

Comments from the Center for International Environmental Law (CIEL) on A.6.4-SBM013-AA-A10: Draft Tool: Article 6.4 Sustainable Development Tool (ver. 7.0)

Thank you for the opportunity to again comment on the Sustainable Development Tool (SDT).¹ We appreciate the Article 6.4 Supervisory Body's efforts to comply with the rules, modalities and procedures set forth in Decision 3/CMA.3, which includes that the Supervisory Body will develop the requirements and processes necessary to operate the mechanism including with regard to human rights, the rights of Indigenous Peoples, and gender equality, among others (para. 24(a)(ix)), as well as "robust, social and environmental safeguards" (para. 24(a)(x)) and considerations of how activities are fostering sustainable development (para. 24(a)(xi)), and that activities should be designed in a way to "minimize and, where possible, avoid negative environmental and social impacts (para. 31(d)(iv)). Unfortunately, the current draft (ver. 7.0) of the Sustainable Development Tool does not provide the necessary elements to uphold this mandate and ensure that Article 6.4 activities will not cause human rights harms and negatively impact the environment.

Carbon market projects - including those operated under UN climate agreements - have a well-documented history of direct human rights harms and damage to the environment, in addition to the harms that offset projects pose by enabling the continuation of business-as-usual emissions of greenhouse gas emissions in one location on the false promise that they are offset by projects elsewhere. The Article 6.4 Mechanism should seek to avoid violations of human rights and the rights of Indigenous Peoples as well as environmental harm.

Process Concerns

We remain concerned about the insufficient consultation and engagement on this document with Indigenous Peoples, civil society organizations, and local communities. Communities on the ground, as well as many Indigenous Peoples, are the ones who will bear the brunt of the impacts of Article 6.4 activities and should be the ones benefiting from any such activity. The provision of only a week (including that documents were not posted until after close of business in many time zones on Monday, July 1) to comment on a document that has been published only in English is significantly too short.² While we understand that this is not the only opportunity to comment and that there has been similar one week time periods before previous meetings and a two-week time period following the eleventh meeting, which was also during a time in which many of those who may comment were also preparing for the Bonn meetings, it is still not enough time especially given that each consultation has been on a different document. For a document that is supposed to both prevent or mitigate negative environmental and social impacts and assess the sustainable development potential of an Article 6.4 activity, this is especially concerning as it is exactly those Indigenous Peoples, women, local communities, and other potentially impacted people who must

¹ Previous CIEL submissions: Call for Input on the Agenda and annexes for the 11th meeting, https://unfccc.int/sites/default/files/resource/SB11_call_for_input_annotation_CIEL.pdf. Call for input on the agenda and annexes for the 10th meeting: https://unfccc.int/sites/default/files/resource/SB010_Call_for_input_annotations_CIEL_SD%20Tool.pdf.

² See, e.g., Almaty Guidelines on Promoting the Application of the Principles of the Aarhus Convention in International Forums, ECE/MP.PP/2005/2/Add.5, para. 24 (June 20, 2005) ("When environmental information is requested by a member of the public, it should be provided as soon as possible following the request, and subject to an appropriate time limit, recalling that the time limit under the Convention is one month.").

be heard. Such a tight timeline in practice deprives key rightsholders from the possibility to consult and provide relevant comments and thereby undermines the legitimacy of the SDT.

Specific Comments on the Draft SDT

The following are largely top-line comments on the draft SDT given the extremely limited timeframe. These comments are not comprehensive and do not imply that passages not mentioned are either adequate or problematic. We note and welcome the improvements in this document including, for example, in defining child labor and extending the consideration of impacts to include an activity's implementation, operations, and decommissioning, among others.

Over-reliance on host Party regulations:

While there are some improvements in this version of the SDT, we are deeply concerned that these and all other aspects of the Sustainable Development Tool risk being undermined by requiring compliance not with a set of standards developed by the Article 6.4 Supervisory Body based on international law and principles, but instead deference to "host Party regulations." Throughout this draft SDT there seems to be reliance only on assessment and compliance with "host Party regulations" rather than on the principles and standards in the SDT or other Article 6.4 policies. For example, para. 19(b) references conducting assessments against principles in accordance with host Party regulations and merely encourages considering the criteria and guiding questions of the principles in the draft SDT. Similarly in para. 5, which requires the identification of potential risks and ways to mitigate such risks if avoidance is not possible, reference is made to needing to show that activities are consistent with host Party regulations, not the SDT or other Article 6.4 policies and activity participants are merely "encouraged" to apply relevant standards, industry best practice, or their own policies in addition to or in the absence of host Party regulations. Activity participants should have to show evidence of compliance with the SDT and other relevant article 6.4 mechanism policies as well as host Party regulations.

This reliance seemingly solely on host Party regulations also appears to undermine the SDT being "mandatory" for all proposed article 6.4 activities (para. 13) because if host Parties do not have regulations equivalent to or better than the those in the SDT's then it is hard to see how the SDT would be applied. Before any SDT is adopted, it must be clear that activity participants have to comply with the SDT and other Article 6.4 policies.

Additionally, the SDT also continues to not only reference the host Party regulations, but only those "applicable to the proposed activity." How is this applicability assessed or determined? Are there some regulations, such as human rights, that are applicable to all proposed activities? Who determines this?

