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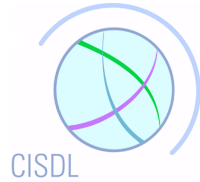


The Center for International Sustainable Development Law
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present:

**Reducing Emissions from Deforestation
and Forest Degradation:
Mexico's Solution for Offsetting Emissions
while Respecting Indigenous and Local
Community Rights**

Frederic Perron-Welch



REDUCING EMISSIONS FROM DEFORESTATION AND FOREST DEGRADATION: MEXICO'S SOLUTION FOR OFFSETTING EMISSIONS WHILE RESPECTING INDIGENOUS AND LOCAL COMMUNITY RIGHTS

Frederic Perron-Welch¹

I. Introduction

In negotiations under the United Nations Framework Convention on Climate Change (the Convention), one of the most talked about measures for the mitigation of global greenhouse gas emissions is the reduction of emissions from deforestation and forest degradation in developing countries (REDD). Mexico is playing an important role as an advocate for REDD by putting forward substantive ideas as to the nature of REDD measures and the considerations that must be addressed in any resulting mechanism. REDD was first put forward as an agenda item at the 11th Conference of the Parties to the Convention in 2005 (COP11), but addressing sustainable management, conservation and enhancement of sinks and reservoirs of greenhouse gases, including forests, dates back to 1992 and the United Nations Framework Convention on Climate Change.² Negotiations on REDD have developed rapidly since COP 11, driven by the Bali Action Plan issued by the 13th Conference of the Parties in 2007.³

The Bali Action Plan initiated a process for the “full, effective and sustained implementation of the Convention through long-term cooperative action.”⁴ Part of this process involves having Parties develop “policy approaches and positive incentives” relating to REDD, and consider the role that “conservation, sustainable management of forests and enhancement of forest carbon stocks” (REDD-Plus) could play in such a scheme.⁵ The emphasis since Bali has been on how to develop and promote the REDD-Plus aspects of the mechanism. The primary method has been through Party submissions and demonstration projects based on the guidance provided in Decision 2 of the 13th Conference of the Parties (the Second Decision).⁶ The Second Decision concentrated on approaches to stimulate action on REDD-Plus and invited Parties to “explore a range of actions, identify options and undertake efforts, including demonstration activities, to address the drivers of deforestation relevant to their national circumstances, with a view to reducing emissions from deforestation and forest degradation and thus enhancing forest carbon stocks due to sustainable management of forests.”⁷ REDD pilot and demonstration activities are being implemented by a number of initiatives at the international level, such as the Forest Carbon Partnership Fund (run by the World Bank) and the UN REDD Programme, which focus on integrating both environmental and socio-economic aspects into REDD.⁸

¹ Frederic Perron-Welch, M.A. (Toronto) and LL.B., Environmental Law (Dalhousie), is a Legal Research Fellow with the Biodiversity and Biosafety Law Research Programme and student-at-law at the Canadian Environmental Law Association in Toronto, Canada.

² United Nations Framework Convention on Climate Change, 9 June 1992, 1771 U.N.T.S. 107, at Art. 4(1)(d).

³ FCCC/CP/2007/6/Add.1, Decision 1/CP.13.

⁴ *Ibid.* at Art. 1.

⁵ *Ibid.* at Art. 1(b)(iii).

⁶ FCCC/CP/2007/6/Add.1, Decision 2/CP.13.

⁷ *Ibid.* at Art. 3.

⁸ Secretariat of the Convention on Biological Diversity and Deutsche Gesellschaft für Technische Zusammenarbeit, “Biodiversity and Livelihoods: REDD Benefits” at 5, online, [www.cbd.int](http://www.cbd.int/doc/publications/for-redd-en.pdf), <http://www.cbd.int/doc/publications/for-redd-en.pdf>.

Advocates of a REDD-Plus mechanism argue that it would lead to more environmentally and socially positive outcomes than a scheme focused simply on emissions mitigation. This is because, without an emphasis on conservation, sustainable management of forests and the resulting enhancement of forest carbon stocks, a REDD mechanism could actually undermine the natural forests that it should aim to aid and protect. This possibility is present due to the definition of “forest” adopted in the Marrakesh Accord, which allows countries to define what constitutes a forest in their circumstances, the lack of a consensus definition of “forest degradation” among international organizations that occupy the field (e.g. FAO, ITTO, UNEP, IPCC), and the lack of differentiation between plantations and natural forests.⁹ Faulty definitions could lead to the loss of carbon, biodiversity, and ecosystem services without these changes being accounted for because the “forest” would remain standing.¹⁰ Furthermore, a strict emphasis on the maximization of carbon yields (either through plantations or management of natural forests) could have a severe impact on forest structure and composition, with resulting negative impacts on biodiversity and ecological integrity.¹¹ The concepts of conservation, sustainable management of forests and the resulting enhancement of carbon stocks could also help bring about a more fair and equitable mechanism that would improve the wellbeing of forest dependent peoples because they would be compensated for the use of their knowledge, territories and skills in the process.

Several items mentioned in the Second Decision are instructive when considering the potential scope and components of a REDD-Plus mechanism. The preamble to the Second Decision recognizes two important points: 1) that REDD can “promote co-benefits and may complement the aims and objectives of other relevant international conventions and instruments” and 2) that “the needs of local and indigenous communities should be addressed” when REDD actions are taken.¹² These items suggest that co-benefits might be identified (by perhaps looking into existing forest instruments that already emphasize the creation of benefits) that would enhance a REDD mechanism, and that the aims and objectives of relevant international conventions and instruments on forests can be complemented. Although not implicit in this language, such conventions will also need to be acknowledged and abided by unless a REDD instrument explicitly overrides their provisions (per the Vienna Convention on the Law of Treaties). Existing instruments on the needs (and rights) of local and indigenous communities should also be considered to inform the second statement. Furthermore, the Annex to the Second Decision indicates that REDD demonstration activities should be consistent with sustainable forest management, *inter alia*, the relevant provisions of the United Nations Forum on Forests and the Convention on Biological Diversity (“CBD”).¹³ Both of these instruments are instructive as to the provisions of REDD-Plus, and the CBD is legally binding as regards the conservation and sustainable use of biodiversity (which obviously includes forests). The manner in which the Convention on Biological Diversity and United Nations Forum on Forests instrument are pertinent will be discussed in the following section.

