnic, Religious and Linguistic Minorities. E/CN.4/Sub.2/384/Rev.1, para. 568. URL: <http://www.ohchr.org/EN/Issues/Minorities/Pages/internationalaw.aspx>

“Most of the decisions were made by KenGen after consulting selected people from the community. The rest of us were only called to be informed of what has been decided. Any person who disagreed was threatened of being excluded from monetary compensation and resettlement”

Interview with Ole Noosaron

The African Commission on Human and Peoples’ Rights and the African Commission on Human Rights Working Group²¹⁵ as well as the United Nations Declaration on the Rights of Indigenous Peoples²¹⁶ identifies the Maasai as “self-identifying indigenous peoples.” Accordingly, there was a need to apply indigenous rights guaranteed in those instruments when dealing with the Maasai in the project area. An Indigenous Peoples Plan for the Maasai would have created an opportunity for due process for developing benefits that the community could claim. The lack of identification of the Maasai as indigenous people has had adverse effects on their lives and livelihoods.

The World Bank’s Social Safeguard Policy was applicable since the projects are co-funded by the World Bank.²¹⁷ The policies of lenders like the World Bank aim at obtaining broad community support among vulnerable and indigenous people. The EIB does not have an indigenous peoples’ policy. Still, the EIB’s Environmental and Social Handbook refers to effective consultation.²¹⁸ However, the EIB and World Bank decided not to treat the affected persons as indigenous peoples and not to apply Annex C 4.10 of the World Bank Operational Manual on Indigenous Peoples.²¹⁹

Against that background, the EIB and World Bank financed the project, even though several rights of the Maasai as an indigenous people were violated.

According to the community, all interviews and consultations with members of the local community were not conducted in the local language (Maa), but in Swahili. Moreover, project materials were not translated into Maa.²²⁰

The right to free, prior and informed consent is critical if indigenous peoples are to achieve the right to self-determination in controlling and managing their lands and resources.²²¹ Free, prior and informed consent ensures their consultation and

215 ACHPR-WG. (2006). Indigenous Peoples in Africa: The Forgotten Peoples. URL: http://www.achpr.org/files/special-mechanisms/indigenous-populations/achpr_wgip_report_summary_version_eng.pdf

216 UNDRIP. (2007, September 13). UNGA Res. 61/295, United Nations Declaration on the Rights of Indigenous Peoples, 61 UN GAOR (vol. III), Supp. No. 49, p. 15, UN Doc. A/61/49. URL: research.un.org/en/docs/ga/quick/regular/61.

217 Testimonies from the community described many occasions on which local human rights defenders were excluded from meetings called for the purpose of consultation on the projects.

218 EIB (2010). Environmental and Social Practices Handbook, Version 2 of 24/02/2010, page 66: “... standards for dealing with involuntary resettlement and standards for the treatment of vulnerable groups, including women and indigenous peoples. Bank staff will endeavor to ensure that appropriate arrangements for effective consultation with stakeholders are put in place”.

219 Note: OP/BP 4.10, Indigenous Peoples, were revised on April 2013 to consider the recommendations in “Investment Lending Reform, URL: <https://policies.worldbank.org/sites/ppf3/PPFDocuments/090224b0822f89d5.pdf>

220 The only time materials were translated was when the EIB-CM and the World Bank were giving feedback about the findings of the investigation into community complaints.

221 It is endorsed in the United Nations Declaration on the Rights of Indigenous Peoples and is an amplification of the consultation and participation requirements under the International Labour Organization Convention No. 169 (1989). Convention on indigenous and tribal peoples, 1989 (No.169), URL: http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C169.

participation in decision-making. However, community members felt that in this case the EIB and its partners ignored this inclusive process.

Land rights

Regarding rights to access land and land-based resources, the community members felt that KenGen abused these rights by:

- Negotiating the size of land instead of basing land-for-land compensation on a proper assessment of land use;

- Failure to provide an assessment of the land quality of the proposed resettlement land as requested by the Environmental and Social Impact Assessment for Olkaria IV;

- Abusing the right of the persons affected by the project to security of tenure²²² by physically relocating them before the title deed to the land had effectively been transferred to the persons affected by the project;

- In addition, their socio-economic livelihood activities had not been restored to a level equal to or above the previous one, as required by the international lenders' policies for involuntary resettlement;

- Further, the community felt that KenGen had abused the rights to adequate compensation for the land they occupied, and thus had violated the rights of the persons affected by the project to property and an adequate standard of living, including the right to adequate food and housing;²²³

- The community also raised their concerns about inadequate consultation on the choice of Rapland. According to their remarks, the current location is unsuitable for human habitation because of the steep terrain, frequent landslides, and poor quality of the soil to support enough pasture and agricultural activities.

By extension, the EIB failed to closely supervise the project and did not put in place adequate procedures to ensure compliance with human rights standards as stipulated in various European laws, policies, UN standards and other global political commitments.²²⁴

2.3.2 EIB Complaints mechanism and mediation process

The World Bank and the EIB, co-financers of the Olkaria projects, received complaints from the community and established a mediation process to consider the complaints and develop a strategy to address the same.²²⁵ To address complaints that arise from projects financed by the European Investment Bank, the EIB created the EIB Complaints Mechanism division (EIB-CM). The Complaints Mechanism is an independent body for investigating complaints from organizations, corporations and individuals affected by EIB activities. Complainants do not need to prove that they are directly affected by an EIB decision, action or omission and are not required to identify the rules, regulations or policies in question.

The report on the mediation process was made available in December 2016 after a long and highly contentious process.²²⁶ According to the Rapland

222 As enshrined in the right to housing (ICESCR, No. 4; Guiding Principles on Internal Displacement – GPID). The community expected to be given an absolute title, but they got a lease instead, which remains a contentious issue.

223 Schade, J. (2017). Kenya Olkaria IV Case Study Report. URL: www.uni-bielefeld.de/soz/ab6/ag_faist/downloads/WP_151.pdf.

224 CEU (2015). Climate Action Delivery Plan, URL: https://eeas.europa.eu/topics/energy-diplomacy_en.

225 EIB (2018). Complaints mechanism [online]. URL: <http://www.eib.org/about/accountability/complaints/index.htm>.

226 EIB-CM (2015). Conclusions Report Olkaria. URL: www.eib.org/attachments/complaints/sg-e-2014-07and-08-conclusions-report-en.pdf.

Community, the mediation process had several critical weaknesses. The outcomes of the mediation agreement included measures to improve the quality of soil, roads and water provision.

The process also acknowledged an increase in the numbers of the persons affected by the project eligible for compensation and provided further re-examination of individual cases under the supervision of the EIB and World Bank. It also included steps to enhance the restoration and improvement of livelihoods, particularly for youth and women.²²⁷

However, the community feels that the mediation agreement failed to clearly address several contentious issues and others were only vaguely dealt with.

The community stated that most of the mediation process agreements had not been fulfilled by KenGen. The community also expressed concerns that water had only been made available to Olosinyati and Oloonongot villages as opposed to the five villages that were in the agreement. While the road is partially complete, it is at risk of being washed away by landslides.

Also, the communities alleged that the grievance mechanism in place was not working effectively and that some of the complainants had been subject to retaliation after sending their complaints to the European Investment Bank Complaints Mechanism and the World Bank. The resettlement plan targeted four villages in different locations²²⁸ but all the members of the four villages were settled as a

group at the current Rapland location. According to the Mediation Mechanisms Agreement,²²⁹ the settlement site would have modern houses, modern infrastructure, social services, and sufficient land for grazing livestock. A Resettlement Action Plan Implementation Committee was set up comprising a team from the World Bank, KenGen, EIB, AFD, KfW, the Naivasha Deputy County Commissioner, representatives of the community,²³⁰ and officials from the Japan Bank for International Cooperation.

According to interviews with the Rapland community on October 12th, 2016²³¹, KenGen did not respect the agreements in the following respects:

- fewer houses were built for the resettlement than initially agreed, with just 150 of the agreed 164 being constructed;
- mobility to access essential services like healthcare and water was reduced due to distances (only two villages have water against the planned five);
- the settlement was not culturally appropriate;
- insufficient consideration was given to the needs of vulnerable persons (mainly the elderly and the disabled); and
- families were separated.²³²

227 EIB. (2016, May 28). Agreement on Olkaria IV Resettlement Mediation. URL: <http://www.eib.org/about/accountability/complaints/cases/sg-e-2014-08-olkaria-b.htm>.

228 Namely Cultural Centre, Oloonongot, Olosinyati, and Olomayiana Ndogo.

229 EIB. (2016, May 28). Agreement on Olkaria IV Resettlement Mediation, op. cit.

230 Comprising five representatives from each community – three men and two women, plus one representative each for young people, vulnerable groups, the council of elders, and Cultural Centre management.

231 Due to fear of retaliation from KenGen and the Provincial Administration, the Rapland community requested that their identities be kept confidential.

232 Members of the Cultural Centre who were used to living together found it unacceptable to be living in scattered family clusters at relatively large distances from one another.

233 GIBB Africa. (2009). KenGen Olkaria IV Project - Resettlement Action Plan. Nairobi, Kenya. URL: <http://pubdocs.worldbank.org/en/175751449237265429/text/Olkaria-IV-RAP-Vol-1-Disclosed-Dec-1-2009.txt>.

234 Ibid.

The process of identifying the eligibility of persons affected by the project for compensation and their entitlements took place between 2009 and 2013.²³³ It included a range of activities and brought about major changes in the identification of the persons affected by the project community. A Resettlement Action Plan was prepared in 2009 that included a set of socio-economic baseline data.²³⁴ Because of the complaints made by the community members, the EIB proposed a mediation process to address the issues that were identified. The mediation process between the company and community representatives was established with the facilitation of the European Investment Bank Complaints Mechanism (EIB-CM), and supported by the World Bank's Grievance Redress Service. According to interview data gathered for this study, three and a half years after the resettlement and almost two years after the mediation agreement, the provisions have not been fully implemented, including critical issues, such as water supply, health facilities, schooling, the availability of grazing land, and land titles.