Similarly, the reference in para. 10 to local stakeholder consultation says that it should take place in line with host Party rules and/or the rules adopted by Article 6.4 Supervisory Body. However, if these two things are not equivalent it is unclear what will prevail. This is particularly concerning in the context of Indigenous Peoples right to free, prior and informed consent (FPIC), which has often been violated by carbon market projects in the past, including under the Clean Development Mechanism, as not all host Parties may respect this right.

This seemingly sole reliance on host Party regulations rather than a set of common standards, such as those contained in the SDT, risks the Article 6.4 mechanism rubber-stamping projects that violate human rights or harm the environment if a host Party does

not have regulations that are deemed applicable despite the SDT trying to promote the exact opposite.

It is also then concerning that it seems that the project proponent can claim that there is no risk or that a principle is not applicable without sufficient justification as it is not clear from the SDT what evidence would be required. The lack of specificity on this could make it easy for a project proponent to claim no risk even when there is substantial risk. The “Do-No-Harm Risk assessment flow chart” seems to represent this potential problem and loophole. Looking at the flow chart it appears that if an activity participant indicates there is a risk, but no host country regulation or no relevant standards or industry best practice then the activity participant can say there is “no risk.” However, that does not mean there is no risk.

Definitions (para. 16): While some definitions have improved, for example on child labor, others are still not in line with international law. For example, why is the definition of “cultural heritage” not the definition that is contained in the World Heritage Convention³ especially given that the definition in the draft SDT appears narrower? As many Parties have consistently emphasized during previous CMAs, it is imperative for the Article 6.4 Mechanism to operate in a manner that is fully and effectively respectful of the rights of Indigenous Peoples, and any provision or definition that is not in line with relevant international human rights law, including the UN Declaration on the Rights of Indigenous Peoples, will likely trigger questions and opposition.

Precautionary Approach: It is positive that in principle P3.1.1 (para. 39) on natural resources, the SDT references taking a precautionary approach and explains, in a footnote, that the precautionary approach is designed to prevent serious and irreversible harm in the absence of scientific certainty of that harm. However, it is not clear why this is only referenced in regards to natural resources and not in regards to other elements of the SDT and environmental and social safeguards. The precautionary approach should be an overarching approach for all principles and elements of the SDT and not mentioned only in one paragraph or footnote.

Principle 1: Climate and energy

In para. 22, the SDT mentions that the proposed activity should not increase greenhouse gas emissions over the baseline scenario. However, no proposed article 6.4 activity should increase greenhouse gases given that the article 6.4 is supposed to enhance climate mitigation and will often be used to offset ongoing emissions elsewhere. Additionally, it is unclear what the baseline scenario is. This poses a substantial risk if the baseline scenario is high.

Principle 2: Air, land, and water

Throughout principle 2, the SDT caveats avoiding harm based on “financial feasibility” and footnote 27 explains financial feasibility as considering the cost of adopting certain measures or actions. This provides a significant loophole as activity participants could claim that risk cannot be avoided because it is too expensive. This could place the financial concerns over those of people or the environment who will face more risk due to the unwillingness to avoid the risk in the first place.

³ See World Heritage Convention glossary, <https://whc.unesco.org/en/glossary/224>.

Principle 4: Human Rights

It is positive that the SDT now recognizes human rights as “an overarching legally binding framework that informs and guides all environmental and social safeguards.” However, it is then inexplicable as to why it is only in principle 4 and not as an overarching guidance on the whole SDT. Human rights-based climate action is more effective and sustainable. As the Intergovernmental Panel on Climate Change (IPCC) confirms “Adaptation and mitigation actions that prioritise equity, social justice, climate justice, rights-based approaches, and inclusivity, lead to more sustainable outcomes, reduce trade-offs, support transformative change and advance climate resilient development.”⁴

It also remains concerning that it only references the Universal Declaration of Human Rights and does not mention other core international human rights instruments. Relatedly, in annex I, it is concerning that the first question on human rights references the “right to sustainable development,” but not civil, political, economic, social, environmental, and cultural rights more broadly.

Principle 5: Labour

The SDT should include reference to and indicate that projects should comply with the core labour standards.

Principle 7: Gender Equality

It is concerning that the SDT does not recognize women and girls as drivers of positive action nor is there any reference to gender responsiveness. Women and girls are not only impacted by climate change and potential climate action, but they often have the solutions and this should be recognized in the SDT.

Principle 8: Indigenous Peoples

There are positive aspects in this principle. However, in addition to concerns mentioned above, it is also concerning that the principle only requires activity participants to recognize Indigenous legal systems that are recognized under host Party regulations. There may be places in which Indigenous Peoples are not recognized as such or where national laws undermine Indigenous Peoples rights. The Article 6.4 mechanism, which is part of the Paris Agreement, should not promote or allow activities that undermine or violate the rights of Indigenous Peoples.

Conclusion

Thank you for your consideration of our comments, which are not comprehensive given the timeframe for providing feedback. The Sustainable Development Tool is an extremely important document and critical to ensuring that Article 6.4 activities do not undermine human rights or the rights of Indigenous Peoples, do not harm communities or the environment, and provide positive benefits. Thus, it is critical that the Supervisory Body get it right. The current draft SDT does not as

⁴ Intergovernmental Panel on Climate Change (IPCC), *Climate Change 2023: Synthesis Report. Contribution of Working Groups I, II, and III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change*, Summary for Policymakers, para. C.5.2 (2023).

it contains far too many loopholes and critically seems to undermine itself by only requiring compliance with host Party regulations rather than international laws, policies, and standards.

If you have any questions or would like to discuss anything further, please contact Erika Lennon, elennon@ciel.org.