II. The overlap between REDD and existing conventions and instruments

⁹ Nophea Sasaki & Francis E. Putz, "Critical Need for New Definitions of "Forest" and "Forest Degradation" in Global Climate Change Agreements" (2009) 2 Conservation Letters 226-232, at 227-228. (This conceptual cloudiness existed in the Barcelona text that was used at COP 15).

¹⁰ *Ibid.* at 229.

¹¹ F.E. Putz & Redford K.H., "Dangers of Carbon-Based Conservation" (2009) 19 Global Environmental Change 400.

¹² Decision 2/CP.13 at Preamble.

¹³ *Ibid.* at Annex.

The objectives of the CBD include the conservation of biological diversity and the sustainable use of its components.¹⁴ States should also “integrate... the conservation and sustainable use of [biodiversity] into relevant sectoral or cross-sectoral plans, programmes and policies.”¹⁵ They are also expected to

*respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of [biodiversity] and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices.*¹⁶

Parties are further expected to “adopt measures relating to the use of biological resources to avoid or minimize adverse impacts on biological diversity”¹⁷ and “protect and encourage customary use of biological resources in accordance with traditional cultural practices that are compatible with conservation or sustainable use requirements.”¹⁸

An interpretation of REDD consistent with the terms of the CBD would require Parties to integrate conservation and sustainable use into REDD plans, programmes and policies, while working to protect and engage indigenous communities in preserving forests and the sharing of the benefits that result. REDD would necessarily be subject to measures to avoid or minimize adverse impacts on biodiversity (which would counter the use of plantations as substitutes for natural forests) and protect and encourage customary use of forests by traditional communities that exercise sustainable or protective uses. Furthermore, the CBD is already working to address deforestation and forest degradation issues through the Programmes of Work on Forest Biodiversity,¹⁹ Protected Areas²⁰ and Incentive Measures²¹ - a REDD mechanism should compliment rather than detract from these efforts.

The United Nations Forum on Forests’ Non-Legally Binding Instrument on All Types of Forests (the Instrument) could also inform the scope and nature of a REDD mechanism. The Instrument was adopted partly with concern about continued deforestation and forest degradation and in recognition of the contribution of forests in addressing climate change.²² The purpose of the instrument is threefold: to strengthen political commitment and action on sustainable forest management and achieve the global objectives on forests; to enhance the contribution of forests to the international development goals, with particular emphasis on poverty eradication and environmental sustainability; and to provide a framework for national action and international cooperation.²³

Importantly, the instrument puts forward the principle that, *inter alia*, indigenous and local communities contribute to achieving sustainable forest management and should be involved in a transparent and participatory way in the forest decision-making processes that affect them.²⁴

¹⁴ Convention on Biological Diversity, 5 June 1992, 3 U.N.T.S. 143, at Art. 1.

¹⁵ *Ibid.* at Art. 6(b).

¹⁶ *Ibid.* at Art. 8(j).

¹⁷ *Ibid.* at Art. 10(b).

¹⁸ *Ibid.* at Art. 10(c).

¹⁹ CBD COP Decision VI/22.

²⁰ CBD COP Decision VII/28.

²¹ CBD COP Decision V/15.

²² United Nations Forum on Forests, Report of the seventh session (24 February 2006 and 16 to 27 April 2007), Non-legally binding instrument on all types of forests, E/CN.18/2007/8 at 1, Preamble.

²³ *Ibid.* at Art. 1.

²⁴ *Ibid.* at Art. 2(c).

Also, the definition of sustainable forest management as a concept that aims to maintain and enhance the economic, social and environmental values of forests for the benefit of present and future generations and the four global objectives on forests (reverse the loss of forest cover worldwide through sustainable forest management, including protection, restoration, afforestation and reforestation, and increase efforts to prevent forest degradation; enhance forest-based economic, social and environmental benefits, including by improving the livelihoods of forest-dependent people; increase significantly the area of protected forests and other sustainably managed forests, and increase the proportion of forest products derived from sustainably managed forests; and reverse the decline in official development assistance for sustainable forest management and mobilize significantly increased new and additional financial resources from all sources for the implementation of SFM)²⁵ all speak toward a particular conception of the role that forests play on our shared planet.

The United Nations Declaration on the Rights of Indigenous Peoples (the declaration) has numerous provisions relevant to REDD, and the possibility of large scale offsets. Reference to the declaration was made in early drafts of the negotiating text, but was removed due to the objections of those States that voted against the Declaration when it was passed at the United Nations General Assembly (Canada, United States, Australia and New Zealand). Nevertheless, the mechanism would function to reduce deforestation and forest degradation in developing countries and the persistent and systematic marginalization of indigenous peoples in much of the developing world requires an equitable REDD mechanism to take indigenous rights and State obligations toward indigenous peoples into consideration.

The declaration requires States to “provide effective mechanisms for prevention of, and redress for, any action which has the aim or effect of dispossessing aboriginals of their lands, territories or resources.”²⁶ This would require States to prevent dispossession for the purposes of REDD projects and redress for those peoples who have been dispossessed of their lands due to such projects. This is a clear possibility given the current form of the REDD mechanism, which does not recognize such an obligation.

