

“Carbon markets, neo-liberalism and human rights: towards a win-win approach”

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ARTICLE INFO	Damilola S. Olawuyi (2013). Carbon markets, neo-liberalism and human rights: towards a win-win approach. <i>Environmental Economics</i> , 4(2)
RELEASED ON	Tuesday, 02 July 2013
JOURNAL	"Environmental Economics"
FOUNDER	LLC "Consulting Publishing Company "Business Perspectives"



NUMBER OF REFERENCES

0



NUMBER OF FIGURES

0



NUMBER OF TABLES

0

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Carbon markets, neoliberalism and human rights: towards a win-win approach

Abstract

Most of the time, applying human rights language into market-based systems is seen as an attempt to merge waters from two different ponds that can never meet. This paper argues that the perceived dichotomy between human rights and market instruments as presented in the literature, stem from the failures of scholars to consider the possibilities of instruments and approaches that present a mutually beneficial relationship and a win-win scenario between both. This paper argues that human rights instruments could in fact strengthen the efficiency of market-based mechanisms if properly applied. This paper proposes a human rights based approach to carbon finance as an approach that could enable us draw on the flexibility of markets, but at the same time mainstream human rights standards into market instruments to protect market abuse, human rights violations and unsustainability.

Keywords: carbon markets, human rights, sustainable development.

JEL Classification: Q50, Q56.

Introduction

The aim of this paper is to examine and contribute to debates on the place of command and control type instruments such as human rights instruments in market-based emission reduction schemes. More than ever, there have been increasing demand for the integration of human rights standards, requirements and frameworks into market-based mechanisms under the Kyoto Protocol to correct certain market anomalies, specifically the high incidents of emission reduction schemes and projects that produce human rights problems in developing countries where such projects are sited. These human rights impacts include: mass displacement of citizens from their homes to allow for climate change mitigation projects; lack of participation by citizens in project planning and implementation; citing and concentration of projects in poor and vulnerable communities; lack of governmental accountability on projects and the absence of review and complaint mechanisms for victims to obtain redress for these problems.

On the one hand, some scholars argue that carbon markets would lose their competitiveness if impeded by command and control mechanisms that stiffen competition, efficiency and profitability. On the other hand, some scholars opine that mainstreaming human rights into market-based instruments would tackle market-driven inequalities, control the 'business-as-usual' and 'emission reduction at all cost' trend in current carbon markets and ultimately restore the integrity and sustainability of these mechanisms. This paper examines and contributes to these debates. Drawing examples from Clean Development Mechanism projects (CDM) under the Kyoto Protocol, this paper argues that the perceived dichotomy between human rights and market in-

struments as presented in the literature are based on the failures of scholars to consider the possibilities of instruments and approaches that present a win-win scenario. A practical and mutually beneficial approach is the human rights based approach to carbon finance which draws on the flexibility of markets, but at the same time mainstreams human rights standards to protect market abuse, human rights violations and unsustainability.

This paper is divided into five sections. This introduction is the first. Section 2 provides a background analysis of the human rights impacts of emission reduction schemes, specifically CDM projects on human rights. Section 3 examines scholarly debates on the desirability of command and control instruments such as human rights instruments for carbon markets. It explores the contested relationships between neo-liberalists and human rights scholars and examines the possibilities and scope for a mutually beneficial understanding of arguments under both schools. Section 4 proposes a human rights based approach to carbon finance as a win-win approach to climate change mitigation. The final section concludes the paper.

1. Carbon markets and human rights struggles: the example of CDM projects

One of the most innovative, yet frequently criticized mechanisms under the Kyoto Protocol is the Clean Development Mechanism (CDM). The CDM allows developing countries to host climate change mitigation projects sponsored by industrialized countries. The CDM allows industrialized countries that are parties to the Kyoto protocol to acquire Certified Emission Reductions (CERs) by investing in projects that lead to emission reductions in a developing country. On the other hand, the CDM aims to assist developing countries in achieving sustainable development by boosting their economies and by

promoting environmentally friendly investment from industrialized countries governments and businesses. Estimates indicate that by 2015, foreign investments through the CDM in a participating developing country could be US\$4752 million annually (Grubb, 2003).

