

Title: Does ODA Grow on Trees? A Legal Analysis of REDD-ODA Finance

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**Abstract:**

*At COP16 REDD was accepted by State Parties to the UNFCCC as a new element of international environmental law. Throughout 2011 and the following years decisions will be made to operationalize REDD. One of the key decisions that will be made is how REDD will be financed. With various reports pointing to a “financing gap” in a purely markets approach, many authors advocate for public funds to be used for REDD.*

*This paper examines how public finance, specifically ODA, can/ should play a role in financing REDD. More specially, it looks at the possible synergies that can be created between REDD finance and development. It looks at selected donor country laws and policies surrounding ODA and explores the policy arguments around its use. Lastly, it puts forth a set of 5 building blocks that should be adopted by AWG-LCA in a decision on REDD finance.*

## ESSAY

### DOES ODA GROW ON TREES? A LEGAL ANALYSIS OF REDD-ODA FINANCE

SEAN STEPHENSON\*

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## 1. Introduction

Forests cover roughly one third of the earth's total land area.<sup>1</sup> Tropical forests, which are primarily located in developing countries, have lost over 500 million hectares of forest cover since 1961 and they are expected to be lost at a rate of 5% per decade over the next 30 to 50 years.<sup>2</sup> Deforestation has become commonplace in most of the developing world as it responds to the demands of various drivers such as agriculture, product for export, and the needs of local populations. This ever-increasing rate of deforestation has concurrently become a driver of climate change. As trees absorb and store terrestrial carbon, the destruction of forests releases those stored gases into the

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<sup>1</sup> "Forest Cover and Distribution" IUCN (April 20, 2010) online: IUCN [http://www.iucn.org/about/work/programmes/forest/fp\\_resources/fp\\_resources\\_forest\\_cover.cfm](http://www.iucn.org/about/work/programmes/forest/fp_resources/fp_resources_forest_cover.cfm).

<sup>2</sup> "Forest Loss" United Nations System-Wide Earth Watch (April 20, 2010), online: UNEP <http://earthwatch.unep.net/emergingissues/forests/forestloss.php>; Sara Sherr, Andy White, David Kaimowitz, 'A New Agenda for Forest Conservation and Poverty Reduction: Making Forest Markets Work for Low-Income Producers' (2003) (CIFOR: Bogor Indonesia) 1; KM Chomitz, P Buys, G De Luca, TS Thomas and S Wertz-Kanounnikoff 'At Loggerheads? Agricultural expansion, poverty reduction and environment in the tropical forests' (2006) A World Bank Policy Research Report Review Draft 1.

atmosphere, contributing a major portion of global greenhouse gas emissions.<sup>3</sup> The Stern Review noted this when it stated that deforestation was estimated to increase global greenhouse gas emissions by 17%.<sup>4</sup> However, the Review also noted that avoided deforestation is one of the most economical ways to reduce climate change.<sup>5</sup> This was elaborated in the follow-up to the Stern Review, the 2008 Eliasch Review, which stated that the economic benefits of halving avoided deforestation may amount to \$3.7 trillion in net savings over the long term.<sup>6</sup>

Forests are also linked to poverty. The World Bank estimates that 350 million people are highly dependent on forests, 60 million indigenous people are solely dependent on forests, and more generally, that 1.2 billion people are dependent on forests for their livelihoods.<sup>7</sup> The forest-poverty link has been generally affirmed through legal instruments such as the OECD's 2006 *Declaration on Integrating Climate Change Adaptation into Development Cooperation*, which states "...the poor are particularly dependant on natural resources for their livelihoods."<sup>8</sup> Moreover, the forest-poverty link has also been evidenced in the World Bank's and the Asian Development Bank's forestry strategies<sup>9</sup> as well as in a wealth of academic literature on the subject.<sup>10</sup> Angelsen and Wunder suggest that forests may benefit the poor in five dimensions: as beneficiaries of forests, through forest products and services, in their livelihood strategy, through resource management, and lastly, via high and low rent products.<sup>11</sup> Thus, it can be concluded that the forest-poverty relationship is both material and direct.

In response to the deforestation phenomenon, Costa Rica and Papua New Guinea introduced the concept of Reducing Emissions from Deforestation into the international

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<sup>3</sup> Terrestrial Carbon Group and UN-REDD, 'Background analysis of REDD Regulatory Framework' (2009) 8.

