



# **SUSTAINABLE DEVELOPMENT LAW ON CLIMATE CHANGE**

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**10  
REDUCING EMISSIONS FROM  
DEFORESTATION AND FOREST  
DEGRADATION, FOREST BIODIVERSITY  
CONSERVATION AND RESPECT FOR  
HUMAN RIGHTS: MEXICO'S APPROACH**

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March, 2011



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### Published by:

International Development Law Organization and the Centre for International Sustainable development Law (CISDL).



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# **REDUCING EMISSIONS FROM DEFORESTATION AND FOREST DEGRADATION, FOREST BIODIVERSITY CONSERVATION AND RESPECT FOR HUMAN RIGHTS: MEXICO'S APPROACH**

Frederic Perron-Welch<sup>1</sup>

## **Introduction**

One of the most talked about measures for the mitigation of global greenhouse gas emissions in negotiations under the United Nations Framework Convention on Climate Change<sup>2</sup> (the Convention) is the reduction of emissions from deforestation and forest degradation in developing countries (REDD). REDD was first put forward as an agenda item at the 11<sup>th</sup> Conference of the Parties to the Convention (COP) in 2005 by Papua New Guinea and other developing countries. However, the idea of sustainable management, conservation and enhancement of sinks and reservoirs of greenhouse gases, including forests, dates back to the Rio Convention of 1992 where the United Nations Framework Convention on Climate Change was accomplished. Mexico has played an important role as an advocate for REDD by putting forward substantive ideas as to the nature of REDD and the considerations that must be addressed in any such mechanism.

Negotiations on REDD have gone on at a furious pace since COP 13 in 2007, driven by the Bali Action Plan.<sup>3</sup> The Bali Action Plan initiated a process for the "full, effective and sustained implementation of the Convention through long-term cooperative action."<sup>4</sup> Part of this process involves having Parties develop "policy approaches and positive incentives" for REDD and consider the role that "conservation, sustainable management of forests and enhancement of forest carbon stocks" (REDD+) could play.<sup>5</sup> The emphasis since Bali has been on how to elaborate reduce emissions from deforestation and forest degradation in developing countries in a manner which furthers conservation, the sustainable management of forests and enhances forest carbon stocks.

Decision 2 of COP 13 elaborated approaches to stimulate action on REDD+ 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

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

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

<sup>4</sup> *Ibid.* at Art. 1.

<sup>5</sup> *Ibid.* at Art. 1(b)(iii).

thus enhancing forest carbon stocks due to sustainable management of forests."<sup>6</sup> In addition to the negotiations, REDD pilot and demonstration activities are being implemented by a number of initiatives, including the World Bank's Forest Carbon Partnership Fund, and the UN REDD Programme, which focuses on integrating both environmental and socio-economic aspects into REDD.<sup>7</sup>

Advocates of a REDD+ mechanism argue that it would lead to more environmentally and socially positive outcomes than a scheme focused simply on the mitigation of CO<sub>2</sub> emissions by fencing off forests or developing carbon-offset plantations to benefit from generous REDD funding. The fear is that without an emphasis on conservation, sustainable management of forests and the enhancement of forest carbon stocks, a badly structured REDD mechanism could actually undermine the ongoing existence of the natural forests it aims 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.<sup>8</sup> A flawed definition could lead a massive loss of carbon, biodiversity, and ecosystem services because natural forests could be converted to tree or coffee plantations and a "forest" would remain standing only on paper.<sup>9</sup> An overriding focus on maximizing carbon yields (either through plantations or the intensive management of natural forests) could have a severe impact on forest structure and composition, with resulting negative impacts on biodiversity and ecological integrity.<sup>10</sup> Furthermore, the people who depend on the use of forests for their livelihoods need continued access to forests to survive both from a health and cultural perspective. Without question, a REDD framework that fails to take human rights into account will be an abject failure from a social and sustainable development perspective. The use of methods for conservation, sustainable management of forests and the enhancement of carbon stocks may be a way to bring about a more equitable form of CO<sub>2</sub> mitigation that could improve both the state of natural forests and the wellbeing of forest dependent peoples. This could be accomplished by partnering with indigenous and local peoples and compensating them for the use of their knowledge, traditional territories and skills with a robust REDD outcome as a result.