2.4 Policy recommendations

To address the current human rights and gender challenges resulting from existing geothermal projects, the EIB and other entities involved in geothermal energy should:

- strengthen indigenous community structures through institutional capacity-building for women, youth, and traditional leadership.

- develop livelihood restoration initiatives need to be culture-appropriate and should involve entrepreneurial capacity-building for local entrepreneurs. Due to the isolation of the Rapland community from the rest of the neighbouring communities, market linkages should be established through financing local producer and marketing groups.

- carry out a participatory process to identify the persons affected by the project that were left out.

- hold off funding to the Akiira 1 project and launch a new study on the health, social, cultural, environmental, and economic impacts that the projects may have on the Rapland community, as recommended by the Resettlement Action Plan in 2012.²³⁵

- Since costs have already been incurred and the rights of the people have been infringed, another study needs to be commissioned by the EIB, the World Bank and KenGen to identify potential opportunities to remedy the situation. It should include an all-inclusive environmental audit for communities that have been affected and those

that are yet to be relocated due to future expansion of geothermal projects. Such a study would enable an in-depth understanding of alternative livelihoods for the potential persons affected by the project and other local communities that will be affected by the projects.

Based on the findings in this study, the following recommendations are made regarding proposed new geothermal projects:

- Financiers need to institutionalize broad stakeholder involvement with mechanisms to ensure the equitable participation of women throughout all stages of the processes.

- The EU should require the fulfillment of all the principles of free, prior and informed consent before approving such projects.

- Financing should be suspended when serious human rights violations occur. Victims must have access to effective remedies, and human rights defenders who raise concerns should not face intimidation or reprisals.

- Impact assessments carried out by the EU, IFIs, GDC, KenGen, and the Government of Kenya should comprehensively address potential impacts in relation to all internal and external factors.

- When addressing the impact assessments, the EU should develop a comprehensive checklist on climate change, fundamental human rights, and gender equality. It should be systematically applied prior to granting concessions, and during project implementation.

- All proposed projects should respect

235 GIBB Africa. (2012). Olkaria IV (Domes) Geothermal Project in Naivasha District: Resettlement Action Plan for Olkaria IV Power Station. URL: <http://documents.worldbank.org/curated/en/508361468046149605/pdf/ RP8830v110P1030IA0IV0RAP0JULY002012.pdf>

the objectives of climate mitigation and ensure that climate adaptations are consistently applied at every stage.

■ All Environmental and Social Impact Assessment studies must include consultations with indigenous experts and should be participatory and inclusive for the persons affected by the project and other communities that are non-resident but depend on the land for their livelihood.²³⁶

The following gender and human rights considerations should be addressed in climate-related development projects funded by the EU:

■ The EIB's operationalization of its existing safeguards should be improved and reviewed to ensure appropriate supervision and implementation of its human rights-based components.

■ The legal foundation of the resolution of the African Commission on Human and Peoples' Rights, the EU Action Plan on Human Rights and Democracy,²³⁷ the Paris Agreement, the United Nations Declaration on the Rights of Indigenous Peoples, and other declarations pertaining to human rights and gender equality should be enhanced to guarantee the participation of indigenous communities, as well as the application of the free, prior and informed consent of communities.

■ The EU should support the Kenyan government in improving the existing Climate Change National Action Plans and implementing the United Nations Guiding

Principles on Business and Human Rights, with specific reference to identifying, mitigating, and preventing the potential human rights and gender impacts on resettlement.

■ The European Union, international financial institutions and the Kenyan government should develop climate change mitigation and adaptation programmes that use a gender analysis to improve the welfare of women and girls—e.g., access to credit, capacity-building and extension services, information dissemination, improved access to land and natural resources, sustainable energy and technology, and access to reproductive health information and services.

■ The European Union, international financial institutions and the Kenyan government should develop gender-sensitive indicators to monitor and evaluate the processes of stakeholder inclusion and responses to their input.

■ Any deviation from EIB social standards in the context of co-funding arrangements should be accompanied by requirements to report negative developments to EIB management and decision-makers. Being informed is a precondition to responding appropriately and in a timely manner. An alternative option is to categorize projects involving resettlement measures as highly sensitive and requiring more frequent and timely reports.

■ Delegation of supervisory responsibilities to co-financiers must be accompanied by clear standards and rules about how the EIB operationalizes its retained supervisory obligations.

236 Pastoralism involves moving livestock from place to place, so there is interdependence of pasture among various Maasai groups. The Maasai communities from Suswa, Oike, and Ewuaso depend on this area for grazing during dry seasons.

237 CEU (2015). EU Action Plan on Human Rights and Democracy 2015-2019. URL: https://ec.europa.eu/anti-trafficking/eu-policy/action-plan-human-rights-and-democracy-2015-2019_en.

2.5 Conclusions

The case of the Olkaria geothermal projects has demonstrated the complexity of climate co-funding, the local obstacles to successful project implementation in host countries, and the inadequacy of supervisory procedures to address the negative impacts of the implementation of geothermal projects. Similarly, the study has shown the importance of integrating and enforcing climate change, human rights and gender equality policies into the development of geothermal projects.

Some challenges emanated from multinational funding of the geothermal projects in Kenya. Key among them is the problem of the supervisory roles of co-funded projects. Further complications arose where the operating standards of international financial institutions were not applied to geothermal projects in Kenya because such standards do not exist or are weak in Kenya. It is suggested that the EIB should extend its external mandate to also include climate change mitigation and adaptation, which links to its energy mandate in matters of renewable energy promotion. Delegating supervisory responsibility to KenGen without clear requirements and standards from the international financing institutions led to lapses in ensuring that all required safeguards were met.

Despite the existence of a domestic legal framework to promote the sustainable development of geothermal energy, as well as the ratification and signing of various international environmental treaties and conventions, there is a great need for high-level policy discussions on reviewing the existing national framework in Kenya regarding its effectiveness in protecting the livelihoods, human rights and gender equality of people affected by large-scale projects.

Effective stakeholder engagement is particularly helpful in planning and decision-making with regard to projects, which could significantly affect local communities. As shown by the case study, ineffective stakeholder engagement could lead directly or indirectly to adverse impacts and infringements of human rights. According to the United Nations Declaration on the Rights of Indigenous Peoples, consultations should be carried out in good faith with the indigenous peoples concerned through their own representative institutions.

Financiers should provide contingency funding to support and facilitate local communities' capacity building to be able to initiate entrepreneurial projects that harness their local natural resources. This may be based on a benefit-sharing approach where local communities benefit as co-owners rather than just receiving compensation. The Geothermal Development Company has the potential to lay a strong foundation for building strong community entry processes and capacity-building initiatives.

PART II: Case studies

3.A Case Study of Palm oil for biofuels in Indonesia

By Sisilia Nurmala Dewi, Arimbi Heroepoetri and Stephen Leonard



3.1 Introduction

A wide range of policy provisions both in Indonesia and in the EU are relevant to determine and analyse the way in which palm oil production is undertaken. At the international level, there are of course the SDGs and the Paris Climate Agreement as well as other international conventions. The EU also has its own resolutions, along with the EU Biofuel Cap and voluntary initiatives that relate to the corporate sector, such as the Principles of Responsible Investment and the Roundtable on Sustainable Palm Oil (RSPO).

At the national level in Indonesia there is legislation related to plantations,²³⁸ reducing greenhouse gases²³⁹ and the Certified Palm Oil Fund²⁴⁰ as well as the Indonesian Sustainable Palm Oil Initiative (ISPO). In order to implement the SDGs and the Paris Agreement, a Presidential Regulation²⁴¹ and new laws²⁴² have been put in place. Thus, Indonesia has agreed to contribute to keeping the global average temperature rise to below 2 or 1.5 degrees C and is now taking steps to implement its Nationally Determined Contribution (NDC), however a recent publication indicates that Indonesia is not on track to achieve its own climate targets.²⁴³

In 2016 the total area of palm oil plantations in Indonesia reached 11.9 million ha, 4.7 million of which are managed by smallholder farmers.²⁴⁴ Resulting palm oil production in the same year reached 37 million tonnes. Most of the production of palm oil and its derivatives are intended for the export market, amounting to 28.4 million tonnes with a value of US\$16.95 billion or equivalent to Rp228.8 trillion.²⁴⁵ According to the Ministry of Industry, the palm oil industry contributes US\$20 billion per year to the country's total export foreign exchange earnings and provides work for approximately 5.3 million people in Indonesia.²⁴⁶

The rapid development of Indonesia's palm oil industry, particularly over the last four decades, has generated significant revenues for Indonesia's economy but simultaneously has caused massive environmental degradation. Allocated land for palm oil has increased 35% from 7.4 million ha in 2008 to 10 million ha in 2013, with an average in-



238 239 CEU (2015). EU Action Plan on Human Rights and Democracy 2015-2019. URL: https://ec.europa.eu/anti-trafficking/eu-policy/action-plan-human-rights-and-democracy-2015-2019_en.

239 Government Regulation No. 61 of 2011 on National Action Plan for Reducing Greenhouse Gases (RAN-GRK).

240 Government Regulation No. 24 of 2015 and Presidential Decree No. 61 of 2015 on CPO Fund.

241 Presidential Decree No. 59 of 2017.

242 Law No. 16 Year 2016 concerns the ratification of the Paris Climate Agreement.

243 Jong, Hans Nicholas (2017, October 16), Indonesia to Miss Carbon Emissions Target Under Existing Climate Policies Study. Mongabay, URL: <https://news.mongabay.com/2017/10/indonesia-to-miss-carbon-emissions-target-under-existing-climate-policies-study/>.

244 Joko Arif, Petani Mandiri (Independent Peasant), Lembar Fakta Kemajuan 1/6 (Progress Fact Sheet), Institute Penelitian Inovasi Bumi, p. 1.

245 Bill of Indonesia Sustainable Palm Plantation year 2016.

246 Fernandez, M.G. (2017, May 31). Pengusaha Tekankan PP 57/2016 Bisa Ganggu Iklim Usaha, Bisnis Indonesia, URL: <http://industri.bisnis.com/read/20170531/99/658261/pp-no.572016-berpotensi-ganggu-industri-sawit-dan-pulp>.