<sup>4</sup> UK, Stern Review on the Economics of Climate Change, Executive Summary (Her Majesty Stationary Office, 2006) 25.

<sup>5</sup> Ibid.

<sup>6</sup> UK, The Eliasch Review, *Climate Change: Financing Global Forests* by Jonah Eliasch (London: Her Majesty's Stationary Office, 2008) [Eliasch Review] 77. This is a net present value estimate based on the global savings from reduced climate change minus the involved costs.

<sup>7</sup> World Bank, *Sustaining Forests: A Development Strategy* (World Bank: Washington, 2004) 12. Although Angelsen A. and Wunder state that this figure is shaky. See Arild Angelsen and Sven Wunder, 'Exploring the Forest-Poverty Link: Key Concepts, Issues, and Research Implications' (2003) Occasional Paper No 40 (CIFOR: Bogor Indonesia).

<sup>8</sup> OECD, *Declaration on Integrating Climate Change Adaptation into Development*, Adopted by the Development and Environment Ministers of OECD Member Countries (Paris, 2006) para 6.

<sup>9</sup> World Bank, n 7; Asian Development Bank, *Forest Policy Working Paper* (June, 2003) Online: [http://www.adb.org/Documents/Reports/Forest\\_Policy/working\\_paper\\_fp.pdf](http://www.adb.org/Documents/Reports/Forest_Policy/working_paper_fp.pdf). The World Bank's forest policy and operational policy are specifically on poverty reduction and the protection of global forests. Similarly the Asian Development notes the forest-poverty link by stating, in the first paragraph of their policy document "forests have an important role in helping to sustain their basic needs and to maintain their quality of life".

<sup>10</sup> See e.g. Arild Angelsen and Sven Wunder, n 7; A Pfaff, S Kerr, L Lipper, R Cavatassi, B Davis, J Hendy, and GA Sanchez-Azofeifa 'Will buying tropical forest carbon benefit the poor? Evidence from Costa Rica' (2007) 28 *Land Use Policy* 3; M Grieg-Gran, I Porras, and S Wunder 'How can market mechanisms for forest environmental services help the poor?' (2005) World Development, [www.povertyenvironment.net/?q=how\\_can\\_market\\_mechanisms\\_for\\_forest\\_environmental\\_services\\_help\\_the\\_poor](http://www.povertyenvironment.net/?q=how_can_market_mechanisms_for_forest_environmental_services_help_the_poor).

<sup>11</sup> Arild Angelsen and Sven Wunder, n 10.

climate change debates in 2005.<sup>12</sup> Over the course of these debates this concept evolved into its current form: Reducing Emissions for Deforestation and Forest Degradation (REDD+),<sup>13</sup> which was adopted at the United Nations Framework Convention on Climate Change (UNFCCC) Conference of the Parties (COP) 16 in Cancun as a new element of international environmental law.<sup>14</sup> At its heart, REDD is a financial mechanism that provides incentives to developing countries for protecting their forests from deforestation and degradation. Currently, REDD is being operationalized through various decisions being made throughout 2011 at both the international and national levels

Hence, REDD has the potential to affect both poverty and climate change. First, as a mitigation activity, REDD will help reduce emissions. Secondly, as REDD is implemented, both forests and those who are dependent on them will be affected.

One of the key decisions to be made this year that will affect REDD's ability to fight poverty and to promote development is the decision on the REDD financing mechanism.<sup>15</sup> Until recently, the debate on REDD finance has been focused on whether a market mechanism or a fund would be better suited to address the problem of deforestation. However, it has now being widely acknowledged that both of these options have their own respective shortcomings. A market based mechanism would not generate the funds necessary for the preparation and development of a global REDD market, and it would potentially exclude States with weak governance structures<sup>16</sup> while a fund approach would not be sustainable on a long-term basis.<sup>17</sup> Faced with this dichotomy, a third finance option has been proposed.<sup>18</sup> This approach recognizes the urgency for action on mitigating climate change and advocates for a three-phased

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<sup>12</sup> See *Report of the Conference of the Parties on its eleventh session, held at Montreal from 28 November to 10 December 2005*, CP, 2005, FCCC/CP/2005/MISC.1.

<sup>13</sup> For the purposes of this essay REDD+ will simply be referenced as REDD.