Several items mentioned in the second Decision of COP 13 are instructive when considering the potential scope and modalities of REDD+. The Preamble recognizes two important points: that REDD can "promote co-

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<sup>6</sup> Decision 2/CP.13, FCCC/CP/2007/6/Add.1, at Art. 3.

<sup>7</sup> 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).

<sup>8</sup> 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.

<sup>9</sup> Sasaki & Putz at 229.

<sup>10</sup> Putz F.E. & Redford K.H., "Dangers of Carbon-Based Conservation" (2009) 19 Global Environmental Change 400.

benefits and may complement the aims and objectives of other relevant international conventions and instruments” and that “the needs of local and indigenous communities should be addressed” when REDD actions are taken.<sup>11</sup> This statement suggests that cross-cutting synergies between conventions can be identified by looking into existing forest instruments that already provide co-benefits and address the needs of indigenous and local communities. Such an approach would enhance the REDD+ mechanism, fulfill the aims and objectives of other relevant international instruments on forests and help conserve natural forests while respecting human rights. Regardless, other conventions need to be acknowledged and abided by until a final REDD+ instrument explicitly overrides their provisions.<sup>12</sup>

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 (UNFF) process and the *Convention on Biological Diversity* (“CBD”).<sup>13</sup> Both the UNFF *Non-legally binding instrument on all types of forests* (NLBI) and the CBD will have an impact on how REDD+ operates. This is particularly so at the present while REDD+ is still in its voluntary phase. Until REDD+ has a solid footing in international law, any activities that pertain to the conservation and sustainable use of forest biodiversity are legally covered in over 190 countries by the provisions of the CBD and its COP declarations. Similarly, the use of genetically modified trees that uptake CO<sub>2</sub> at an increased rate may be impacted by the provisions of the Cartagena Protocol on Biosafety to the CBD. The manner in which the CBD and NLBI are pertinent will be discussed in the following section as well as the human rights obligations contained in the *Declaration on the Rights of Indigenous Peoples*.

## **REDD and existing conventions and instruments**

### **Convention on Biological Diversity**

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

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<sup>11</sup> UNFCCC Decision 2/CP.13 at Preamble.

<sup>12</sup> “In most cases, general international law does not, on the face of it, provide either for a specific authorization or a prohibition of the creation of special law on the same subject-matter. Thus, it remains a question of the interpretation of the relevant general law as well as the specific rule as to which it provides” (ILC, “Report of the Study Group on fragmentation of international law: difficulties arising from the diversification and expansion of international law”, A/CN.4/L.644 at p. 6). Treaty interpretation is guided by paragraphs 30 and 31 of the *Vienna Convention on the Law of Treaties*, 1155 U.N.T.S 331.

<sup>13</sup> UNFCCC Decision 2/CP.13 at Annex.

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

<sup>15</sup> *Ibid.* at Art. 6(b).

and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices.”<sup>16</sup> Parties are further expected to “adopt measures relating to the use of biological resources to avoid or minimize adverse impacts on biological diversity”<sup>17</sup> and “protect and encourage customary use of biological resources in accordance with traditional cultural practices that are compatible with conservation or sustainable use requirements.”<sup>18</sup>

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 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,<sup>19</sup> Protected Areas<sup>20</sup> and Incentive Measures<sup>21</sup> a REDD mechanism should compliment rather than detract from these efforts.

## **Non-legally binding instrument on all types of forests**

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.<sup>22</sup> 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.<sup>23</sup>

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 forest decision-making processes that affect them.<sup>24</sup> 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

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<sup>16</sup> *Ibid.* at Art. 8(j).

<sup>17</sup> *Ibid.* at Art. 10(b).

<sup>18</sup> *Ibid.* at Art. 10(c).

<sup>19</sup> CBD COP Decision VI/22.

<sup>20</sup> CBD COP Decision VII/28.

<sup>21</sup> CBD COP Decision V/15.

<sup>22</sup> 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.

<sup>23</sup> *Ibid.* at Art. 1.