247 Ibid.

crease of 520,000 ha per year. An area the size of Bali is converted from forest to palm oil each year in Indonesia.²⁴⁷

In 2015 there were 2.55 million ha of forest fires, much of which was associated with land clearing for plantations, which released 1.1 gigatonnes of Co₂ emissions from peat and biomass emissions and caused massive health issues and around 100,000 premature deaths.²⁴⁸

Recent estimates suggest biofuels will increase to around 5 million tonnes per year by 2025, to 128 million tonnes by 2040; and 285 million tonnes by 2050. The EU market has been the main export destination and the Indonesian domestic market is increasing.

Palm oil as a commodity is said to have a very strategic value to support national development in Indonesia.²⁴⁹ The Indonesian government strongly supports the palm oil industry.²⁵⁰

Indonesia is the world's largest palm oil producer and exporter. The country dominates nearly 60% of the palm oil market, with the EU being one of the top consumers, together with China and India.

Human rights violations in palm oil plantations are ongoing and are not given the attention they deserve, often overshadowed by the argument that the industry is necessary for economic growth and efficiency. Conflicts associated with land acquisition on a massive scale have led to violence and the criminalisation of local communities, in-

cluding indigenous peoples; threats to community livelihoods; and stateless children. Labour-related breaches of human rights are also being committed in the palm oil sector, especially child labour.²⁵¹

3.2 Policy Context

3.2.1 Human Rights law and women's rights in Indonesian law

Human rights provisions are comprehensive in the Indonesian Constitution, including the rights of indigenous and tribal peoples. In particular, human rights are regulated through the Human Rights Act, which establishes the National Commission of Human Rights and the Human Rights Tribunal. Indonesia has also ratified the core of human rights covenants, such as the International Covenant on Civil and Political Rights, the International Covenant on Economic Social and Cultural Rights, the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW), the Convention on the Rights of the Child, the Convention against Torture, the Convention on the Elimination of all Forms of Racial Discrimination, the International Convention on the Rights of Persons with a Disability, and the International Convention on the Protection of all Rights of Migrant Workers.

Women's rights in Indonesia are mostly considered under CEDAW, which was ratified in 1984²⁵².

248 Burrows, Leah. (2016,December 19). Smoke from 2015 Indonesian fires may have caused 100,000 premature deaths, Harvard John A. Paulson School of Engineering and Applied Sciences, URL: <https://www.seas.harvard.edu/news/2016/09/smoke-from-2015-indonesian-fires-may-have-caused-100000-premature-deaths>.

249 Rosediana Suharto, et.al., Studi Bersama Persamaan dan Perbedaan Sistem Sertifikasi ISPO dan RSPO, (Jakarta: Sekretariat Komisi Indonesia Sustainable Palm Oil, 2016), p. 5.

250 To stimulate the industry, the Indonesian government provides a subsidy for biofuels of around Rp 11 trillion. This does not include another Rp 9.6 trillion issued by the Palm Oil Plantation Fund Management Board.

251 Jiwan, Norman (2013). The Political Ecology of the Indonesian Palm Oil Industry: A Critical Analysis, in Oliver Pye (Ed.), The Palm Oil Controversy in Southeast Asia: A Transnational Perspective, URL: <https://itunes.apple.com/au/book/palm-oil-controversy-in-southeast-asia-transnational/id794302655?mt=11>.

252 CEDAW is ratified through law number 7/1984



Picture : Icaro Cooke Vieira/CIFOR

This was then followed by a Presidential Instruction concerning Gender Mainstreaming, which emphasizes that gender mainstreaming is a strategy to integrate gender into the design, preparation, implementation, monitoring and evaluation of national development policies and programmes. It aims to eliminate the gender gap and is expected to enhance transparency and accountability from central to local government. Procedures include gender mainstreaming in development planning; implementation of development; and monitoring and evaluation of implementation.

Gender issues in the palm oil sector are often overshadowed by poverty and human rights violations that do not distinguish between the sexes.

Gender issues are “relegated to the periphery of the debate around sustainable palm oil even though women play a critical role in the sector and gender inequalities are rampant”.²⁵³ This is not only the case for the government and palm oil companies, but also for civil society.

Indonesia has also developed a National Action Plan (NAP) for Business and Human Rights, premised on the UN Guiding Principles on Business and Human Rights, also known as the Ruggie Principles. These principles have been developed to address poor business practices resulting in human rights violations and are built on three main pillars:

- the State’s duty to protect human rights;
- the corporate responsibility to respect human rights; and
- access to remedies for victims of human rights violations.

The Business and Human Rights NAP is a manifestation of the first pillar, and provides guiding principles for corporate responsibility, to respect human rights throughout the entire company, regardless of size, sector, context of activity, ownership, and structure.²⁵⁴ However, implementation of this NAP is going slowly and possibly failing due to a lack of political will and the voluntary nature of the process.

3.2.2 The Indonesian Plantations Law

The most relevant law related to palm oil is the Plantations Law.²⁵⁵ The Plantations Law purports to provide some protections for indigenous peoples and local communities. The Law also stipulates that the competent authority is prohibited from issuing plantation business permits on the

253 CEU (2015). EU Action Plan on Human Rights and Democracy 2015-2019. URL: https://ec.europa.eu/anti-trafficking/eu-policy/action-plan-human-rights-and-democracy-2015-2019_en.

254 Rencana Aksi Nasional Bisnis dan Hak Asasi Manusia (Komnas HAM dan Elsam: Jakarta, May 2017), p. 15.

255 Law no. 39 of 2014

customary land of customary law communities. The plantation business permit will only be issued when the company has obtained an environmental permit and has shown compliance with the spatial and regional plans and shown conformity with the plantation plan. The environmental permit can only be obtained by submitting an environmental impact analysis, which contains a clause outlining the community's participation.²⁵⁶ In addition, plantation enterprises holding cultivation plantation business permits are required to facilitate the development of community plantations measuring at least 20% of the total area cultivated by the plantation companies.

Art 107 of the Law foresees sanctions in case of illegal plantation or logging.²⁵⁷ However, palm oil companies are often 'permitted' to operate without proper legal requirements in place.²⁵⁸ The opposite applies to indigenous peoples and local communities. They are subjected to very strict and challenging requirements in any efforts to secure rights to access and use land. Also, the sanction provision of the Plantations Law does not identify the minimum amount of logging. Consequently, people who cut down one single tree could be punished under this Act.

3.3 Biofuels, Forest and Climate Change : challenges and opportunities in terms of human rights and gender

3.3.1 Challenges generated by palm oil's production prospects

Under the pretext of sustainable development and climate change mitigation and adaptation, owners of palm oil plantations have new reasons to increase their production for the purposes of renewable energy and transport. The EU market, for example, imports 23% of its biofuel resources from palm oil, most of which comes from Indonesia. Meanwhile, domestic demand for palm oil for biofuels is expected to keep increasing due to the targets put in place by the Ministry of Energy and Mineral Resources.²⁵⁹

On 24 October 2016, the Paris Agreement was ratified by Indonesia²⁶⁰ and the government is

256 The law requires that the participation of communities includes: participation in the planning, area development, research and development, financing, empowerment, supervision, system and information development, institutional development and preparation of guidelines for the development of the plantation with the participation in the form of recommendations, responses, filing objections, suggestions and/or assistance.

257 Article 107 of the Plantations Law reads: "Any unlawful person who uses and controls plantation land or commits logging in plantation areas will be subject to a penalty of imprisonment for a maximum of 4 years or a fine of up to Rp 4 billion".

258 <http://ekonomi.kompas.com/read/2009/11/01/20401842/banyak.perkebunan.sawit.beroperasi.tanpa.hgu>; see also <http://www.tuk.or.id/perkebunan-sawit-banyak-perusahaan-beroperasi-tanpa-hgu/>.

259 Those targets are: 20% biodiesel blended with non-subsidized diesel fuel for the transportation and industrial sectors, power plant sectors to blend 30% of biodiesel, and the aviation industry is expected to seek very significant amounts of biofuels in coming years, with estimates that this industry alone will require around 285 million tonnes per year by 2050. See Singgih, Viriya P. (2017, February 4). Biodiesel on High Demand as Indonesia Turns to Cleaner Fuel. The Jakarta Post, URL: <http://www.thejakartapost.com/news/2017/02/04/biodiesel-on-high-demand-as-indonesia-turns-to-cleaner-fuel.html> and <http://www.biofuelwatch.org.uk/wp-content/uploads/Aviation-biofuels-report.pdf>.

260 Indonesia Law No. 16 of 2016 on Ratification of the Paris Agreement to the United Nations Framework Convention on Climate Change (UNFCCC).

Based on the experience of the non-governmental organisation Sawit Watch and research since 1998, problems associated with palm oil production in Indonesia can be categorised under the following twelve areas :

- Land acquisition;
- Lack of security for indigenous peoples;
- Lack of free, prior and informed consent;
- The controlling power of the State: limiting 'eminent domain';
- Land disputes and human rights abuses;
- Lack of enforcement capacity and weak governance;
- Vulnerable groups: women, bonded labour and children;
- High conservation values problems: identification, management and protection;
- Absence of rule of law;
- Problems facing smallholders;
- Food sovereignty; and
- Many palm oil operations still allow slavery-like practices (worst labour conditions)

now taking steps to implement its obligations under the agreement and has submitted a Nationally Determined Contribution (NDC), which provides that greenhouse gas emissions should be reduced by 29% by 2030. Special attention is given to land use with an expected reduction of emissions from the land sector by 17% by 2030 and from energy by 11%. The remaining 1% reduction will come from waste, industry, agriculture and others. The NDC is of relevance to the palm oil industry in relation to the land use and forest provisions (which include REDD+), the renewable energy provisions and the provision on greenhouse gas reductions.

One of the most important steps taken to address climate change in Indonesia is through its renewable energy policies. The legal framework for renewable energy policy is contained in the 2007 Energy Law. The Energy Law regulates the development of renewable energy, including bioenergy.

Biofuel is one of the major fuel sources in the energy diversification trajectory taken by the Indonesian government to slowly reduce fossil fuels and transition to renewable energy because of its competitive price, entrenched production, infrastructure capacity and established industry readiness.