Recent statistics seem to buttress these projections¹. Studies show that over the past decade, the CDM alone has helped nations to mitigate approximately one billion tons of greenhouse gas emissions while saving developed countries a total of US\$3.6 billion in mitigation costs. With over 5,200 registered CDM projects in over 80 countries, the CDM has mobilized more than US\$215.4 billion in investments in developing countries, thereby providing opportunities for socio-economic growth and poverty alleviation in many developing countries².

However, the design and execution of a number of CDM projects have been fraught with challenges (Roht-Arriaza, 2010). A number of CDM projects approved by the CDM Executive Board have been criticised for resulting in the violation of fundamental human rights in developing countries. Generally, it is estimated that CDM projects and other climate change mitigation projects already displace over 20 million people a year (de Sherbinin, et al., 2011; Couldrey & Herson, 2008). These tend to be the poorest and the most vulnerable citizens in developing countries where these projects are located. In addition, there are concerns related to pollution caused by the transfer of outdated and inefficient technologies for emission credits. Other human rights concerns include the lack of opportunities for participation by citizens in project planning and implementation, citing of projects in poor and vulnerable communities, lack of governmental accountability on projects and the absence of judicial and quasi-judicial remedies for victims of the above-mentioned problems³. Due to these problems, the credibility and integrity of project-based mechanisms under the Kyoto Protocol have been doubted. Projects that carry undoubted potential for climate change mitigation have been met with resistance, criticisms and protests due to their impacts on human rights (Olawuyi, 2012; German Energy Transition, 2011). These concerns have led to questions on

whether solutions to climate change are not in fact threatening more human rights than climate change itself. The CDM has in fact been labelled as a 'Cheap and Corrupt Development Mechanism'⁴.

The high incidents of human rights violations resulting from CDM projects have further increased the calls for a more transparent, accountable and human rights based approach to climate change mitigation in general. Most recently, in March 2012, a coalition of developing countries petitioned the United Nations to seek powers to withdraw approvals they have given to emission reduction projects if evidence emerge that they breach human rights or harm the environment⁵.

These concerns emphasise how policy measures and projects intended to advance emission reduction goals can have serious negative impacts on fundamental human rights. They also underpin the need to re-examine how environmental objectives can be balanced with respect for human rights. This has triggered fresh calls on the need to mainstream human rights standards into carbon-based mechanisms.

This proposal is however not without debates. While some scholars have argued for a new generation of market instruments, others have argued that emission reduction schemes in general must be reformed to reflect robust human rights standards (Streck, 2009; Wiener, 2009). We shall now consider these debates.

2. Human rights language in market instruments: theoretical debates

The idea of introducing human rights norms into market or economic instruments has been hugely contested (Childs, 2012; Center of Concern, 2011). This debate is centred on the question whether command and control type instruments such as human rights should be applied to market systems⁶.

⁴ See Down to Earth Group, 'Issues: Flexibility Mechanisms' *Down to Earth Magazine* (November 15, 2005); see also Center for Science and Environment, 'Current CDM Design Corrupt and 'Unclean'', <http://www.cse-india.org/node/3031>, accessed 21 March 2012. This paper disagrees with this rather sentimental condemnation of the CDM; while it acknowledges the flaws in the current implementation of the CDM, we argue that the CDM could stimulate real economic, social and environmental growth in developing countries if properly restructured. This paper, therefore, calls for a reform of the CDM as well as other market-based instruments to make them more transparent, accountable and right-based.

⁵ Point Carbon, 'CDM Host Nations ask U.N. for Power to Ban Projects', <<http://www.pointcarbon.com/news/1.1802068>>, accessed 30 March 2012.

⁶ Fletcher has argued that the growing effort to address anthropogenic climate change through carbon markets and other financial mechanisms constitutes a form of 'disaster capitalism'. See R. Fletcher (2012). 'Capitalizing on Chaos: Climate Change and Disaster Capitalism', *Ephemera Journal*, 97, 12 (1/2); see also M. Dowell-Jones, and D. Kinley (2011). 'Minding the Gap: Global Finance and Human Rights', *Ethics & International Affairs*, 25 (2), pp. 183-210; L. Lohmann and S. Böhm (2012). 'Critiquing Carbon Markets: A Conversation', *Ephemera Journal*, 12 (1/2), pp. 81-96.