<sup>24</sup> *Ibid.* at Art. 2(c).

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)<sup>25</sup> all speak toward a particular conception of the role that forests play on our shared planet.

## **Declaration on the Rights of Indigenous Peoples**

The United Nations Declaration on the Rights of Indigenous Peoples (the Declaration) has numerous provisions relevant to REDD and large scale carbon offsets. Reference to the Declaration was made in early drafts of the negotiating text on REDD 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). The four dissenting states have now acceded to the Declaration and two more States that abstained from voting (Colombia and Samoa) have done so as well. Despite some dissent over its legal nature, the Declaration does form a part of the *corpus* of international human rights law and has obtained almost universal support. The Declaration's tenets are recognized in national laws around the world and states act accordingly. Given state practice and clear *opinio juris*, some principles do represent the state of customary international law despite the Declaration not being a legally binding instrument.<sup>26</sup>

The Declaration should be used as a guidepost to develop REDD+ in a way that is respectful of human rights of forest dependent indigenous and local communities. It is a particularly relevant document given that REDD's original goal was to reduce deforestation and forest degradation in *developing* countries, where there exists persistent and systematic marginalization of indigenous peoples. An equitable REDD+ mechanism must take into consideration the human rights of indigenous people as well as the duties of States toward them.

For example, 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."<sup>27</sup> 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.

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<sup>25</sup> *Ibid.* at Art. 5.

<sup>26</sup> Un Special Rapporteur's report on UNDRIP

<sup>27</sup> United Nations Declaration on the Rights of Indigenous Peoples, A/61/L.67/Annex, Art. 8(2)(b).

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.”<sup>28</sup> Given the urgency behind negotiations on a REDD mechanism and the large amount of funding expected for projects (UN-REDD estimates \$30B per year)<sup>29</sup>, 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...”<sup>30</sup> 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 measures that may affect them.”<sup>31</sup> 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...”<sup>32</sup> 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.”<sup>33</sup> A mechanism that promotes the conversion of forest lands 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.<sup>34</sup> 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.

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<sup>28</sup> *Ibid.* at Art. 10.

<sup>29</sup> See <http://www.un-redd.org/AboutREDD/tabid/582/language/en-US/Default.aspx>

<sup>30</sup> *Ibid.* at Art. 18.

<sup>31</sup> *Ibid.* at Art. 19.

<sup>32</sup> *Ibid.* at Art. 26(2).

<sup>33</sup> *Ibid.* at Art. 29(1).

<sup>34</sup> *Ibid.* at Art. 32(2).



## Mexico's Stance in International Negotiations on REDD

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 in Mexico.<sup>35</sup> 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+ principles rather than one strictly focused on emissions mitigation. This position is clearly indicated in Mexico's past submissions to the UNFCCC on the subject.<sup>36</sup>

In discussing Para. 1(b)(iii) of the Bali Action Plan on REDD and REDD-Plus in its 2009 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."<sup>37</sup> This explicitly ties the REDD mechanism to social and environmental goals through the promise of sustainable development for forest users and inhabitants rather than leaving them 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.<sup>38</sup> 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.

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<sup>35</sup> European Tropical Forest Research Network, "Forests and Climate Change: adaptation and mitigation", ETFRN News Issue No. 50, November 2009 at 35.

<sup>36</sup> 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

<sup>37</sup> Ibid. at p. 3, para. 2.

<sup>38</sup> Ibid. at p. 3, para. 3.

In a contemporaneous submission to the Subsidiary Body for Scientific and Technological Advice<sup>39</sup> (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.”<sup>40</sup> 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 goes on to provide guidance on matters that should be included in any REDD mechanism. Firstly, “REDD activities carried out in indigenous peoples and/or local communities’ territories should obtain prior informed consent according to national circumstances and regulatory frameworks.”<sup>41</sup> The language is not quite as strong as that contained in the Declaration (free prior informed consent) but is consistent with the spirit of consultation; that indigenous peoples are consulted before having their territorial rights affected. The submission is supported by two later statements, that “REDD initiatives should consider land property rights of indigenous and local communities”<sup>42</sup> 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.”<sup>43</sup>

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.”<sup>44</sup> 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 negotiations<sup>45</sup> and that indigenous peoples and local communities should be provided with appropriate assistance in the analysis of the opportunity costs of REDD.<sup>46</sup>

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<sup>39</sup> 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.