A major concern related to palm oil expansion concerns is the recently developed fuel efficiency measures to be applied through the aviation industry's Carbon Offsetting and Reduction Scheme for International Aviation (CORSIA). Through the industry's international body (the International Civil Aviation Organization - ICAO) the aviation industry is expecting to achieve carbon neutrality, largely through the use of biofuels for planes.

An expansion of the biofuel industry will be accompanied by an expansion of the palm oil industry and the associated risks related to ongoing human rights violations. The intersection between human rights and climate change in Indonesia is, however, not specifically regulated. Within the NDC the government declares that "In line with the Paris Agreement, Indonesia respects, promotes and considers its rights to adat (indigenous) communities, local communities, migrants, children, persons with different abilities and empowerment of women and intergenerational equity". In addition, the SDGs in their wider context bring together aspects of human rights and climate change to ensure the fulfilment of objectives related to both issues. Also, the Constitution provides that the right to a good and healthy environment is part of human rights.

The combination of a rights-based approach to climate management is a principle that needs to be mainstreamed. It is currently too early to tell whether and when this will occur in the context of the Paris Agreement. A complaint related to human rights violations may be made to the National Human Rights Commission, however no complaints have yet been made that include matters related to climate change.

3.3.2 Palm Oil sustainability policy: opportunities

The world has grown increasingly aware of issues related to sustainability in the context of palm oil, which put people, profit, and the planet on a more equal footing. The UN has now established the 2030 Agenda for Sustainable Development, which sets out 17 main goals that should be achieved within this timeframe. All 17 of these goals are applicable to the palm oil industry.²⁶¹ This serves to illustrate just how serious the palm oil issue is and why it is vital that problems are identified and resolved and that a satisfactory long-term solution should be found, both in Indonesia and in the policies of trading partners such as EU countries.

Mandatory: Indonesian Sustainable Palm Oil (ISPO)

The Indonesian Sustainable Palm Oil (ISPO) policy is a policy within the Ministry of Agriculture to enhance the competitiveness of Indonesian palm oil in the world market. It was established in 2009 by the Indonesian government²⁶² to ensure that all palm oil entrepreneurs meet the permitted farming standards and is the first national standard for palm oil for a country. ISPO-certified products are, however, not accepted in many European products on the basis that it is not 'sustainable enough', although there is currently no agreed definition of what 'sustainable' or 'unsustainable' means.

The seven principles of ISPO are :

- Legality of plantation business;
- Plantation management;
- Protection of the use of primary natural forests and peatlands;
- Environmental management and monitoring;
- Responsibility to workers;
- Social responsibility and economic empowerment of the community; and
- Continuous improvement of business.

In 2011, the ISPO issued its Sustainable Palm Oil Plantation Guidelines. The ISPO is a mandatory government regulation, especially for large-scale plantation companies, but voluntary for small farmers. The above-mentioned guidance was revised in 2015 and became the Indonesian Sustainable Palm Oil Certification System.²⁶³

Case Study 1 : PTPN IV (State-Owned Enterprise)

PT Perkebunan Nusantara IV (PTPN IV), is the biggest palm oil producer owned by the state. PTPN IV owns 30 plantations managing the cultivation of palm oil and tea, mainly in the province of North Sumatra. Its total concession area covering palm oil plantations and tea plantations extends to 175,735 ha. In addition, it also has forest area preserved as buffer forests covering an area of 13,309 ha. Total palm oil production in 2015 was 622,065 tonnes while the palm oil kernel production in 2015 amounted to 115,616 tonnes.

As at 2015 PTPN IV had obtained Roundtable on Sustainable Palm Oil (RSPO) certification for 3 palm oil business units, which is valid from 25 August 2015 to 24 August 2020. In addition, the company received from the Ministry of Environment and Forestry in 2015 a Corporate Performance Evaluation Programme in Environmental Management (PROPER) certificate for 3 palm oil mills (PKS).

PTPN IV faces unresolved land-related conflicts with local communities, especially in the field of land administration. There are at least two land disputes with local communities: in Labuhanbatu Regency and at the Adolina Plantation in North Sumatra, covering 200 hectares of land.

261 More particularly, the palm oil industry is more closely linked to goals 2, 3, 6, and 12 – 17.

262 www.sustainablepalmoil.org/standards-certification/certification-schemes.

263 Rosediana Suharto, et.al., Loc.cit., p. 7.

As of April 2017, the ISPO commission has certified 266 palm oil business actors covering 1.67 million ha of plantation land or only around 13% of the total palm plantations. Only two of them fall within the Indonesian plasma scheme²⁶⁴ concerning smallholder farmers and independent farmers' cooperatives.

The lack of involvement of smallholders, who make up 40% of the entire industry, which creates significant reputational challenges for the ISPO. Meanwhile, according to data from Greenpeace and WRI there are around 1,700 palm oil companies operating in Indonesia, meaning there could be some 1,400 palm oil companies that are not certified by the ISPO, giving rise to serious questions about the enforcement measures that are not applied to this scheme. Those certified cover only 7.6 million tonnes of crude palm oil production from the total 31 million tonnes produced by Indonesia in 2016.²⁶⁵

Voluntary: Roundtable on Sustainable Palm Oil (RSPO) and Zero Deforestation Commitments

The RSPO was established in 2004 with the aim of promoting the sustainable growth and use of palm oil products through global standards. It has 3,082 members ranging from civil society to producers, processors and traders of palm oil, whose membership mechanism is voluntary.²⁶⁶

The RSPO established in 2014 a Human Rights Working Group (HRWG).²⁶⁷ The HRWG links its work to the UN Guidelines on Business and Human Rights (the "Ruggie Principles") and seeks to cover:

the duty of states to protect human rights; the responsibility of businesses to respect human rights; and the access to remedy for human rights victims. The responsibility of businesses to respect human rights in the palm oil sector implies that companies should apply due diligence to human rights and develop action plans to avoid human rights violations. It also calls on companies to be pro-active and constructive in the remediation of situations where rights have been abused.

The core mission of the HRWG is primarily to ensure the successful implementation of the Principles of the 2013 RSPO Principles and Criteria that are relevant for the protection and respect of human rights. The HRWG reviews the Criteria and associated Guidance for adequacy, clarity, relevance and meaningfulness, and works to provide RSPO members with mechanisms to identify, prevent, mitigate and address human rights issues and impacts.

However, despite the HRWG's involvement with the RSPO, there is no provision for human rights included in the RSPO's conflict resolution policies.

Companies' Sustainability commitments

The New York Declaration on Forests was a global milestone achieved in 2014. It brought together States and non-state actors, including subnational governments, companies, indigenous peoples, and CSOs who made voluntary pledges to work together to halve the rate of loss of natural forests globally by 2020. The signing of the New York Declaration led to the adoption of zero deforestation pledges by commodity producers and traders. Major global traders

264 Under the Indonesian plasma scheme, businesses may develop the land first and then distribute it to local communities to manage and harvest their own oil palm trees as smallholders. In return for this assistance, smallholders commit to selling their crops to the company at a set price to be processed at the company's nearby mill, with a proportion of any loans received deducted from the revenue.

265 <http://industri.bisnis.com/read/20170411/99/644566/disepelekan-uni-eropa-perpres-ispo-tetap-lanjut>.

266 <http://www.rspo.org>, Responsible Palm Oil Roundtable (RSPO). Downloaded on 27 December 2016.

267 Human Rights Working Group. RSPO, URL: <http://www.rspo.org/about/who-we-are/working-groups/human-rights-working-group>.

Case Study 2: PT Bangun Nusa Mandiri (Private Plantation, Golden Agri-Resources)

PT Bangun Nusa Mandiri is fully owned by Golden Agri-Resources, the world's second-largest private plantation manager and cultivates 488,300 ha of palm oil plantations.

The majority of the population inhabiting the concession are indigenous Dayak Jelai whose livelihoods largely depend on the land and ecosystems therein, in particular the tropical rainforests and rivers. The Silat Hulu indigenous group was among the groups resisting the acquisition of their customary land, arguing that it occurred without proper consultation and consent.

In 2008 a conflict arose when the company destroyed the community's ancestral graveyard and livelihood area with company machinery. The community had made several peaceful demands and opposed the action on the basis it was in breach of their rights under customary law. Around sixty people from the community protested by seizing 2 bulldozers that had been used for the destruction as a guarantee of compensation from the company. The community also reported the case to the police.

When the police became involved, they sided with the company and accused the community of infringing a concession area in breach of the Plantations Law and two community members were charged and imprisoned. The case went to appeal in the Constitutional Court. Upon review by the Supreme Court of Indonesia the community members were freed and granted rehabilitation and restitution rights.²⁶⁸

In this case, the company's environmental impact assessment did not mention any potential impact on the local community and the company had not obtained the procedural legal requirements including an environmental licence, operating licence or rights of cultivation to be issued by the National Land Agency, which are necessary to start a plantation operation. Golden Agri-Resources remains a member of the RSPO. The Silat Hulu rights of restitution including the return of their customary land have not been realized.

of palm oil have adopted zero deforestation policies covering about 60% of global trade,²⁶⁹ including Wilmar International, Golden Agri-Resources and Cargill. Transparency and accountability with regard to these pledges will be a major challenge and questions related to participation, tracking, independent monitoring, independent verification and the timeframe of the application are consistently raised, but to date only voluntary reporting processes through non-governmental channels have been undertaken and there is no official account-

ability system in place, leaving such "campaigns" open for greenwashing. (See case-studies 2 and 3)

By December 2016, 269 companies around the world had made commitments to support sustainable supply in the palm oil sector, of which 114 included zero deforestation commitments. Meanwhile, in the tropical domain, net annual loss of forest area from 2000 to 2010 was about 7 million hectares and net annual increase in agricultural land area was more than 6 million hec-