¹ See the 2012 Report of the UNFCCC, 'The Benefits of the Clean Development Mechanism 2012', http://cdm.unfccc.int/about/dev_ben/ABC_2012.pdf, accessed 12 January 2013.

² *ibid.*

³ See Petition to the Inter-American Commission on Human Rights Seeking Relief from Violations Resulting from Global Warming caused by Acts and Omissions of the United States, by the Inuit people of the Arctic Regions of the United States and Canada, December 7, 2005. Available at http://inuitcircumpolar.com/files/uploads/iccfiles/FINAL_PetitionICC.pdf, accessed 12 July, 2011.

Neoliberalism advocates that markets should be free from governmental control, regulations and interests. Underlying the hypothesis is the belief that markets are self-regulating, and as such markets work better when they are free from governmental interference. Neoliberalists are, therefore, quick to reject the idea of mainstreaming human rights norms to market-based instruments such as the market mechanisms under the Kyoto Protocol (Bacchi and Eveline, 2004; Lohmann and Böhm, 2012; Levy, 2012). The crux of the arguments is that market-based mechanisms are incentive-based mechanisms that should not be diluted by conduct-based instruments such as human rights. As such, the neo-liberalistic assumption is that mainstreaming human rights norms to incentive-based regimes such as the Kyoto Protocol would reduce their effectiveness, and might in all defeat the entire purpose of the markets. Another neoliberalist argument is that the flexibility of costs cannot be sidelined in an effective regulatory system. As Weiner notes, incentive instruments would be more cost effective than conduct instruments and fixed performance standards such as human rights instruments. This is because market-based instruments serve as incentives for developed countries to achieve steady progress in environmental protection at the least cost and with much flexibility (Weiner, 1999).

These arguments are in contrast with the views of human rights mainstreaming theorists that social justice issues such as climate change mitigation are far too important to be left to market contortions and manipulations (Roht-Arriaza, 2009-2010; Kravchenko, 2008). Petersmann has been one of the most consistent proponents of an approach that mainstreams human rights into world trade and global markets (Petersmann, 2000, 2002, 2003). He argues that human rights could enhance the effectiveness of market economies. To him, human rights empower citizens to demand a correction of market injustices; it also limits the strong governmental influences and control on markets. For example, the right to information can act as a basis for citizens to demand market information such as market prices from governments, which would enable them to make more informed decisions. He calls for the transformation of market freedoms into fundamental human rights and the integration of human rights norms into the laws and treaties of worldwide organizations¹. According to Khan (2009), the injustices of the market systems are evident in trying to achieve results at all costs. He noted that the world needs a different kind of leadership, based on the idea of human rights (Khan, 2009).

Markets have also been criticised for fostering discriminations and deep-rooted inequities. For example, Silayan has analyzed the inequalities in adopting a market-based approach in climate change frameworks². Since investors in the markets seek to pursue an optimal investment portfolio and to maximize profits and minimize cost, they tend to achieve results at all costs, including by fostering inequities in host countries³. Apart from the issues of concentrating projects in a few selected countries, host countries are also forced to dance to the tune of the investors or lose out. This has led to issues such as governments repressing and oppressing its own citizens just to retain projects and satisfy investors⁴. In this, the only winners would be those countries that lower sustainability standards, increase investment incentives and turn a blind eye to human rights standards when they stand in the way of economic gain⁵. Countries that fail to do this become the losers in the market, as they would be left behind⁶. Haya (2002) was also of the view that free-trade mechanisms will lead to further societal injustices in developing countries with already abysmal human rights records⁷. She maintained that most industrialized countries are likely to capitalize on the nature of the markets to propose 'free rider' and 'business as usual projects' that only worsen the environmental and human rights conditions of developing countries. Haya argues that leaving climate change in the hands of markets would be counter-productive in the long run⁸.