Furthermore, the declaration states that “indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return.”²⁷ Given the urgency behind negotiations on a REDD mechanism and the large amount of funding expected for projects (UN-REDD estimates \$30B per year)²⁸, there will be serious pressure placed on indigenous peoples, and forcible relocation without consent or compensation is a likely outcome. The option of return is also likely to be curtailed, as offsets must be in perpetuity and allowing for the return of forest dependent peoples and their lifestyles might be seen as imperilling such an outcome.

The declaration also states that “indigenous peoples have the right to participate in decision-making in matters which would affect their rights...”²⁹ and that States “must consult and cooperate in good faith with the indigenous peoples concerned... in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative

²⁵ *Ibid.* at Art. 5.

²⁶ United Nations Declaration on the Rights of Indigenous Peoples, A/61/L.67/Annex, Art. 8(2)(b).

²⁷ *Ibid.* at Art. 10.

²⁸ See <http://www.un-redd.org/AboutREDD/tabid/582/language/en-US/Default.aspx>. Accessed 7 December 2009.

²⁹ *Supra* note 26, at Art. 18.

measures that may affect them.”³⁰ Top-down measures implementing an international mechanism are likely to override the right to participate, and consultation and cooperation in good faith unless such requirements are explicitly required in the mechanism itself.

In regards to property and ownership, the declaration states that “indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use...”³¹ In many developing countries, traditional ownership or traditional occupation/use is not explicitly recognized in the common or civil law property law scheme. Without explicit reference to such property rights over traditional lands, a REDD mechanism will run roughshod over this particular right in the rush to secure offsets. Indigenous peoples further have “the right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources.”³² A mechanism that promotes the conversion of forestlands to plantations or prevents indigenous people from accessing the productive capacity of their lands will further breach this right.

Lastly, the declaration requires that States “consult and cooperate in good faith with indigenous peoples in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories” and other resources.³³ A REDD mechanism needs to recognize this right to free and prior informed consent before it enables unilateral measures that directly infringe on this right in regards to projects that affect indigenous lands, territories or resources.

Given the pre-existing instruments in the field of conservation, sustainable forest management and indigenous rights, a REDD mechanism that ignores all of these commitments would run counter to the language and spirit of decades of negotiations, non-binding instruments and binding law on forests and the rights of indigenous peoples in regards to those forests. A heavy-handed approach to reducing emissions from deforestation and forest degradation has the potential to compromise the conservation and sustainable use of natural forests, and destroy the existing bio-cultural relationships that exist between indigenous peoples and their territories that have often lead to sustainable use and conservation without any financial incentive – simply as a way of life. The modern threat to forests has usually been rapacious use from industrial pressure, and a REDD mechanism that enables the large-scale creation of forest offsets to mitigate emissions in the developed world may simply perpetuate the ongoing colonialization of indigenous communities and contribute to their continued marginalization and disempowerment.

III. Mexico’s Contribution to International Negotiations on REDD under the UNFCCC

Mexico has taken a unique and active role in promoting an international REDD mechanism through its submissions to the Convention and its reasons for assuming this role are clear when one takes into consideration its domestic circumstances, the efforts that it is making at the national level and the potential financial benefits of a mechanism. Mexico’s submissions at the international level reflect key aspects of its domestic legal and political reality - namely the large presence of indigenous peoples and their ownership and management of forests. It has been estimated that between 53% and 80% of Mexico’s forests are owned and managed by local communities under collective land grants and that there are 17 million forest dependent people

³⁰ *Ibid.* at Art. 19.

³¹ *Ibid.* at Art. 26(2).

³² *Ibid.* at Art. 29(1).

³³ *Ibid.* at Art. 32(2).

in Mexico.³⁴ These land grants are subdivided into two forms of ownership: *ejidos* (communal land) and ownership by indigenous communities. As a result, Mexico prefers a mechanism based on REDD-Plus principles rather than one strictly focused on emissions mitigation. This position is clearly indicated in Mexico's recent submissions to the UNFCCC on the subject.³⁵

In discussing Para. 1(b)(iii) of the Bali Action Plan on REDD and REDD-Plus in its most recent submission to the Ad Hoc Working-Group on Long Term Cooperative Action Under the Convention, Mexico put forward two relevant points. The first stated that a REDD mechanism shall “support and incentive Parties’ efforts to maintain global forest carbon stocks while promoting the sustainable development of the inhabitants of forested areas, as well as achieving the ultimate objective of the Convention.”³⁶ This explicitly ties the REDD mechanism to social and environmental goals through the promise of sustainable development for forest inhabitants rather than leaving forest dwellers out of the equation.

The second point recognizes the nationally appropriate rights and roles of local communities and indigenous peoples, and subsequently that

REDD activities should involve the legally recognized inhabitants of forested areas, and respect their traditional knowledge and intrinsic relationship with forest resources in tropical countries, while significantly supporting their social, environmental and economic development to alleviate pressure for forest degradation and deforestation in the medium to long term.³⁷

This point recognizes the argument made above on aspects of the declaration in regards to the inclusion of the rights of indigenous peoples in a REDD mechanism and recognition that the inhabitants of forested areas have an intimate bio-cultural relationship with forests that can be supported to ensure reduced deforestation and forest degradation.