268 Jiwan, N.(2013). PT Bangun Nusa Mandiri and the Dayak Jelai and Dayak Kendawqangan Peoples of Ketapang District, West Kalimantan. In Colchester, Marcus; Chao, Sophie (Eds). *Conflict or Consent: The Oil Palm Sector at a Crossroads*. Forest Peoples Programme, Sawit Watch and TUK Indonesia. Retrieved from: <https://www.forestpeoples.org/sites/fpp/files/publication/2013/11/conflict-or-consentenglishlowres.pdf>. p. 180. Bogor

269 New York Declaration on Forest, URL: <http://www.un.org/climatechange/summit/wp-content/uploads/sites/2/2014/07/New-York-Declaration-on-Forest-%E2%80%93-Action-Statement-and-Action-Plan.pdf>.

tares.²⁷⁰ According to the Global Forest Resources Assessment 2015 (FAO, 2015), the global forest area fell by 129 million hectares (3.1%) in the period 1990–2015, to just under 4 billion hectares.²⁷¹

Case Study 3: Pusaka Foundation's investigations

In 2014, the Pusaka Foundation released an investigation of subsidiary companies of Wilmar in the Sorong District in West Papua Province where they identified that no free, prior and informed consent had been put in place before Wilmar chopped down the Malalilis community's forest. It is also alleged that the company used intimidation to force the local community to give up their customary forest and the forest was razed without consent or compensation for the community.²⁷²

3.4 The EU and the palm oil industry in Indonesia

3.4.1 The EU and biofuels: legal background and opportunities

The EU has an important role to play with regard to sustainable palm oil because of the extent to which demand for products containing palm oil requires their export to Europe. For the purposes of this report, the emphasis is placed on biofuels, as 46% of imported palm oil is used to produce bio-

fuels in the EU and is directly linked to measures to address climate change, and its use is expected to increase rapidly.²⁷³

Through the EU Renewable Energy Directive (2009),²⁷⁴ the EU has developed a roadmap toward sustainable energy that progressively seeks decarbonisation pathways split across several generations of renewable energy. Biofuel is included in the second generation of EU steps to reduce dependence on fossil fuels. In April 2015, it was agreed by the European Parliament that by 2020 fuels in the transport sector derived from food-based biofuels would make up 7% and that this should be reduced by half by 2030.²⁷⁵

The sustainability criteria of the Directive stipulate:

- a minimum GHG-saving requirement;
- a ban on using biomass from primary forest, nature protection areas, or highly biodiverse grassland;
- a ban on using biomass from land converted from wetland, forest, or undrained peatland; and
- a requirement to report on certain environmental and social impacts. Hence, there is only a reporting requirement concerning social impacts and if adverse impacts are identified and noted in the report, corrective action will be proposed.

However, there is no clear process on the follow-up to the report, let alone the continual monitoring of the implications of these measures²⁷⁶.

270 Food and Agriculture Organization of the United Nations, *State of the World's Forests* (Rome: FAO, 2016), p. 7.

271 Op. Cit., p. 10.

272 Yayasan Pusaka (July 2014). *Lain Ditulis, Lain Diucapkan, Lain Pelaksanaannya: Hutan Rusak dan Masyarakat Adat*, p. 5

273 Bob Flach, et. Al., *EU Biofuels Annual 2017*, (The Hague: Global Agricultural Information Network, 2017), p. 11.

274 Directive 2009/28/EC of the European Parliament and of the Council (23 April 2009), URL: <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32009L0028&from=EN>.

275 European Parliament Press Room (April 28, 2015). *Parliament supports shift towards advanced biofuels*. Retrieved on 25 January 2017 from: <http://www.europarl.europa.eu/news/en/press-room/20150424IPR45730/parliament-supports-shift-towards-advanced-biofuels>

276 Ibid.

This deficiency in the EU Directive may create indirect exposure to human rights violations in Indonesia that may come from the expanding palm oil biofuels industry, for example through the aviation industry, especially if EU airlines are major purchasers of palm oil-based biofuels. This situation should be considered as serious since there are significant known human rights violations already occurring within the industry. This is particularly serious because the Plantations Law favours companies over communities, the ISPO has only certified a small portion of companies operating, and the RSPO is only voluntary.

Altogether, the EU Renewable Energy Directive as it relates to biofuels does not adequately prevent social impacts arising from high demand for land²⁷⁷ to meet the demand for biofuels, which raises questions about the human rights of people in remote Indonesia.

Another relevant Directive concerns the Indirect Land Use Change (ILUC) Directive 2015/1513. It requires biofuel suppliers to report greenhouse gas emissions estimates to EU countries and the European Commission.²⁷⁸ With these regulations in place, Indonesia must identify the amount of greenhouse gases emitted from the change of function or land use to enable importers in Europe to report the greenhouse gas emissions (GHG) relating to their indirect land use change.²⁷⁹ This Directive is intended to be more focused on GHG emissions.

However, this should not exempt it from also having regard to social and environmental considerations.

3.4.2 EU's increasing diplomatic pressure regarding gender and Human Rights issues in the context of palm oil

In recent times, and through the 2017 European Parliament resolution,²⁸⁰ it would appear that the EU is seeking to increase its diplomatic pressure on Indonesia around the subject of palm oil and sustainability. While trade is an area where the EU has exclusive competencies under Article 3 of the TFEU, climate change is an area of shared competencies between the EU and Member States according to Article 4 of the TFEU.

The EU Parliament's actions since 2017 : phasing out palm oil from biofuels and the Palm Oil and Deforestation of Rainforest Report

The European Parliament voted in April 2017 to call on the EU to phase out the use of palm oil in biofuels by 2020 and adopted the Palm Oil and Deforestation of Rainforest Report. Members of the European Parliament noted that the EU demand requires the use of about one million hectares of tropical soils,²⁸¹ identified that self-regulation is not enough to stop deforestation, and pointed to the thin standards and weak enforcement capacities. This resolution builds on the Amsterdam Declaration (2015) of which the EU and its Member

277 Joana Chiavari(2013). EU Biofuel Policies and Their Implication for Southeast Asia, The Palm Oil Controversy in Southeast Asia: A Transnational Perspective, (Singapore: Institute of Southeast Asian Studies). Page 413 states: The impact assessment accompanying the renewable energy directive does not recommend including social criteria in the sustainability scheme given the technical and administrative difficulties of linking social criteria to individual consignments of biofuels and complications regarding international law. Despite an effort by the European Parliament to include social sustainability requirements within the biofuels sustainability criteria, including compliance with principles on labour standards set out by the ILO, this was notably excluded from the final text.

278 Kotrba, R. (2015, April 28). Parliament votes to approve EU biofuels cap, provides closure. Biomassmagazine, URL: <http://biomassmagazine.com/articles/11869/parliament-votes-to-approve-eu-biofuels-cap-provides-closure>.

279 Bob Flach, et. Al.(2017). EU Biofuels Annual 2017, (The Hague: Global Agricultural Information Network), p. 5.

280 European Parliament (2017). Report on Palm oil and deforestation of rainforests adopted by the Environment, Public Health and Food Safety Committee (ENVI) on 3 March 2017, URL: [http://www.europarl.europa.eu/oeil/popups/ficheprocedure.do?reference=2016/2222\(INI\)&l=en](http://www.europarl.europa.eu/oeil/popups/ficheprocedure.do?reference=2016/2222(INI)&l=en).

281 Bob Flach, loc. cit., p. 11.

States take note and support the private-sector-driven commitment to 100% sustainable palm oil in Europe by no later than 2020.

The resolution also called for the European Commission to develop an EU action plan to put in place concrete regulatory measures to ensure EU supply chains and financial transactions are free from deforestation. Furthermore, it suggested that the European Commission and EU Member States should support developing countries with implementing environmentally and socially responsible production practices in order to secure the rights and livelihoods of indigenous peoples and local communities.²⁸² The European Parliament resolution also called on the European Commission to phase out the use of biofuels based on vegetable oil, which includes palm oil. However, when considering the expected increase in demand and dependence of the European aviation industry on palm oil for biofuels, it is difficult to see how this can be achieved when all EU Member States have confirmed their intention to participate in the ICAO CORSIA.²⁸³

More recently, in January 2018, the European Parliament took another significant step and voted in favour of phasing out palm oil-based biofuel as a renewable energy source by 2021 and to cap Member States' consumption levels of crop-based biofuels at no more than their 2017 levels and no higher than 7% of their total consumption of transport fuels until 2030. This then raises questions as to how the EU will fulfil its 2030 commitment related to renewable energy and energy efficiency of at least 35% and the long-term target of net zero GHG emissions by 2050.



Picture : Icaro Cooke Vieira/CIFOR

Gender and Women's Rights

Research shows that about 89% of women devote their time to activities to manage palm oil plantations with men. Their activities include everything from initial land clearance to sales. In small-scale plantations (2-4 hectares) women undertake productive work such as helping their husbands with weed spraying, fertilizing, harvesting, transporting, picking fresh fruit bunches, and pruning.²⁸⁴ This shows a multiple role in the context of employment activities on the part of women, which is also not balanced between women and men, with only 27% of men involved in the home domestic activities. The unrecognised multiple roles of women leads to them being marginalised at multiple levels.

The main issue concerning gender relates to the rights of women to land. Social norms are applied in the local communities, which are not included and may be inconsistent with legal requirements in the process of land use. Often, without women's consent, land is sold to palm oil companies. It can leave entire communities with food insecurity and water scarcity and prevent access to natural traditional medicines. Women also get paid a lower salary than men even though the burden is relatively

282 Greenpeace press release (2017, April 4). EU Stop Palm Oil Deforestation Parliament, URL: <http://www.greenpeace.org/eu-unit/en/News/2017/EU-stop-palm-oil-deforestation-Parliament/>.

283 <https://www.icao.int/environmental-protection/Pages/market-based-measures.aspx>;

284 Uwin, Swisto, Perempuan dan Perkebunan Kelapa Sawit: Studi Kasus di Kabupaten Sekadau, Provinsi Kalimantan Barat. SPKS Nasional, URL: <https://www.spksnasiona.or.id/research/perempuan-dan-perkebunan-kelapa-sawit/>.

equal. Women often work in an informal economy and are not registered as staff. They are mostly assigned to the fertilizing work which is dangerous to their health, especially for expectant mothers, and safety measures are often not provided. Further, because land ownership is mostly titled under men's names, women cannot have access to credit without the permission or support of the man in the family.²⁸⁵ Research in East Kalimantan has shown that these gender norms identified as far back as the 1980s remain remarkably resilient in the face of large-scale landscape change.²⁸⁶

There is a systematic failure to accommodate the special needs of women in the palm oil industry. Despite Indonesia putting in place legal tools for programmes to achieve gender equality, the issues do not feature with any priority in regulations and policies concerning palm oil and biofuels.