Arguably, the cases put forward by market enthusiasts are not strengthened by the human rights petitions and protests that have trailed current market systems. From issues such as the transfer of outdated and inefficient technologies for emission credits, to massive governmental repressions, killing and maiming of citizens to force through climate change projects; the lack of fair and transparent opportunities for participation by citizens in project planning and implementation; the citing of projects in poor and vulnerable communities; lack of governmental accountability on projects and the absence of judicial and quasi-judicial remedies for victims of the above mentioned problems. The international community would have failed in its role as gatekeeper

¹ E. Petersmann (2002). 'Time for a United Nations 'Global Compact' for Integrating Human Rights into the Law of Worldwide Organizations: Lessons from European Integration, *EJIL*, 13, p. 641.

² A. Silayan, 'Equitable Distribution of CDM Projects Among Developing Countries', HWWA Report, 255, pp. 56-57.

³ *ibid.*

⁴ *ibid.* 56.

⁵ *ibid.* See also R. Saner (2005). 'Hype or Reality: Can the CDM Trigger FDI', European Climate Platform 2.

⁶ A. Silayan, 'Equitable Distribution of CDM Projects among Developing Countries' HWWA Report 255, Hamburg, p. 58; see also R. Timmons and B. Parks (2007). *A Climate of Injustice: Global Inequality, North-South Politics, and Climate Policy*, MIT Press 2007, p. 11.

⁷ B. Haya (2002). *Damming the CDM: Why Big Hydro is Ruining the Clean Development Mechanism*, International Rivers Network, 1.

⁸ *Ibid.*, pp. 2-3.

and protector of human rights and dignity if nothing is done to curtail the excesses of the current carbon markets. The loss of human lives cannot be quantified in terms of costs, be they monetary or in the form of emission credits. It would be difficult to appraise the cost effectiveness of markets if individuals continue to pay the higher prices of displacements from homes and at times of death.

Generally, markets are not the biggest problems. The biggest problem is an unregulated market, i.e. a market without adequate rules that prevent oppressions and injustice. For example, in terms of climate change, the adoption of market mechanisms is not by any stretch the main problem. In fact the history of the process that led to the Kyoto Protocol shows that but for the market mechanisms, a global agreement on climate change could not have been reached (Depledge, 2011; Jackson, 1998; Grubb, 1999). This is because the flexibility and cost abatement offered by markets are great incentives for industrialized countries to take part in GHG mitigation. Markets also allow developing countries to gain in terms of access to newer technologies, more job opportunities and solutions to long-term environmental problems.

As such, the question is not to throw away the markets, but to ask how new policy measures can be designed to achieve two pronged goals of: maintaining the market outlook of the Kyoto Protocol and secondly laying down stricter regulations that respond to the injustices of the current climate change regimes. Thinkers in the field have failed to address the possibility of such a win-win scenario¹. A win-win scenario of this sort can be achieved by restructuring extant climate change regimes to include flexible but binding obligations on market participants to respect international human rights. Such a mechanism would impose penalties on countries that fail to respect human rights in project execution and implementation. Such a mechanism would represent a justifiable mix of climate change mitigation, carbon finance, respect for human rights, equity and development.

Arguably, a human rights-based approach to carbon finance presents an opportunity to achieve a win-win scenario. It provides an opportunity to achieve an instrument that is both incentive-based and command-based. A rights-based framework provides a double opportunity to strengthen existing climate

change regimes by the integration of processes, standards and institutions that protect the interests of individuals from market inequalities. By putting individuals and stakeholders at the center through participation, accountability and access to justice, human rights mainstreaming provides the opportunities to address the human rights issues associated with projects and to change the negative perceptions of the market systems. Without this, it might amount to attempting to solve the problem of climate change by creating many other problems (Meijer and Werksman, 2005; Cameron, 2009-2010).

3. Towards a human rights based approach to carbon finance

In this section I propose that the United Nations Human Rights Based Approach (HRBA) framework could be adopted as a policy framework through which human rights standards could be reflected in the approval and execution of emission reduction projects. The HRBA provides a procedural framework that focuses on the institutionalization of human rights into development generally. It offers a template and guideline for incorporating human rights threshold that must be met before the approval and registration of emission reduction projects.