In a contemporaneous submission to the Subsidiary Body for Scientific and Technological Advice³⁸ (SBSTA), Mexico elaborated on REDD issues related to indigenous and local communities. Mexico opened its submission by stating its belief that “indigenous peoples and local communities’ rights, visions and experiences should be taken into account in the discussions of any topic regarding REDD” and that “there should be enough flexibility in the discussion to allow for the consideration of parties’ circumstances and legislation regarding consultation processes and property rights.”³⁹ This statement recognizes that indigenous peoples need to be considered in REDD negotiations, but that this should be subject to national circumstances and legislation. This allows Parties with drastically different laws and understandings to partake in discussions while still allowing for indigenous rights, visions and experiences to also be taken into account.

The Mexican submission to the SBSTA then provides guidance on matters that should be included in any REDD mechanism. Firstly, “REDD activities carried out in indigenous peoples

³⁴ European Tropical Forest Research Network, “Forests and Climate Change: adaptation and mitigation”, ETFRN News Issue No. 50, November 2009 at 35.

³⁵ Ideas and proposals on the elements contained in paragraph 1 of the Bali Action Plan. Submissions from Parties AWGLCA Sixth Session, (Bonn, 1-12 June 2009) Addendum. FCCC/AWGLCA/2009/MISC.4/Add.1

³⁶ *Ibid.* at p. 3, para. 2.

³⁷ *Ibid.* at p. 3, para. 3.

³⁸ Issues relating to indigenous people and local communities for the development and application of methodologies. Submissions from Parties. SBSTA Thirtieth Session (Bonn, 1-10 June 2009) FCCC/SBSTA/2009/MISC.1/Add.1, at p. 5-6.

³⁹ *Ibid.* at p. 5.

and/or local communities' territories should obtain prior informed consent according to national circumstances and regulatory frameworks.”⁴⁰ The language is not quite as strong as that contained in the declaration (free prior informed consent) but is consistent with the spirit of the requirement that indigenous peoples be consulted before having their territorial rights affected. It is supported by two later statements, that “REDD initiatives should consider land property rights of indigenous and local communities”⁴¹ and that “Indigenous peoples and local communities should be involved in all the processes and dialogs regarding any REDD initiative, both at local and national level.”⁴²

Secondly, “the implementation of REDD activities, plans and strategies should previously include capacity building for the indigenous peoples and local communities involved, taking into account traditional activities, languages and knowledge, when appropriate.”⁴³ Capacity building would allow indigenous people and local communities to comprehend the nature of the mechanism and the plans and strategies surrounding it at the national level. It would also allow them to participate in REDD activities to a greater extent and perhaps supplement their existing knowledge and practices to increase REDD outcomes. This is supported by two further points, that: the strengthening of organizations, umbrella organizations and networks should be supported and encouraged in order to assist indigenous peoples and local communities to get organized, to design and implement REDD activities, and to give advice on their legal and financial negotiations⁴⁴ and that “indigenous peoples and local communities should be provided with appropriate assistance in the analysis of their opportunity costs regarding REDD.”⁴⁵

Thirdly, ILC can be engaged in REDD monitoring and the measurement of carbon stocks.⁴⁶ This would increase their sense of ownership and understanding of the impact of land use change, which supports positive REDD outcomes.⁴⁷ Furthermore, it empowers indigenous and local communities that would otherwise be left out of REDD activities and promotes the use of traditional knowledge and the sustainable development of forest reliant peoples by recognizing the fact that they are an integral part of forest ecosystems. It is further supported by the later point that “indigenous peoples and local communities’ knowledge and experiences should be taken into account during the identification of direct and indirect deforestation and forest degradation drivers.”⁴⁸ Fourthly, environmental co-benefits as well as cultural integrity should be taken into account and promoted when undertaking alternative production activities in indigenous peoples and local communities’ territories.⁴⁹ This supports the view that REDD should be pursued for the greatest benefit to ecosystems and communities and should be based on the principles of sustainable forest management. Lastly, in cases where national scale is chosen, transparent, efficient, equitable and fair distribution mechanisms of REDD derived benefits should be developed. These mechanisms should be able to demonstrate the ways in which ILC will benefit from their contribution to REDD activities.⁵⁰

This point is incredibly important considering the amount of money that is expected to flow to States for REDD activities. Many of the States with the highest rates of deforestation have

⁴⁰ *Ibid.* at para. 1.

⁴¹ *Ibid.* at para. 9.

⁴² *Ibid.* at para. 10.

⁴³ *Ibid.* at para. 2.

⁴⁴ *Ibid.* at para. 6.

⁴⁵ *Ibid.* at para. 8.

⁴⁶ *Ibid.* at para. 3.

⁴⁷ *Ibid.*

⁴⁸ *Ibid.* at para. 7.

⁴⁹ *Ibid.* at para. 4.

⁵⁰ *Ibid.* at para. 5.

political systems that are corrupt, inefficient, inequitable and unfair – which is usually why they are experiencing high rates of deforestation. Unless the proper safeguards are established, a REDD mechanism will simply enrich those who have already profited from deforestation and further marginalize the indigenous peoples and local communities that have worked to conserve the forests, or might be persuaded to do so through REDD benefit sharing.

IV. Mexico's Domestic Approach to REDD

The Mexican Government acknowledges its place as one of the world's most biodiverse countries, and recognizes that such a gift allows it to benefit greatly from mitigation measures related to the conservation and sustainable use of ecosystems and ecosystem services, including REDD.⁵¹ This is demonstrated in the Programa Especial de Cambio Climático 2009-2012 (PECC), published in August 2009, which sets Mexico's long-term climate change agenda, together with medium-term goals for adaptation and mitigation. The PECC asserts that an adequate forestry policy could compensate for the growth in CO₂ emissions generated by other sectors of the Mexican economy as well as emissions from other countries, making it one of Mexico (and the world's) most important mitigation options in the short and medium term.⁵² As a result, Mexico has adopted several objectives to promote conservation and carbon capture and storage in the forestry sector.