<sup>40</sup> Ibid. at p. 5.

<sup>41</sup> Ibid. at para. 1.

<sup>42</sup> Ibid. at para. 9.

<sup>43</sup> Ibid. at para. 10.

<sup>44</sup> Ibid. at para. 2.

<sup>45</sup> Ibid. at para. 6.

<sup>46</sup> Ibid. at para. 8.

Thirdly, ILC can be engaged in REDD monitoring and the measurement of carbon stocks, increasing their sense of ownership and understanding of the impact of land use change, which supports positive REDD outcomes.<sup>47</sup> Furthermore, it empowers indigenous and local communities that would otherwise be left out of REDD activities, and promotes the use and recognition of traditional knowledge and the sustainable livelihoods of forest dependant peoples by recognizing the fact that they are an integral part of forest ecosystems. This is the 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."<sup>48</sup> 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.<sup>49</sup> 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.<sup>50</sup>

This 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 political systems that are corrupt, inefficient, inequitable and unfair, which is a significant contributor to 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 change their current land use practices through REDD benefit sharing.

## **Mexico's Domestic Approach to REDD**

The Mexican Government acknowledges its role 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 ecosystems and ecosystem services, including REDD.<sup>51</sup> 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 CO<sub>2</sub> 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

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<sup>47</sup> Ibid. at para. 3.

<sup>48</sup> Ibid. at para. 7.

<sup>49</sup> Ibid. at para. 4.

<sup>50</sup> Ibid. at para. 5.

<sup>51</sup> Programa Especial de Cambio Climático 2009-2012 at vii.

short and medium term.<sup>52</sup> 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.<sup>53</sup> This objective is supported by nine goals: to manage 2.95 million hectares of forests sustainably; add 2.5 million hectares of forest into wildlife conservation units; add 2.175 million hectares of forest to the payment for ecosystem services scheme; convert 750,000 hectares of forests into natural protected areas; undertake works on 200,000 hectares for the conservation and restoration of forested lands; undertake phytosanitary treatment of 200,000 hectares of forest zones; undertake phytosanitary diagnosis of 3 million hectares of forest zones between 2008-2012; elaborate and publish a National Strategy for Forest Phytosanitary Treatment; and formulate and implement 8 state programmes to combat desertification and drought between 2008-2012.<sup>54</sup> 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.<sup>55</sup> This objective is supported by five goals: to establish 170,000 hectares of commercial forest plantations; undertake the simple reforestation of an area of 1.117 million hectares; undertake reforestation with soil restoration over an area of 418,130 hectares from 2008-2012; restore 170,000 hectares of forest ecosystems through the Program for Environmental Compensation (funded by payments for land use change) from 2008-2012; and to put at least 0.50 MtCO<sub>2</sub>e of credits from the forest sector on international carbon markets between 2008-2012 (conditional on multilateral negotiations on REDD).<sup>56</sup> 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.

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 uses<sup>57</sup> by designing and implementing a scheme of incentives to reduce emissions from deforestation and forest degradation in the period from 2008-2012.<sup>58</sup> The second objective aims to reduce the impact of forest fires caused by

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<sup>52</sup> *Ibid.* at 42.

<sup>53</sup> *Ibid.* at Objetivo 2.3.6.

<sup>54</sup> *Ibid.* at Metas M.64 – M.72.

<sup>55</sup> *Ibid.* at Objetivo 2.3.7.

<sup>56</sup> *Ibid.* at Metas M.73 – M.77.

<sup>57</sup> *Ibid.* at Objetivo 2.3.8.