<sup>14</sup> Report of the Conference of the Parties on its sixteenth session, held in Cancun from 29 November to 10 December 2010 Addendum Part Two: Action taken by the Conference of the Parties at its sixteenth session, UNFCCC 1/CP.16 *The Cancun Agreements: Outcome of the work of the Ad Hoc Working Group on Long-term Cooperative Action under the Convention* FCCC/CP/2010/7/Add.1 [Cancun Agreement] para 73.

<sup>15</sup> Cancun Agreement (n 14) 77; UNFCCC, *The Cancun Agreements, Mitigation: Reduction of Emissions Through Stronger Actions on Forests*, Online: <http://cancun.unfccc.int/mitigation/reduction-of-emissions-through-stronger-actions-on-forests/#c207>.

<sup>16</sup> Eliasch Review (n 6) 122; *Cost of implementing methodologies and monitoring systems relating to estimates of emissions from deforestation and forest degradation, the assessment of carbon stocks and greenhouse gas emissions from changes in forest cover, and the enhancement of forest carbon stocks*, Technical Paper, (2009) UNFCCC, FCCC/TP/2009/1 para 43; Policy Department Economic and Scientific Policy, *International Forest Policy: Integrated Climate and Forestry Policy Options. The Implications of Carbon Financing for Pro-poor Community Forestry: How Do We Design Forest Policy Tools to Jointly Address Climate Change, Environmental and Development Goals?*; D David Brown and Leo Peskett (European Parliament: 2008) 29; Michael Dutschke and Sheila Wertz-Kanounnikof et al, *Financing REDD: Linking country needs and financing sources, brief info* (CIFOR: Bogor Indonesia) 1; Michael Dutschke and Sheila Wertz-Kanounnikof et al, 'How do we match country needs with financing sources?' in Arild Angelseat (ed) *Moving Ahead with REDD: Issues, Options and Implications* (CIFOR, Bogor Indonesia 2008) 47.

<sup>17</sup> Eliasch Review (n 6) 222; See also Arild Angelsen, Sandra Brown, Cyril Loisel et al, *Reducing Emissions from Deforestation and Forest Degradation (REDD): An Options Assessment Report* (2009) [Options Assessment] 3.

<sup>18</sup> Ibid.

approach moving from a publicly financed fund to a market mechanism as REDD develops over time. This approach appears the most likely option for the operationalization of a REDD financing mechanism.

As a result of this third proposal, there is a growing body of state practice and academic literature that supports financing REDD with Official Development Assistance (ODA).<sup>19</sup> On its face, this proposal offers a potential win-win situation. Developed countries could increase their ODA spending and potentially fulfill their 0.7% ODA commitments while concurrently fulfilling their climate change obligations. However, this proposal is potentially dangerous for development aid. Financing REDD with current ODA funds without knowing how REDD will be operationalized risks diverting scarce ODA resources away from key goals such as poverty reduction. In this respect, capacity building projects such as institutional development must be distinguished from continuous REDD funding. The former is something traditionally financed by ODA and recognized in article 76 of the Cancun Agreements, while the latter is a potentially new and contentious use of ODA.<sup>20</sup> Financing REDD with ODA casts some doubt on whether climate mitigation can include development benefits such as poverty reduction.<sup>21</sup> In this regard, strong arguments for a co-benefits approach to REDD finance, and additionality present possible alternatives which promote a more comprehensive view on the possible scope of REDD benefits. The co-benefits approach, which would also uses ODA as a source of funding would allow developed States to fulfill their climate change obligations while progressing towards their 0.7% of GDP commitment while at the same time providing development benefits to developing countries. Thus, such an approach would create a positive synergy between REDD and development and would get around the short-comings of other policies. This paper reviews the current REDD finance options, examines the legal authority for ODA-financed mitigation activities (looking at select donors as well as the international legal system), identifies reasons for and against REDD-ODA finance, and concludes by supporting a phased funding approach with ODA and by describing the building blocks for an international legal framework on REDD finance.

## 2. REDD Finance Options

The Cancun Agreements adopted REDD as an element of the international climate change framework and requested that the Ad Hoc Working Group on Long Term Cooperative Action (AWG-LCA) to explore REDD financing options.<sup>22</sup> The AWG-LCA is scheduled to report back to COP17 in December, 2011, with a decision on the

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<sup>19</sup> According to OCED Development Assistance Committee (DAC) ODA is defined as the “flows of official financing administered with the promotion of economic development and welfare of developing countries.” OECD, Glossary of Statistical Terms, Online: <http://stats.oecd.org/glossary/detail.asp?ID=6043>.