The HRBA seeks to mainstream five interconnected human rights norms and principles into decision-making, they are: participation and inclusion; accountability and rule of law; equality and non-discrimination; empowerment; and access to justice². The framework requires that these human rights elements must be incorporated into policies, guidelines, and procedural requirements for development. Through the HRBA, procedural human rights could be harmonized and integrated into policies and project activities, thereby giving the public a basis to demand enforcement. The HRBA represents a shift from a needs-based approach to an approach that requires governments and project proponents to consider the impact of a particular project on the enjoyment of existing human rights. It integrates human rights safeguards into project plans and implementation³.

The HRBA identifies rights-holders and their entitlements and corresponding duty-bearers and their obligations and works towards strengthening the capacities of rights-holders to make their claims, and of duty-bearers to meet their obligations. By

¹ See S. Jodoin (2011). 'Human Rights and the Environment: Key Challenges and Best Practices', CISDL Brief presented to the United Nations Office of the High Commissioner for Human Rights, 10-11. Available at <http://www.cisd.org/publications/collaborative005.html>, accessed August 3, 2011. Jodoin notes that scholars have not been creative enough to explore the possibilities of a win-win scenario of this nature.

² See United Nations (2003). The Human Rights Based Approach to Development Cooperation towards a Common Understanding among UN Agencies, http://www.undg.org/archive_docs/6959-The_Human_Rights_Based_Approach_to_Development_Cooperation_Towards_a_Common_Understanding_among_UN.pdf, accessed October 12, 2010.

³ A. Cheria, E. Sriprapha Petcharamesree (2004). *A Human Rights Approach to Development: Resource Book*, ActionAid, pp. 2-4.

focusing on due process and an opportunity for stakeholders to iron out grievances. The HRBA provides a holistic framework through which parties can meet their obligations under both instruments. It allows States to respect, protect and fulfil human rights in the process of meeting their climate change obligations. As such, the HRBA does not seek to impose any new obligation other than those, which parties have already agreed to under international human rights law.

This approach is in tandem with the precautionary principle, which requires States to anticipate and avoid environmental damage before it occurs, especially where failure to do so would result not only in environmental degradation, but in human rights violations as well¹. Article 3(3) of the UNFCCC urges states to take 'precautionary measures to anticipate prevent or minimize the causes of climate change and mitigate its adverse effects'². According to the principle, where there are threats of serious or irreversible damage, governments should take all effective measures to prevent the adverse effects of climate change; and that the lack of full scientific certainty should not be used as a reason for postponing such preventive measures. This approach calls on governments to anticipate and respond to the adverse effects of climate change. This would arguably include not only the direct adverse effects of climate change on human rights but also the adverse effects of climate change measures on human rights. By providing opportunities for the public to raise genuine environmental and human rights concerns about a project, such concerns could be effectively addressed and prevented at the earliest opportunity.

The HRBA places emphasis on identifying human rights obligations that are relevant to a project; using human rights standards to guide project planning and implementation; engaging with the rights implications as a matter of obligation; supporting efforts to address the underlying causes of rights violations. This is achieved by addressing inequitable power relations that prevent the public from playing active roles in project design and implementation; building the capacity of both rights holders and duty-bearers to claim their rights and meet their respective responsibilities; taking all available measures to respect rights in all cases and supporting their protection and further fulfillment wherever possible, particularly for the most vulnerable; and supporting efforts to provide access to justice and redress for

violations³. For example with respect to emission reduction schemes such as the CDM, the HRBA would enable us to identify the public as rights-holders and to emphasise their entitlements to play active roles in project design and execution. It identifies project proponents, host countries, the CDM EB and the Conference of the Parties to the UNFCCC as the corresponding duty-bearers and emphasises their obligations to work towards strengthening the capacities of rights-holders to make their claims⁴.

As such, projects that violate any category of human rights would be considered as incompatible with international human rights obligations. Members of the public are provided ample opportunities to demonstrate how a particular mitigation project could affect their human rights. This supports the development of the capacities of duty-bearers to meet their obligations and of 'rights-holders' to claim their rights⁵. The aim of the HRBA is to integrate and harmonize all human rights norms and obligations into the processes of planning and executing mitigation projects. When stakeholders are given a chance to play active roles in decision-making, conflicts between human rights are better addressed in a balanced way.