The RSPO Principles and Criteria have not provided a foundation solid enough for gender equality. It makes gender issues a household or communal matter. Accordingly, it is not within the boundaries of certification standards. Principle 2 on compliance with local and customary systems, Principle 6 on responsible consideration of individuals and communities affected by growers and millers, and Principle 7 on responsible development of new plantations, are all related to land tenure rights and Free and Prior Informed Consent. They use gender-neutral language and do not explicitly mention that women need to be included in the negotiations

during and after land acquisition of new plantings.

The EU Resolution does not adequately explore the importance of gender and human rights issues towards sustainable palm oil production, nor does the EU Renewable Energy Directive. However, the resolution does recognise the UN 2030 Agenda for Sustainable Development, which sets out 17 main goals that should be achieved within this time-frame.

Indigenous Peoples, Local Communities and Conflict Resolution

Throughout 2015, the Consortium for Agrarian Reform noted that there were at least 252 agrarian conflicts with a total area of conflict of 400 thousand hectares and involving at least 108,714 households. Half of these conflicts occurred in the plantation sector with a total area of 302,000 hectares of conflict.²⁸⁷ Agrarian conflicts mostly involve the livelihood of indigenous peoples and local communities.²⁸⁸

The cases related to PTPN IV and PT Bangun Nusa Mandiri provide examples of the slow rate at which cases are resolved by the RSPO and their ineffectiveness. One of the main problems is the slow settlement of cases. There is also a very strong reluctance on the part of the power-holders to resolve cases satisfactorily for both parties.

In cases where palm oil plantations are at stake,

285 Komisi Nasional Anti Kekerasan terhadap Perempuan, *Pencerabutan Sumber-sumber Kehidupan: Pemetaan Perempuan dan Kemiskinan dalam Kerangka HAM*, Jakarta, 2014. (National Commission on Violence Against Women (2014). *Uprooting Livelihood Sources: Mapping Women and Improverishment in Human rights Frame*, Jakarta)

286 Revisiting gender and forestry in Long Segar, East Kalimantan, Indonesia: palm oil and divided aspirations, Rebecca Elmhirst, Mia Siscawati and Carol Colfer in Coral J Pierce Colfer et al (ed)(2016). *Gender and Forest, Climate Change, Tenure, Value Chains and Emerging Issues*, Routledge, New York, p.314

287 Purba, Christian (2017). *Enam Tahun ISPO: Kajian Terkait Penguatan Instrumen ISPO dalam Merespon Dampak-dampak Negatif seperti Deforestasi, Kerusakan Ekosistem Gambut, Kebakaran Hutan dan Lahan, serta Konflik Tenurial*, Forest Watch Indonesia. Retrieved from: http://fwi.or.id/wp-content/uploads/2017/03/6_tahun_ISPO.pdf, p. 7.

288 Komisi Nasional Hak Asasi Manusia, *Inkuiri Nasional Komnas HAM: Hak Masyarakat Hukum Adat atas Wilayahnya di Kawasan Hutan*, (National Commission on Human Rights, (2016). *National Inquiry regarding Indigenous Peoples Rights on Their Area in Forest Area*) The inquiry examines 40 indigenous peoples' cases.

complaints may also go through the RSPO, which adopted a complaints system in 2007. There have been 50 complaints submitted since 2008, but the process of handling them is very slow. The executive board with the authority to handle conflicts consists of members of the RSPO (palm oil companies). Many perceive it as a conflict of interest. There is no independent mechanism and it could be argued that the mechanism does not meet the standards of non-legal complaints mechanisms in accordance with UN human rights principles.

In addition to the potential outcomes of the Parliament's report, the EU Strategy on Human Rights in Indonesia does emphasize and prioritise land rights and human rights defenders, who are often members of indigenous communities. It seems that there may be some positive signs of progress on this subject.

3.4.3 Impact of recent EU Intervention on the Indonesian palm oil industry

Although the European Parliament Resolution is a non-legally binding document, it has been influential in changing the dynamic between the European Commission and the Indonesian Government in a way that may have a significant bearing on the current ongoing free trade negotiations and much needed efforts to improve the ISPO. The report calls for concrete regulatory measures in order to ensure EU supply chains and financial transactions are free from deforestation and to provide support to developing countries for responsible production practices.

The Indonesian response has been one of concern and has been defensive and reactive, going so far as to threaten to disrupt trade to the EU related to other products. Some tensions have emerged between the EU and Indonesia around the subject, with some alleging a "trade war" and arguing that

the report is discriminatory and protectionist.

Whilst the EU seeks outcomes that require greater sustainability measures that will satisfy the EU market and uses its trade leverage to achieve this, Indonesia seeks to improve the increasingly damaged reputation and poor perception of palm oil in the international market. The Indonesian government is engaging with EU countries to maintain its market access to palm oil products from Indonesia. The European Commission in Indonesia has since communicated with the Coordinating Ministry for Economic Affairs and is now putting more emphasis on improving Indonesia's certification through the ISPO and a number of meetings and communiqués are happening between the parties (they are not public).²⁸⁹ It will be important to maintain focus on new developments related to social and environmental certification and law enforcement through the ISPO and the Comprehensive Economy Partnership Agreement' free trade negotiations to fully understand the impact of the recent developments at the EU level.

However, as mentioned above, neither the biofuels provisions of the EU renewable Energy Directive nor the ILUC Directive contain strong provisions related to social considerations concerning biofuels, and despite all efforts the biofuels sustainability criteria do not include social sustainability requirements, including compliance with the International Labour Organization labour standards. It is occurring in a global trade environment where it is expected that the palm oil industry will expand, premised on increasing demand for biofuels, especially for the aviation industry.

Whilst EU policies on sustainability and biofuels can impact the economy of countries such as Indonesia, this should not occur in a vacuum and without consideration of the impacts of these policies on the people of Indonesia, many of whom already live in poverty. There are significant chal-

289 According to the interview with an anonymous European Commission official in Indonesia.



lenges in terms of the readiness of the industry actors themselves at the national level, especially smallholder farmers, due to requirements to implement higher environmental standards. The International Labour Organization's Just Transition Guidelines can guide this transition toward sustainable palm oil through social dialogue, social protection and rights-based approaches²⁹⁰. The provision of financial support from the EU for such measures could go a long way in Indonesia, and would be consistent with the calls of the European Parliament. Other possible assistance could be derived from the Green Climate Fund to support smallholders due to the obvious climate-related mitigation and adaptation benefits arising from a more sustainable palm oil industry.

290 International Labour Organization (2015). Guidelines for a just transition towards environmentally sustainable economies and societies for all, (Geneva: ILO)

3.5 Policy recommendations

— Both Indonesia and the EU should put in place appropriate policies related to mainstreaming climate change and human rights in relation to climate actions and measures, as well as climate-related impacts. In doing so, they might take into consideration:

— Gender and human rights issues linked to palm oil production;

— The measures taken by the RSPO Human Rights Working Group; and

— Voluntary reporting channels related to zero-deforestation commitments.

— The free trade negotiations between the EU and Indonesia through the Comprehensive Economy Partnership Agreement should ensure the inclusion of:

— Respect for human rights including the rights of indigenous peoples and local communities;

— Social and environmental certification and law enforcement through the ISPO and provisions related to enforceability of actions not complying with sustainability requirements; and

— Standards related to labour as provided by the International Labour Organization, among others just transition of the workforce, including smallholder farmers.

— Amendments should be made to the biofuels provisions of the EU Directive and all other relevant EU policies to prevent social impacts arising from high demand for land to meet the demand for biofuels and respect human rights including the rights of indigenous peoples, including:

— Respect for indigenous knowledge on agriculture, medicine and sustainable food management;

— Collective rights of indigenous women in technology and innovation; and

— Holistic approach to customary territories for which the environment is perceived as an interconnected ecosystem, inseparable from the tenure and governance aspects.

— The EU should provide significant financial support to smallholder farmers to assist them to meet sustainability criteria and access supply chains arising from any measures taken in the EU that could negatively impact on smallholder farmers.

— The EU should support Indonesia to implement environmentally and socially responsible production practices for securing the rights and livelihoods of indigenous peoples and local communities.

— The EU should put in place legal tools for making programmes achieve gender equality with priority given to regulations and policies concerning palm oil and biofuels.

3.6 Conclusions

— Adequate enforcement measures should be undertaken with regard to companies that do not adhere to the requirements of the ISPO.

— Accountability and transparency mechanisms related to zero deforestation commitments should be put in place, as a means to understand whether and how such commitments are being met.

— Regulations should be put in place in the EU that require European airlines to only use deforestation-free biofuels under the ICAO CORSIA.

As the world's largest producer of palm oil, Indonesia continues to have a high appetite for development, resulting in approaches to trade and production being dominated by economics, and potential for revenues taking precedence over human rights and social and environmental considerations. The country has a strong basis for human rights law, and has ratified the Paris Agreement. It has shown an intention to put in place new measures towards sustainability, such as through support for sustainable supply chains, peatland restoration, business and human rights and the gender action plan. Many challenges remain, especially when it comes to actual implementation and law enforcement. It will continue to create a negative perception of the palm oil industry in the country and beyond its borders. Outcomes such as those in the recent European Parliament report and its content compounds these challenges by placing additional international pressure on Indonesia to reform a massive industry, much of which relies on informal economies and smallholder rural farmers.

Significant reform of the ISPO with regard to smallholder certification, human rights and gender, rights of workers and just transition will be necessary to achieve this and Indonesia will require a significant amount of support in this respect. Said support and leadership could be achieved in a step-by-step manner, i.e. by changing the political economy at subnational scale, district by district, until a critical mass of fair, transparent and greener political leaders and responsible business/farmer organizations feel ready and able to challenge the status quo, as the best way to reap the full benefit of their efforts, namely getting better access to global markets than their less responsible peers.