The first objective proposes to mitigate emissions from the forestry sector and those resulting from land use change through programmes for the protection, conservation and sustainable use of forest ecosystems and soils.⁵³ This objective is supported by nine goals: 1) to manage 2.95 million hectares of forests sustainably; 2) to add 2.5 million hectares of forest into wildlife conservation units; 3) to add 2.175 million hectares of forest to the payment for ecosystem services scheme; 4) to convert 750,000 hectares of forests into natural protected areas; 5) to undertake works on 200,000 hectares for the conservation and restoration of forested lands; 6) to undertake phytosanitary treatment of 200,000 hectares of forest zones; 7) to undertake phytosanitary diagnosis of 3 million hectares of forest zones between 2008-2012; 8) to elaborate and publish a National Strategy for Forest Phytosanitary Treatment; and 9) to formulate and implement 8 state programmes to combat desertification and drought between 2008-2012.⁵⁴ Clearly this is a fairly comprehensive component of the national scheme that aims to conserve forests through sustainable forest management, conservation and payment for ecosystem services, rehabilitation and improving forest health.

The second objective proposes to increase the potential of forest carbon sinks through afforestation and reforestation efforts.⁵⁵ This objective is supported by five goals: 1) to establish 170,000 hectares of commercial forest plantations; 2) to undertake the simple reforestation of an area of 1.117 million hectares; 3) to undertake reforestation with soil restoration over an area of 418,130 hectares from 2008-2012; 4) to restore 170,000 hectares of forest ecosystems through the Program for Environmental Compensation (funded by payments for land use change) from 2008-2012; and 5) to put at least 0.50 MtCO₂e of credits from the forest sector on international carbon markets between 2008-2012 (conditional on multilateral negotiations on REDD).⁵⁶ This component of the national scheme is also quite extensive and seems mostly reliant upon a return to natural forests rather than reliance on forest plantations.

⁵¹ Programa Especial de Cambio Climático 2009-2012 at vii.

⁵² *Ibid.* at 42.

⁵³ *Ibid.* at Objetivo 2.3.6.

⁵⁴ *Ibid.* at Metas M.64 – M.72.

⁵⁵ *Ibid.* at Objetivo 2.3.7.

⁵⁶ *Ibid.* at Metas M.73 – M.77.

To complement these objectives, the PECC has recognized the value of the strategy adopted in Mexico's National Development Plan to halt the advancement of the agricultural frontier on forests and rainforests. Two PECC objectives have been adopted in this regard. The first aims to stabilize the forest-agricultural frontier to reduce GHG emissions from the conversion of forest lands to agricultural uses⁵⁷ by designing and implementing a scheme of incentives to reduce emissions from deforestation and forest degradation in the period from 2008-2012.⁵⁸ The second objective aims to reduce the impact of forest fires caused by agricultural and forestry burns⁵⁹ by limiting the average area affected per forest fire so that it does not exceed 30 ha per event.⁶⁰ Limiting the expansion of the agricultural frontier to prevent deforestation and forest degradation is a sound policy that could be adopted in many developing countries, especially if this can be linked to a REDD incentive scheme to compensate farmers affected by this policy to reduce contravention of the law and the resulting deforestation or forest degradation for agricultural purposes.

In sum, Mexico has taken concrete steps at the national level to set objectives and goals leading to mitigation measures from the reduction of emissions from deforestation and forest degradation. Through these measures, it expects to mitigate 41.8 MtCO₂e of emissions from 2008 – 2012 and 13.44 MtCO₂e in 2012. That sum is greater than the mitigation resulting from measures undertaken in Mexico's oil and gas sector, and will constitute 26.5% of total mitigation in 2012 (compared to 20.4% for the oil and gas sector). These are high expectations, but they demonstrate that REDD could play a significant role in mitigating emissions and slowing the rampant destruction of forests in developing countries.⁶¹

The objectives and goals set by the PECC will be addressed through the framework of Mexico's Ley General de Desarrollo Forestal Sustentable⁶² (Ley General) which was passed in 2003. The Ley General's relevant general objectives are: to contribute to the country's social, economic, ecological and environmental development through the sustainable management of forest resources and watersheds;⁶³ to boost silviculture and the use of forest resources that contribute goods and services that improve the standard of living for the owners of forests and forest reliant peoples;⁶⁴ to develop environmental goods and services and protect, maintain and augment the biodiversity afforded by forest resources;⁶⁵ and to respect the right of use and preferential benefit of forest resources in areas occupied and inhabited by indigenous communities provided by the Mexican constitution and relevant applicable norms.⁶⁶ In sum, the general objectives of the Ley General would promote the broad use of sustainable forest management for the purposes of sustainable development, help develop modes of forestry and uses of forest resources that improve standards of living, elaborate ecosystem goods and services and promote forest biodiversity, and show consideration for indigenous rights. All of these objectives are consistent with the PECC's aims and REDD-Plus.

Many of the specific objectives of the Ley General are also relevant, including: regulating the protection, conservation and restoration of forest ecosystems and resources, as well as the

⁵⁷ *Ibid.* at Objetivo 2.3.8.

⁵⁸ *Ibid.* at Meta M.78.

⁵⁹ *Ibid.* at Objetivo 2.3.9.

⁶⁰ *Ibid.* at Meta M.79.

⁶¹ *Ibid.* at xi (see Table).

⁶² General Law on Sustainable Forest Development

⁶³ Ley General de Desarrollo Forestal Sustentable at Artículo 2(I).

⁶⁴ *Ibid.* at Artículo 2(II).

⁶⁵ *Ibid.* at Artículo 2(III).