The HRBA also provides a legal framework for citizens to hold non-state actors such as project proponents or multinational corporations that fund climate change projects accountable for human rights violations. The increasing roles of influential non-state actors such as multinational corporations, financial institutions, and development agencies in the subversion of human rights have been documented⁶. The HRBA provides the public with the opportunity to demand transparency and accountability from corporations that sponsor and benefit from mitigation projects that violate human rights. For example, the roles played by a German development bank in the Barro Blanco project in Panama attracted so much concerns, and put enormous pressure on the CDM Executive Board (EB) to condemn and delist the bank from funding CDM projects¹.

¹ See Principle 15 of the Rio Declaration, which states that 'where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost effective measures to prevent environmental degradation'.

² The United Nations Framework Convention on Climate Change, <<http://unfccc.int/resource/docs/convkp/kpeng.html>>, accessed January 10, 2011.

³ See IUCN, 'Resolution 4.056, Rights-Based Approaches to Conservation' (IUCN 2008) <https://community.iucn.org/rba1/RBA%20Wiki/Resolution%204.056%20Rights-based%20approaches%20to%20conservation.aspx>, accessed October 12, 2010.

⁴ See also United Nations (2008). 'Claiming the Millennium Development Goals: A Human Rights Approach', UN/HR/PUB/08/3.

⁵ United Nations (2003). The Human Rights Based Approach to Development Cooperation towards a Common Understanding among UN Agencies. See http://www.undg.org/archive_docs/6959-The_Human_Rights_Based_Approach_to_Development_Cooperation_Towards_a_Common_Understanding_among_UN.pdf, accessed October 12, 2010.

⁶ See J. Ruggie (2011). 'United Nations Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework', UN Document A/HRC/17/31 (March 21, 2011) paras 8-12; see also D. Korten (2001). *When Corporations Rule the World*, Berrett-Koehler.

There is a need to recognise the increasing roles played by such organisations by empowering the CDM EB to investigate and block projects that entrench human rights violations. Through the HRBA, procedural safeguards that allow the public to expose such collusions by international agencies would be incorporated into climate change regimes.

Practically, what this approach would mean is that existing climate change agreements would be reformed to establish project-approval guidelines that would include elements of participation; accountability; equality and non-discrimination; access to information; and access to justice. It would provide a threshold that would require governments and project proponents to demonstrate that these elements have been complied with and guaranteed to citizens in project planning and execution. Any project that does not satisfy the elements would either be referred back or refused approval by supervisory bodies of climate change mitigation projects, for example CDM EB and Designated Operational Entities (DOEs). It would also include establishing complaint mechanisms and procedures for stakeholders or private individuals whose human rights have been infringed to seek redress, to block the approval of such projects or to seek the review of already approved projects.

Conclusion

Previous studies tend to characterise human rights and carbon markets as irreconcilable, specifically as waters from two different ponds that can never meet. This paper has examined a legal framework

for a mutually beneficial relationship. This paper has shown that such characterizations are erroneous in that they fail to examine the possibilities of a win-win scenario. This paper proposes the human rights based approach to carbon finance as a mutually beneficial framework through which the intersections between market-based instruments under international climate change regimes and international human rights principles could be holistically addressed. This framework allows the integration of human rights standards such as access to project information, participation, accountability, equality and access to justice in the procedures and guidelines for approving and executing emission reduction projects. This framework would allow policy makers to anticipate the sources of human rights violations and to identify the opportunities to address them at the stage of project planning and execution. This approach could also help to reduce protests and litigation arising from climate change mitigation efforts as it allows citizens to take part in the process for planning and designing projects. Through this approach, the design of climate actions could be strengthened so that their execution and approval would be dependent on the consent and cooperation of stakeholders, individuals and communities. This way, human rights infringements due to emission reduction projects may be avoided. It also provides preventive/long-term processes through which human rights are systematically integrated into climate change governance structures so as to avoid the source of the problems in the first place.

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