<sup>58</sup> *Ibid.* at Meta M.78.

agricultural and forestry burns<sup>59</sup> by limiting the average area affected per forest fire so that it does not exceed 30 ha per event.<sup>60</sup> 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 MtCO<sub>2</sub>e of emissions from 2008 – 2012 and 13.44 MtCO<sub>2</sub>e 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.<sup>61</sup>

The objectives and goals set by the PECC will be addressed through the framework of Mexico's *Ley General de Desarrollo Forestal Sustentable*<sup>62</sup> (*Ley General*) which was passed in 2003. Relevant objectives of the *Ley General* are: to contribute to the country's social, economic, ecological and environmental development through the sustainable management of forest resources and watersheds;<sup>63</sup> 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;<sup>64</sup> to develop environmental goods and services and protect, maintain and augment the biodiversity afforded by forest resources;<sup>65</sup> 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.<sup>66</sup> 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 regulation and management of

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<sup>59</sup> *Ibid.* at Objetivo 2.3.9.

<sup>60</sup> *Ibid.* at Meta M.79.

<sup>61</sup> *Ibid.* at xi (see Table).

<sup>62</sup> Or General Law on Sustainable Forest Development

<sup>63</sup> *Ley General de Desarrollo Forestal Sustentable* at art. 2(I).

<sup>64</sup> *Ibid.* at art. 2(II).

<sup>65</sup> *Ibid.* at art. 2(III).

<sup>66</sup> *Ibid.* at art. 2(V).

forests;<sup>67</sup> strengthening the contribution of forest activities to the conservation of the environment and the preservation of ecological equilibrium;<sup>68</sup> rehabilitating and developing forests in deforested areas to conserve soils and waters as well as to energize rural development;<sup>69</sup> 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;<sup>70</sup> enabling compatibility between pastoral and agricultural activities in forested and deforested areas;<sup>71</sup> regulating the prevention, combat and control of forest fires, as well as forest pests and diseases;<sup>72</sup> promoting and regulating plantations with commercial ends;<sup>73</sup> supporting the organization and development of forest owners and improving their silvicultural practices;<sup>74</sup> regulating the promotion of activities which protect biodiversity of managed forests through more sustainable silvicultural practices;<sup>75</sup> promoting actions with conservation and soil restoration purposes;<sup>76</sup> 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;<sup>77</sup> promoting training for the sustainable management of forest resources;<sup>78</sup> developing and strengthening institutional capacity through a scheme of decentralization, deconcentration and social participation;<sup>79</sup> guaranteeing the participation of society, including indigenous peoples and communities, in the application, assessment and monitoring of forest policy;<sup>80</sup> promoting economic instruments to promote forest development;<sup>81</sup> and promoting the development of social and community forest enterprises by indigenous peoples and communities.<sup>82</sup> 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 underemphasized. 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.<sup>83</sup> 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.

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<sup>67</sup> *Ibid.* at art. 3(II).

<sup>68</sup> *Ibid.* at art. 3(IV).

<sup>69</sup> *Ibid.* at art. 3(VIII).

<sup>70</sup> *Ibid.* at art. 3(XI).

<sup>71</sup> *Ibid.* at art. 3(XII).

<sup>72</sup> *Ibid.* at art. 3(XV).

<sup>73</sup> *Ibid.* at art. 3(XVI).

<sup>74</sup> *Ibid.* at art. 3(XX).

<sup>75</sup> *Ibid.* at Art. 3(XXI).

<sup>76</sup> *Ibid.* at Art. 3(XXII).

<sup>77</sup> *Ibid.* at Art. 3(XXIII).

<sup>78</sup> *Ibid.* at Art. 3(XXIV).

<sup>79</sup> *Ibid.* at Art. 3(XXV).

<sup>80</sup> *Ibid.* at Art. 3(XIX).

<sup>81</sup> *Ibid.* at Art. 3(XXX).

<sup>82</sup> *Ibid.* at Art. 3(XXXI).

<sup>83</sup> *Ibid.* at Art. 4(I) and (II).