National policies in the field of environment and plantations in Indonesia are often not aligned, favour large companies, and contradict each other.

Palm oil companies are often able to operate without proper legal requirements, whilst indigenous peoples and local communities living on their communal land struggle to have their rights and land claims recognized or are punished for exercising their rights on their land, such as removal of products from forests or traditional burning practices.²⁹¹ Gender considerations are lacking throughout meaningful regulations, and it remains to be seen as to how effective the new Gender Action Plan will be, along with efforts to integrate or implement it.

The relationship between the EU and Indonesia has, however, recently entered into a new phase, with the EU seemingly increasing its pressure through trade on Indonesia, during a time of expected expansion of the palm oil industry for the purposes of biofuels, especially for aviation. This extra pressure is now playing out through diplomatic channels related to reform of the ISPO and the Comprehensive Economy Partnership Agreement free trade agreement negotiations as well as in other international processes such as the UNFCCC and ICAO. The ultimate challenge will, however, be whether policies are agreed that are efficient, effective, able to be implemented and have equitable social and environmental substance.

291 Article 69, Law No. 32 Year 2009; and Article 23 of the Plantations Law.

PART III:

Policy recommendations and conclusions

By Dr. Armelle Gouritin



Picture: European Union 2014 - European Parliament

GENERAL POLICY RECOMMENDATIONS TO THE EUROPEAN UNION

EU legislative process

■ The Impact Assessments should comprehensively address potential impacts in relation to external impacts.

■ Human rights and gender equality requirements should be systematically addressed in Impact Assessments.

■ When realizing the Impact Assessments, the Commission's "Fundamental Rights checklist" should be systematically and fully addressed.

More particularly (recommendations from the Kenyan case study):

■ When addressing the impact assessments, the EU should develop a comprehensive checklist on climate change, fundamental human rights and gender equality. It should be systematically applied prior to granting concessions, and during the project implementation.

The EU as a consumer of international goods

■ The recast of the Renewable Energy Directive as it stands should continue to include in its criteria the potential social implications of its target and a clear reference to international law and human rights law.

More particularly (recommendations from the Mexican case study):

■ The EU should not limit its human rights screening to human rights as they are guaranteed in international or EU law. Due attention should be paid to human rights guaranteed at the regional and national level. Indigenous peoples' rights, and more particularly indigenous peoples' right to consultation, illustrates this requirement. While EU law does not recognize indigenous peoples' rights and international law does not provide clear and detailed requirements in terms of the quality of consultations, the Inter-American human rights protection system does provide for such detailed quality requirements and sets out practical guidelines in this respect.

■ The recast of the Renewable Energy Directive as it stands should continue to explicitly address land rights issues and other rights-related issues potentially linked with biofuels.

More particularly (recommendations from the Indonesian case study):

■ The EU should support Indonesia to implement environmentally and socially responsible production practices for securing the rights and livelihoods of indigenous peoples and local communities.

■ Accountability and transparency mechanisms related to zero deforestation commitments should be put in place, as a means to understand whether and how such commitments are being met.

Amendments should be made to the biofuels provisions of the EU Directive and all other relevant EU policies to prevent social impacts arising from high demand for land to meet the demand for biofuels and respect human rights including the rights of indigenous peoples.

The inclusion of biomass combustion as one of the options to meet the EU's renewable energy targets for 2020 should be reconsidered or severely framed.

More particularly (recommendations from the Indonesian case study):

Accountability and transparency mechanisms related to zero deforestation commitments should be put in place, as a means to understand whether and how such commitments are being met.

The Report of the European Parliament on palm oil could pave the way towards EU policies that encompass human rights requirements within sustainability criteria

The EU as a participant to international carbon markets

The EU should set additional EU compliance criteria for the credits accepted to meet any EU-related mitigation target.

More particularly (recommendations from the Mexican case study):

The EU should extend the aforementioned template and guidelines mechanisms that apply to large hydroelectric projects to all renewable energy projects such as wind farm or solar panel projects. The San Dionisio case, other projects mentioned in this report and the references therein illustrate that they have a demonstrated record of serious human rights infringements associated with their development.

The EU-ETS Directive should be modified to introduce a provision that would foresee the linking suspension in case of serious human rights infringements. In this context, the EU should perform a screening of all existing CDM wind farm projects in Mexico. In light of the structural problems identified in terms of indigenous peoples' right to consultation, the linking of CER allowances with the EU-ETS should be put on hold until the European Commission identifies those problems on a case-by-case basis and is provided with documented guarantees that the structural problem has been addressed and there are no further infringements of indigenous peoples' right to consultation.

International carbon markets should include human rights and gender criteria.

More particularly (recommendations from the Mexican case study):

When screening national legislations and institutions, international and EU mechanisms should not limit themselves to

identifying whether or not human rights are robustly guaranteed at the national level. International and EU mechanisms should devote strong attention to the practical functioning of national laws and institutions and ensuring that human rights are fully enjoyed by communities and private persons. The mechanisms aimed at guaranteeing the effective enjoyment of human rights in the context of energy projects should not be limited to the initial project development phase, but should rather extend from the very first development phases of the project to the running and end of exploitation phases, i.e. to the whole life cycle of the project.

The EU as an international negotiating actor

Early coordination among EU delegations is critical to ensure that the EU can adequately support the principles to which it is strongly committed in negotiations.

Greater coordination between the EU delegations before the negotiations would ensure a consensus on the support for human rights and gender equality provisions' inclusion in the relevant negotiated texts.

More particularly (recommendations from the Indonesian case study):

The free trade negotiations between the EU and Indonesia through the Comprehensive Economy Partnership Agreement should ensure the inclusion of:

- Respect for human rights including the rights of indigenous peoples and local communities;

- Social and environmental certification and law enforcement through the ISPO and provisions related to enforceability of actions not complying with sustainability requirements; and

- Standards related to labour as provided by the International Labour Organization, among others just transition of the workforce, including smallholder farmers.

- The EU Commission and the European External Action Services should ensure the participation of a human rights expert in the process in order to support the EU delegation and the Member States.

- The EU should sign the Geneva Pledge for Human Rights in Climate Action.

- The EU gender team as a coordination and exchange of information mechanism is a good example that should be applied with human rights.

- The EU should influence the UNFCCC negotiations with a view to providing clear and strong guarantees in terms of human rights and gender equality protection in the context of carbon markets, including the new market-based mechanism mandated under the Paris Agreement, the Sustainable Development Mechanism SDM.

More particularly (recommendations from the Mexican case study):

- The EU should keep pushing for the following changes to occur. Firstly, UNFCCC CDM mechanisms should not limit themselves to transmitting human rights violations concerns to UN human rights bodies and the host country. The interplay between UNFCCC CDM mechanisms and UN human rights bodies should be mutual. UNFCCC

mechanisms should also integrate and address the numerous human rights violations that are documented to be directly caused by CDM projects. Secondly, the EU should keep pushing for the UNFCCC CDM mechanisms to address the serious human rights violations directly caused by CDM wind farms projects in Mexico. At least six such projects are currently registered as CDM projects. Thirdly, the UNFCCC system should provide the criteria and requirements that guarantee the effective local stakeholder consultation necessary for a CDM project to be registered. Fourthly, a grievance or appeal mechanism should be introduced within the CDM institutions.

The EU as an international donor and lender

— The EU should introduce human rights and gender safeguards, criteria and mechanisms to monitor the respect of human rights and gender requirements in all the projects it finances, including through international funds.

More particularly (recommendations from the Kenyan case study):

— Any deviation from EIB social standards in the context of co-funding arrangements should be accompanied by requirements to report negative developments to EIB management and decision-makers. Being informed is a precondition to responding appropriately and in a timely manner. An alternative option is to categorize projects involving resettlement measures as highly sensitive and requiring more frequent and timely reports.

— Delegation of supervisory responsibilities to co-financers must be accompanied by clear standards and rules about how the EIB operationalizes its retained supervisory obligations. It must also be accompanied by a requirement for early-warning indicators when their supervisory activities have to be increased because of co-financers failing to perform adequately.

— Also, the EIB and other entities involved in geothermal energy should:

— strengthen indigenous community structures through institutional capacity-building for women, youth, and traditional leadership.

— develop livelihood restoration initiatives need to be culture-appropriate and should involve entrepreneurial capacity-building for local entrepreneurs.

— The European Union, international financial institutions and the Kenyan government should develop gender-sensitive indicators to monitor and evaluate the processes of stakeholder inclusion and responses to their input.

— The blending mechanism is of particular concern. Independent evaluations of the blending mechanism should be undertaken with a particular focus on human rights and gender requirements and its impact on local communities

— Financial support should be automatically suspended (instead of being a possibility) in cases of violations and risk of violations of human rights and gender requirements.

More particularly (recommendations from the Kenyan case study):

The following gender and human rights considerations should be addressed in climate-related development projects funded by the EU:

- The EIB's operationalization of its existing safeguards should be improved and reviewed to ensure appropriate supervision and implementation of its human rights-based components.

- The legal foundation of the resolution of the African Commission on Human and Peoples' Rights, the EU Action Plan on Human Rights and Democracy, the Paris Agreement, the United Nations Declaration on the Rights of Indigenous Peoples, and other declarations pertaining to human rights and gender equality should be enhanced to guarantee the participation of indigenous communities, as well as the application of the free, prior and informed consent of communities.

- The EU should support the Kenyan government in improving the existing Climate Change National Action Plans and implementing the United Nations Guiding Principles on Business and Human Rights, with specific reference to identifying, mitigating, and preventing the potential human rights and gender impacts on resettlement.

- The European Union, international financial institutions and the Kenyan government should develop climate change mitigation and adaptation programmes that use a gender analysis to improve the welfare of women and girls—e.g., access to credit, capacity-building and extension services, information dissemination, improved access to land and natural resources, sustainable

energy and technology, and access to reproductive health information and services.

- Financing should be suspended when serious human rights violations occur. Victims must have access to effective remedies, and human rights defenders who raise concerns should not face intimidation or reprisals.