⁶⁶ *Ibid.* at Artículo 2(V).

regulation and management of forests;⁶⁷ strengthening the contribution of forest activities to the conservation of the environment and the preservation of ecological equilibrium;⁶⁸ rehabilitating and developing forests in deforested areas to conserve soils and waters as well as to energize rural development;⁶⁹ promoting and consolidating permanent forest areas through delimitation and sustainable management to prevent land use change with agricultural or other purposes from affecting their permanence and potential;⁷⁰ enabling compatibility between pastoral and agricultural activities in forested and deforested areas;⁷¹ regulating the prevention, combat and control of forest fires, as well as forest pests and diseases;⁷² promoting and regulating plantations with commercial ends;⁷³ supporting the organization and development of forest owners and improving their silvicultural practices;⁷⁴ regulating the promotion of activities which protect biodiversity of managed forests through more sustainable silvicultural practices;⁷⁵ promoting actions with conservation and soil restoration purposes;⁷⁶ contributing to the socioeconomic development of indigenous peoples and communities, as well as *ejidatarios* (those who occupy *ejidos*), communal owners, cooperatives, small owners and other owners of forest resources;⁷⁷ promoting training for the sustainable management of forest resources;⁷⁸ developing and strengthening institutional capacity through a scheme of decentralization, deconcentration and social participation;⁷⁹ guaranteeing the participation of society, including indigenous peoples and communities, in the application, assessment and monitoring of forest policy;⁸⁰ promoting economic instruments to promote forest development;⁸¹ and promoting the development of social and community forest enterprises by indigenous peoples and communities.⁸² These specific objectives are also consistent with the PECC's aims and a full understanding of REDD-Plus.

The importance Mexico put on these objectives cannot be overemphasized. The Ley General goes so far as to declare that the conservation, protection and restoration of forest ecosystems and their elements, as well as forest watersheds, and the undertaking of works aimed at conservation, protection and/or development of environmental goods and services are of public benefit.⁸³ This implies that deforestation and forest degradation are against the public interest and should be strongly combated, while REDD projects such as those proposed by the PECC should be openly pursued and financially supported.

This is explicitly laid out in the Ley General under the section that regulates the Política Nacional en Materia Forestal.⁸⁴ The section opens by declaring that sustainable forest development is a national development priority area and, for that reason, related public and private activities are of

⁶⁷ *Ibid.* at Artículo 3(II).

⁶⁸ *Ibid.* at Artículo 3(IV).

⁶⁹ *Ibid.* at Artículo 3(VIII).

⁷⁰ *Ibid.* at Artículo 3(XI).

⁷¹ *Ibid.* at Artículo 3(XII).

⁷² *Ibid.* at Artículo 3(XV).

⁷³ *Ibid.* at Artículo 3(XVI).

⁷⁴ *Ibid.* at Artículo 3(XX).

⁷⁵ *Ibid.* at Artículo 3(XXI).

⁷⁶ *Ibid.* at Artículo 3(XXII).

⁷⁷ *Ibid.* at Artículo 3(XXIII).

⁷⁸ *Ibid.* at Artículo 3(XXIV).

⁷⁹ *Ibid.* at Artículo 3(XXV).

⁸⁰ *Ibid.* at Artículo 3(XIX).

⁸¹ *Ibid.* at Artículo 3(XXX).

⁸² *Ibid.* at Artículo 3(XXXI).

⁸³ *Ibid.* at Artículo 4(I) and (II).

⁸⁴ National Policy on Forest Matters, Title Three of the Ley General de Desarrollo Forestal Sostenible.

priority.⁸⁵ Therefore, the policy developed by the government must observe the following guiding principles: ensuring that the sustainable exploitation of forest ecosystems is a permanent source of income and better living conditions for forest owners or holders of forest resources;⁸⁶ strengthening capacities in decision-making and acting, and the capacity of communities before policy makers and other productive agents, so that they can exercise their right to protect, conserve and utilize forest ecosystems, in accordance with their knowledge, experiences and traditions;⁸⁷ ensuring the permanence and quality of environmental goods and services derived from ecological processes by incorporating the interdependence of natural elements into programs, projects, rules and procedures to establish management processes and forms of integrated management of natural resources;⁸⁸ developing mechanisms and procedures that recognize the value of the goods and services that are provided by forest ecosystems, with the aim of having society assume the cost of their conservation;⁸⁹ creating economic mechanisms to compensate, support or stimulate the owners and holders of forest resources to generate environmental goods and services to guarantee biodiversity and the sustainability of human life;⁹⁰ and strengthening a forestry culture that guarantees the care, preservation and sustainable exploitation of forest resources and their environmental goods and services.⁹¹

Social forestry policy must also be developed according to relevant obligatory criteria, including: respect for the knowledge of nature, the culture and traditions of indigenous peoples and communities and their direct participation in the development and implementation of forestry programmes in areas where they live;⁹² the participation of social and private organizations, and public institutions in the conservation, protection, restoration and exploitation of forest ecosystems and their resources;⁹³ and that the regulation and exploitation of forest resources and lands must have as the object of its attention the social, economic, environmental and cultural needs of present and future generations.⁹⁴

Forest policy regarding forestry for environmental and plantation purposes is also subject to relevant obligatory criteria, including: the health and vitality of forest ecosystems;⁹⁵ the sustainable use of forest ecosystems and the establishment of commercial forest plantations;⁹⁶ the stabilization of the use of forest land through actions which prevent change in use, promoting permanently forested areas;⁹⁷ the protection, conservation, restoration and exploitation of forest resources with the goal of avoiding erosion or soil degradation;⁹⁸ the use of forest land should be done in a manner which maintains its physical integrity and productive capacity, controlling in all cases the processes of erosion and degradation;⁹⁹ the contribution to carbon sequestration and oxygen release; the conservation of the biodiversity of forest ecosystems, as well as the prevention and combat of theft and illegal extraction, especially in indigenous communities;¹⁰⁰ the afforestation of deforested land to increase the forest frontier;¹⁰¹

⁸⁵ Ley General de Desarrollo Forestal Sostenible, Artículo 29.