This is explicitly laid out in the Ley General under the section that regulates the Política Nacional en Materia Forestal.<sup>84</sup> 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 priority.<sup>85</sup> 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;<sup>86</sup> 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;<sup>87</sup> 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;<sup>88</sup> 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;<sup>89</sup> 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;<sup>90</sup> and strengthening a forestry culture that guarantees the care, preservation and sustainable exploitation of forest resources and their environmental goods and services.<sup>91</sup>

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;<sup>92</sup> the participation of social and private organizations, and public institutions in the conservation, protection, restoration and exploitation of forest ecosystems and their resources;<sup>93</sup> 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.<sup>94</sup>

Forest policy on forestry for environmental and plantation purposes is also subject to obligatory criteria, including: the health and vitality of forest ecosystems;<sup>95</sup> the sustainable use of forest ecosystems and the

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<sup>84</sup> National Policy on Forest Matters. Title Three of the Ley General de Desarrollo Forestal Sostenible.

<sup>85</sup> Ley General de Desarrollo Forestal Sostenible, Art. 29.

<sup>86</sup> *Ibid.* at Art. 30(I).

<sup>87</sup> *Ibid.* at Art. 30(II).

<sup>88</sup> *Ibid.* at Art. 30(V).

<sup>89</sup> *Ibid.* at Art. 30(VI).

<sup>90</sup> *Ibid.* at Art. 30(VII).

<sup>91</sup> *Ibid.* at Art. 30(IX).

<sup>92</sup> *Ibid.* at Art. 32(I).

<sup>93</sup> *Ibid.* at Art. 32(IV).

<sup>94</sup> *Ibid.* at Art. 32(VI).

<sup>95</sup> *Ibid.* at Art. 33(II).

establishment of commercial forest plantations;<sup>96</sup> the stabilization of the use of forest land through actions which prevent change in use, promoting permanently forested areas;<sup>97</sup> the protection, conservation, restoration and exploitation of forest resources with the goal of avoiding erosion or soil degradation;<sup>98</sup> 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;<sup>99</sup> 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;<sup>100</sup> the afforestation of deforested land to increase the forest frontier;<sup>101</sup> and the use of species compatible with native ones and with the persistence of forest ecosystems.<sup>102</sup>

Lastly, the *Ley General* requires the Department of the Environment and Natural Resources (SEMARNAT) to 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.<sup>103</sup> 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.

## 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. The primary concern from many quarters is to ensure that a REDD mechanism contributes - rather than detracts - from 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 supportive and appropriate REDD+ 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

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<sup>96</sup> *Ibid.* at Art. 33(III).

<sup>97</sup> *Ibid.* at Art. 34(IV).

<sup>98</sup> *Ibid.* at Art. 34(V).

<sup>99</sup> *Ibid.* at Art. 34(VI).

<sup>100</sup> *Ibid.* at Art. 34(X).

<sup>101</sup> *Ibid.* at Art. 34(XIII).

<sup>102</sup> *Ibid.* at Art. 34(XIV).

<sup>103</sup> *Ibid.* at Art. 133.



account. The first aspect of REDD+ – 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+, the sustainable management of forests, is addressed by the United Nations Forum on Forests' Non-Legally Binding Instrument on All Types of Forests and can be significantly informed by that document. The instrument is the result of over 15 years of negotiations (the Rio Forest Principles of 1992 being the previous attempt at a forest instrument) 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 NLBI 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.

The primary threat to forests is rapacious use and destruction combined with climate change caused by the burning of fossil fuels. A REDD mechanism that enables the large-scale creation of forest offsets for the convenience of the developed world may simply perpetuate the ongoing marginalization and disempowerment of indigenous communities. A heavy handed approach to reducing emissions from deforestation and forest degradation actually has the potential to compromise the conservation and sustainable use of natural forests, and destroy the existing bio-cultural relationships of indigenous peoples and their environments that may constitute conservation and sustainable use without any financial incentive – simply as a way of life.

Given the numerous pre-existing international instruments in the field of conservation, sustainable forest management and indigenous rights, a REDD mechanism that is developed ignorant of these commitments would run counter to the language and spirit of decades of negotiations on forests and the rights of indigenous peoples relating to their traditional territories. REDD negotiators will need to overcome serious obstacles to duly take into account the rights of peoples under human rights law and the obligations of States in regards to the conservation and sustainable use of forests. These legal hurdles are daunting but will need to be addressed if REDD is to be successful. It will be important to analyse the decisions reached at COP 16/CMP 6 in Cancun to determine whether a path for the successful negotiation of an effective agreement on REDD has been established.

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