CONCLUSIONS

The report has identified a strong body of legal and institutional safeguards at the EU level from the perspective of a rights-based approach and gender mainstreaming. Among others, Treaties provisions (TEU, Articles 2, 3(5) and 21; TFEU, Articles 8, 208, 209 and 212)), coordination mechanisms and Policy Coherence for Development arrangements (inter-service consultation, monitoring and promotion of policy coherence, EP special rapporteur on Policy Coherence for Development, and inter-institutional dialogues), impact assessments of EU climate actions on human rights and gender, and the EU's "Fundamental Rights checklist" all provide a strong foundation for the rights-based approach and gender mainstreaming in EU external climate actions. If systematically mobilised and applied, they all have the potential to prevent human rights violations. Another clear opportunity has been illustrated by the Indonesian case study: the EU as a major domestic market has the potential to trigger changes in terms of social safeguards.

Several points of entry have been pinpointed as opportunities from the rights-based approach and gender mainstreaming perspectives where weaknesses have been identified at the EU and international levels. Such points of entry are stronger and more complete social safeguards in the EU biofuels Directive (as illustrated by the Indonesian case study), the programmes of the EU as a donor, the establishment of a grievance mechanism within the UNFCCC Clean Development Mechanism (and its forthcoming successor, the Sustainable Development Mechanism), and strict respect for indigenous peoples' rights as they are guaranteed at international, regional and national levels.

Against this background, the greatest challenge seems to be the concrete implementation of the rights-based approach and gender mainstreaming. The three case studies conducted in Mexico, Kenya and Indonesia all point in that direction.

For example, respect for human rights in the context of the EIB financing and more particularly the EIB Complaints Mechanism has been identified as deficient in the Kenyan case study.

Respect for the rights of indigenous peoples is particularly problematic. Those rights are solidly grounded in international, regional and national laws. However, their practical implementation is a cornerstone challenge, as the Mexican and Kenyan case studies demonstrate. The EU should ensure the concrete enjoyment of those rights. The very denial to define the Maasai people as an indigenous people by the EIB illustrates the need for the EU and its institutions and programmes to fully acknowledge the legal figure endorsed in international, national and regional institutions (such as the inter-American and African human rights protection systems).

The Indonesian case study also highlights the challenge of actually respecting human rights and gender provisions in terms of land rights.

The changes suggested in the general policy recommendations detailed at more length in each case study's recommendations illustrate both the potential for improvement, and the conduct of a true and strong move towards human rights and gender requirements mainstreaming at the EU and international levels, with a view to moving towards climate actions fully in line with sustainable development.

List of abbreviations

AFD	Agence Française de Développement	ICAO	International Civil Aviation Organization
AGIL	African Geothermal International Limited	ICCPR	International Covenant on Civil and Political Rights
AMAN	Aliansi Masyarakat Adat Nusantara (Indigenous People's Alliance of the Archipelago)	ICESCR	International Covenant on Economic, Social and Cultural Rights
CDM	Clean Development Mechanism	ILUC	Indirect land use change
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women	IPPs	Independent Power Producers
CER	Certified Emissions Reduction	ISPO	Indonesia Sustainable Palm Oil
COP	Conference of the Parties to the UNFCCC	KenGen	Kenya Electricity Generating Company
CPO	Crude palm oil	KfW	Kreditanstalt für Wiederaufbau
DG-DEVCO	Directorate-General EuropeAid Development & Cooperation	LSC	Local Stakeholder Consultation
EIB	European Investment Bank	LULUCF	Land Use, Land-Use Change and Forestry
EIB-CM	European Investment Bank Complaints Mechanism	MDGS	Millennium Development Goals
EU	EU	NAP	(on Business and Human Rights) Indonesia National Action Plan on Business and Human Rights
EU-ETS	EU Emissions Trading Scheme	NDC	Nationally Determined Contribution
GDC	Geothermal Development Company	NEMA	National Environmental Management Authority
GHG	Greenhouse gas emissions	ODA	Official Development Assistance
HRWG (of the RSPO)	Human Rights Working Group within the Roundtable on Sustainable Palm Oil	OECD	Organisation for Economic Cooperation and Development

PTPN	Perkebunan Nusantara, Co, state-owned enterprise for palm oil plantation
RAN GRK	Indonesia National Action Plan on Green House Gas Emissions
REDD+	Reduce Emissions from Deforestation and Forest Degradation
RSPO	Roundtable on Sustainable Palm Oil
SDGS	Sustainable Development Goals
SDM	Sustainable Development Mechanisms
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union
TJRC	Truth Justice and Reconciliation Commission
UNDP	United Nations Development Program
UNFCCC	United Nations Framework Convention on Climate Change

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List of Civil Society Experts Interviewed

List of Civil Society Experts interviewed for Part I, chapters 1 - 2

Name	Position	Organisation
Anke Stock	Senior Specialist Gender and Rights	Women in Europe for a Common Future
Celine Mias	EU Representative	CARE
Fanny Petitbon	Advocacy Manager	CARE
Femke de Jong	EU Policy Director	Carbon Market Watch
Francesco Martone	Policy Advisor	Forest Peoples Programme
Gotelind Alber	Cofounder and consultant	Gender CC
Hannah Mowat	Forests and Climate campaigner	Fern
Irene Dankelman	Scholar	Radboud University
Liane Schatalek	Associate Director	Heinrich Böll Stiftung, North America
Lies Craeynest	Policy Advisor	Oxfam
Maeve McLynn	Climate and Development Policy Coordinator	Climate Action Network Europe
Meera Ghani	Policy and Advocacy Officer Climate Justice	CIDSE
Sally Nicholson	Head, Development Policy & Finance	WWF-European Policy Office

In addition, a climate negotiator from a member state was also interviewed but wished to remain anonymous.

List of Civil Society Experts interviewed for Part II, chapter 2

Name	Position	Organisation
Cornelius Ndetei Haron Kiraison	Environmental Scientist Community Liaison	Kenya Electricity Generating Company
Eng. Johnson Ole Nchoe Joan Wamuyu Irene Onyambu Daniel Kilelu Pascal Manan Paul Lemori	CEO GM Corporate Services RM South Rift Area Admin. South Rift SOCR Nakuru Area Admin.-North Rift	Geothermal Development Company
Dr. Clement Lenachuru	Commissioner	National Land Commission
Rebecca Supeyo	Community Liaison	Akiira Geothermal Limited
13 members attended. The community requested ano- nymity for fear of retalia- tion.		Olgumi/Kisharu/ Community
14 members attended. The Rapland representatives re- quested anonymity for fear of retaliation		Rapland Community
17 members attended. The community requested ano- nymity for fear of retalia- tion.		Suswa Community
31 members attended. The communities requested anonymity for fear of retal- iation.		Kitet/Satelite/Kedong Communities
Jackson Shaa Daniel Mpatinga Jackson Torinke Dancan Sencho Lucy Kisotu Daniel Ole Shaa		Narasha Community
Michael Tiampati Robert Roine	National Coordinator	Pastoralist Development Network of Kenya
Daniel S. Rogei	Researcher on Geothermal Energy	SIM00/McGill University
Hon. Phillip Mpaayei	Senator, Kajiado County	Kajiado County
Prof. Simon ole Seno Dr. James Nampushi	DVC & Natural Resource Expert Social Development Expert	Maasai Mara University

Short biographies

Sébastien Duyck (Introduction, Part I chapters 1 – 2) is a senior attorney at the Center for International Environmental Law (CIEL) and is based in Geneva. His work focuses primarily on promoting the integration of human rights and public participation in climate governance.

Dr. Armelle Gouritin (Introduction, Part I chapters 1 – 2, Part II chapter 1, and Part III chapters 1 - 2) holds a PhD in law (Vrije Universiteit Brussel, Institute for European Studies). Her main lines of investigation are environmental responsibility, and the link between human rights and environmental protection. She has written extensively along those lines of investigation and written several reports for EU institutions and NGOs. She is currently a professor at the Facultad Latinoamericana de Ciencias Sociales – Mexico.

Dr. Ben R. Ole Koissaba (Part II, chapter 2) holds a Ph.D. in International Family and Community Studies from Clemson University, South Carolina, USA, an MA in Social Entrepreneurship from Northwest University, Kirkland, Washington, USA, and a Post-Graduate Diploma in Theology and Development from the Oxford Center for Mission Studies of the University of Leeds, UK. He is a Certified Development Project Manager.

Sisilia Nurmala Dewi (Part II, chapter 3) is a policy advocate and campaigner who is consistently and actively involved in community development with experiences at local community and international level, a nongovernmental and governmental background on the issues of human rights, land and natural resources and climate change. She headed up the advocacy and campaign work at HuMa, an Indonesian NGO focusing on ecology and community based law reform from 2012-2016. She is currently working with the Partnership for Governance Reform, an Indonesian non-governmental organisation on deployment to the Peatland Restoration Agency to assist with its education, socialisation, participation and partnership work. Sisilia graduated in Law, Society and Development at the University of Indonesia.

Stephen Leonard (Part II, chapter 3) is an international lawyer with specialist experience in climate policy, land use and forestry in developing countries. Stephen has provided policy analysis and strategic advice to UN agencies and non-governmental organisations from around the world including the Center for International Forestry Research, the Food and Agriculture Organisations, the Rainforest Foundation Norway and the International Labour Organisations.

Arimbi Heroepoetri (Part II, chapter 3), S.H.LL.M, is actively working for environmental issues, indigenous peoples, consumers, women and globalisation. She worked in WALHI (Indonesian Forum for Environment - Friends of the Earth Indonesia) from 1988 to 2000. She was a coordinator and lecturer on the course in Feminist Political Ecology Women's Studies at the University of Indonesia (2001-2011) and Director of debtWATCH Indonesia (2000-2008). Arimbi is also involved in a network of E-LAW (Environmental Law Alliance Worldwide), a worldwide network of environmental public defenders. With a background in environmental law, she completed her education at the Faculty of Law, Padjadjaran University, Indonesia and Dalhousie Law School in Halifax, Canada. Arimbi can be reached at debtwatch@yahoo.com.



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