⁸⁶ *Ibid.* at Artículo 30(I).

⁸⁷ *Ibid.* at Artículo 30(II).

⁸⁸ *Ibid.* at Artículo 30(V).

⁸⁹ *Ibid.* at Artículo 30(VI).

⁹⁰ *Ibid.* at Artículo 30(VII).

⁹¹ *Ibid.* at Artículo 30(IX).

⁹² *Ibid.* at Artículo 32(I).

⁹³ *Ibid.* at Artículo 32(IV).

⁹⁴ *Ibid.* at Artículo 32(VI).

⁹⁵ *Ibid.* at Artículo 33(II).

⁹⁶ *Ibid.* at Artículo 33(III).

⁹⁷ *Ibid.* at Artículo 34(IV).

⁹⁸ *Ibid.* at Artículo 34(V).

⁹⁹ *Ibid.* at Artículo 34(VI).

¹⁰⁰ *Ibid.* at Artículo 34(X).

and the use of species compatible with native ones and with the persistence of forest ecosystems.¹⁰²

Lastly, the Ley General requires that the Department of the Environment and Natural Resources (SEMARNAT) promote the development of a market for environmental goods and services within the framework of international treaties and relevant national provisions that will reward the benefits provided by the owners and holders of forest resources to other sectors of society.¹⁰³ An international REDD mechanism and its domestic provisions would clearly fall within the scope of this section, meaning that the legislative authority already exists for the implementation of such a mechanism in Mexico.

V. Conclusion

Emissions of greenhouse gases from deforestation and forest degradation in the developing world make up a significant portion of the world's emissions. Yet, reducing emissions from deforestation and forest degradation in developing countries is one of the least expensive modes of mitigation, and could generate significant co-benefits. Parties to the Convention are taking REDD seriously and it featured expressly in the Copenhagen Accord¹⁰⁴. The primary concern from many quarters is to ensure that a REDD mechanism contributes to - rather than undermines - the conservation of natural forests, sustainable forest management and the enhancement of carbon stocks. The impact of a REDD mechanism on forest reliant peoples, who tend to be marginalized and disempowered, is also of great concern. Developing a strong and appropriate REDD-Plus mechanism could address many of these concerns.

Therefore, it is important for all stakeholders involved that REDD take into account a broad range of considerations that extend far beyond the simple reduction of emissions from deforestation and forest degradation in developing countries. First, it must be remembered that the Convention does not operate in a vacuum and thus the interaction between a REDD mechanism and existing treaties and instruments must be taken into account. The first aspect of REDD-Plus – conservation – is legally binding upon States under the Convention's sister treaty, the CBD, as is the sustainable use of biodiversity. This would seem to preclude a REDD mechanism whose sole purpose is carbon capture and sequestration regardless of the mode in which this occurs. In addition, the CBD requires States to protect the knowledge, innovations and practices of indigenous and local peoples relevant for the conservation and sustainable use of biodiversity and promote their wider application while equitably sharing the benefits. States must also protect and encourage customary use of biological resources in accordance with traditional cultural practices that are compatible with conservation or sustainable use requirements. This precludes outsiders in many parts of the developing world from adopting a top-down approach to REDD that ignores pre-existing communities and their knowledge regarding the conservation and sustainable use of forests. Lastly, States must adopt measures on the use of biological resources to avoid or minimize adverse impacts on biological diversity, which counters the use of forest plantations or other modes of carbon capture and sequestration that would negatively impact natural forests. The CBD presently has 193 State Parties, which includes all of the UNFCCC Parties but for the United States.

The second aspect of REDD-Plus – sustainable management of forests – is addressed by the United Nations Forum on Forests' Non-Legally Binding Instrument on All Types of Forests and

¹⁰¹ *Ibid.* at Artículo 34(XIII).

¹⁰² *Ibid.* at Artículo 34(XIV).

¹⁰³ *Ibid.* at Artículo 133.

¹⁰⁴ Copenhagen Accord, Report of the Conference of the Parties on its fifteenth session (Copenhagen, from 7 to 19 December 2009), FCCC/CP/2009/11/Add.1.

can be significantly informed by that document. The instrument is the result of 15 years of negotiations (since Rio in 1992) and an impressive statement of consensus given the vast divergence of views on the sustainable use of forests and their resources. Concern for ongoing deforestation and forest degradation and the contribution that forests can make in the response to climate change underlie the reasons that the instrument was put forward – especially the recognition that sustainable forest management can contribute to the enhancement of carbon stocks. As a result, its definition of sustainable forest management as a concept that aims to maintain and enhance the economic, social and environmental values of forests for the benefit of present and future generations should be considered seriously by REDD negotiators and incorporated into the mechanism.

The instrument also emphasizes the role of indigenous and local communities in sustainable forest management and the requirement that they be involved in transparent and participatory way in forest decision-making processes that affect them. This is strongly supported by the text of the United Nations Declaration on the Rights of Indigenous Peoples. REDD negotiators should take full notice of the existence of forest-dependent indigenous communities and recognize their rights over traditional territories and resources. They should not be dispossessed or forcibly removed from their lands, but be consulted and involved in decision-making processes that affect them on the basis of free and prior informed consent. They should be consulted and cooperated with, and have their rights to the use, conservation and protection of their lands and resources respected.

Mexico's submissions to the UNFCCC support these contentions. Its international submissions focus on efforts to maintain forest carbon stocks while involving the legally recognized inhabitants of forested areas, respecting their traditional knowledge and relationship with forest resources and significantly supporting their social, environmental and economic development to alleviate pressure for forest degradation and deforestation. Capacity building, support and assistance for forest-dependent peoples and communities are also key components, as they will help promote involvement and development while addressing deforestation and forest degradation through sustainable forest management. Fair and transparent benefit sharing is the means through which the inhabitants of forested areas are engaged and provided with incentives for reducing deforestation and forest degradation while contributing to their social, environmental and economic development.

Mexico's domestic plan, put forward in the Programa Especial de Cambio Climático 2009-2012, shows that it intends to pursue significant measures to reduce emissions from deforestation and forest degradation. This involves expanding the amount of forest in conservation areas and wildlife protection areas, including more forests in the payment for ecosystem services scheme, increasing the amount of forests under sustainable management (which is expected to enhance carbon stocks), reforestation and afforestation, pest control, addressing desertification and drought, stabilizing the forest-agricultural frontier through economic incentives and reducing the incidence and scale of forest fires.

These goals are supported by the Ley General de Desarrollo Forestal Sustentable, which puts forward a comprehensive framework on sustainable forest management in Mexico. The manner in which it describes its goals is entirely consistent with the nature a REDD scheme. This includes supporting the development of forest dependent peoples through sustainable forest management, promoting the development of ecosystem services and enhancing biodiversity, strengthening permanent forest reserves, balancing agricultural and pastoral interactions with forests, and supporting the preferential use and benefit of forest resources by indigenous peoples and communities. The conservation, preservation and restoration of forests, as well as the

conservation, preservation and development of ecosystem services are transformed from laudable ideals into activities that are concretely in the public interest. In further support of the public interest, decentralization, deconcentration and social participation are emphasized, as is respect for indigenous communities, the development of community forest enterprises, and the creation of economic instruments to support conservation, ecosystem goods and services and sustainable use.

Mexico is still developing its domestic action plan in regards to REDD, but this is dependent on the outcome of international negotiations. However, from the above survey, it is clear that Mexico's submissions form a sound basis for the elaboration of a REDD scheme that is consistent with the Bali Action Plan, the CBD, the Non-Legally Binding Instrument on All Types of Forests, and the Declaration on the Rights of Indigenous Peoples. Adopting their submissions for the elaboration of a REDD mechanism would promote conservation, sustainable forest management and the enhancement of carbon stocks while ensuring equity, participation, sustainability and the preservation of natural forests. This would address many of the major concerns that presently exist in regards to REDD. Furthermore, Mexico's domestic policies back up its submissions and provide a sound case study for other developing countries that are interested in a legal framework for REDD. It is a balanced scheme that incorporates a wide variety of different approaches to tackle the complex problem of deforestation and forest degradation, while promoting a local approaches through decentralization and deconcentration, respect for forest-dependent peoples and indigenous communities, and benefit sharing resulting from the preservation of forests and environmental goods and services (such as carbon capture and sequestration).

With the potential substance of a REDD mechanism elaborated on the aforementioned grounds, and the technical aspects of measuring, reporting and verifying emissions from forests well developed, the main hurdle to REDD is what it has always been: funding. Without adequate sources of funding, either private or public, it will remain more profitable to cut down forests than it is to keep them standing. Economic incentives need to be created and promoted to enable responsible forest owners and holders to conserve, sustainably manage and increase carbon stocks while being adequately compensated and ensuring that they are not unjustifiably forced out of the market (and their land) by larger players. Although developing countries will have to contribute to establishing and funding such a scheme, the bulk of the financing will need to come from the main consumers of forest products and producers of carbon emissions – the developed world. Unfortunately, the 15th Conference of the Parties to the Convention failed to produce a strong binding deal on this issue. The lack of such a deal, will likely undermine a REDD mechanism because the potential benefits will be too small to compensate for the loss of income from timber sales. It is hoped therefore, that the COP16 in Cancun will produce a more effective result. The framework for action and model legislation exists – Parties must now seize the opportunity to stop deforestation and forest degradation once and for all.

The mission of the Centre for International Sustainable Development Law (CISDL) is to promote sustainable societies and the protection of ecosystems by advancing the understanding, development and implementation of international sustainable development law.

The CISDL is an independent legal research centre which collaborates with the McGill Law Faculty in engaging students and interested faculty members in sustainable development law research and scholarly initiatives. The CISDL also works in cooperation with a network of developing country faculties of law, and is developing closer ties with the Cambridge University Faculty of Law, the Université de Montreal, Capetown University and the University of Costa Rica. It has guidance from the three Montreal-based multilateral treaty secretariats, the World Bank Legal Vice-Presidency, the United Nations Environment Programme and the United Nations Development Programme, and a memorandum of understanding with the International Institute for Sustainable Development (IISD).

With the International Law Association (ILA) and the International Development Law Organisation (IDLO), under the auspices of the United Nations Commission on Sustainable Development (UN CSD), CISDL chairs a Partnership Initiative, International Law for Sustainable Development that was launched in Johannesburg at the 2002 World Summit for Sustainable Development, to build knowledge, analysis and capacity about international law on sustainable development.

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Contact Information:

Ashfaq Khalfan
Acting Chair of the CISDL Board of Governors
email: akhalfan@cisdl.org
Centre for International Sustainable Development Law
Faculty of Law, McGill University
3644 Peel St
Montreal, Quebec
H3A 1W9 Canada
Tel: 001 514 398 8918

Marie-Claire Cordonier Segger
CISDL *Pro Bono* Director
email: mcsegger@cisdl.org
Centre for International Sustainable Development Law
Faculty of Law, McGill University
3644 Peel St.
Montreal, Quebec
H3A 1W9 Canada
Tel: 001 514 398 8918