<sup>20</sup> Cancun Agreement (n 14) art 76.

<sup>21</sup> Here, the term “development” is being used in broad sense as defined by the UNDP as creating an environment in which people can develop their full potential and lead productive, creative lives in accord with their needs and interests. Online <http://hdr.undp.org/en/humandev/>.

<sup>22</sup> Cancun Agreement (n 14) 77.

REDD financing mechanism.<sup>23</sup> The following will review the possible REDD financial mechanisms.

## 2.1 Fund v. Market Approach

Until 2009, the debate surrounding REDD finance revolved around implementing a market or a fund approach. A market approach would allow for developing States to take voluntary actions to reduce their deforestation rates or to maintain carbon stocks on the basis of a pre-determined national or sub-national baseline. Emission reductions would generate carbon credits that could be sold at a market-determined price. This could later be linked to a post-Kyoto carbon market.<sup>24</sup> In contrast, a fund approach to REDD finance would rely on voluntary contributions from developed countries in the form of ODA or other funds as well as funds from international institutions.<sup>25</sup> Here, it should be noted that the fund approach would only be temporary until a market for these carbon credits could be developed. This approach could be modeled on past environmental funds such as the fund created under the Montreal Protocol.<sup>26</sup> However, over the past two years there has been a growing movement in favor of a hybrid approach between the two that is phased in over time. This is, in large part, because of the stark reality that private investments will not generate the funds needed to cover the estimated start up costs of REDD, while solely a fund approach would be unsustainable. This apprehension is illustrated by the 2008 Eliasch Review.

The Eliasch Review estimates that the annual costs of halving emissions in the global forestry sector range between \$17 to \$33 billion USD up until 2030.<sup>27</sup> The review divides the costs of mitigation activities into two categories according to the timeframe in which they will need to be incurred. The first category includes the up-front capacity building costs such as building, measuring, and monitoring capacity, as well as governance capacity to enable forest nations to adopt and implement effective policies to reduce forest emissions. The second category includes the ongoing costs of emissions reductions such as the opportunity cost and income forfeited and the implementation costs of REDD.<sup>28</sup> The review concludes that privately sourced finance would still fall \$11 to \$19 billion USD short of the required funding each year to halve deforestation emissions by 2020 even if REDD were initially integrated into carbon markets.<sup>29</sup> This

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<sup>23</sup> Ibid.

<sup>24</sup> Ned Helme, Diana Movius, Matt Ogonowski and Jake Schmidt, 'The Dual Markets Approach to Reducing Emissions From Deforestation and Degradation in Developing Countries' in Christian Egenhofer (ed) *Beyond Bali - Strategic Issues for the Post-2012 Climate Change Regime* (Belgium Centre for European Policy Studies, Brussels 2008) [Dual Markets Approach] 107; Lee Godden, Anne Kallies, Rodney J Keenan and Jacqueline Peel, 'Reducing emissions from deforestation and forest degradation in developing countries (REDD): implementation issues' (2010) 36.1 Monash University Law Review, Online: Legal Trac.

<sup>25</sup> Ibid. Dual Markets Approach (n 24) 108.

<sup>26</sup> *Integrating Development into Climate Change: A Framework Policy Discussion Paper on Key Elements for the Development of the Post-2012 Global Climate Policy Regime* (2007) South Centre Special Policy Discussion Paper 22.

<sup>27</sup> Eliasch Review (n 6) 69.

<sup>28</sup> Ibid, 69.

<sup>29</sup> Ibid, 222; Also see Options Assessment (n 17) 3. This is the Norwegian phased approach which reiterates this point.

has led many authors to conclude that even if a market approach would be preferable, public finance will be needed for at least the preliminary stages of REDD activities.<sup>30</sup> Further, the market approach raises concerns such as whether private investments will flow to areas of weak governance, namely Sub-Saharan African States, where a substantial amount of deforestation is occurring.<sup>31</sup>

## 2.2 An ODA Supported Hybrid Approach

Faced with this reality and on-going debate between the differences of the fund and market approaches Norway proposed a hybrid-phased approach to REDD financing in 2009.<sup>32</sup> This approach bridges the fund-market dichotomy while responding to the market-based financing gap. The hybrid approach consists of a three-staged transition for REDD finance from a fund based approach to a market mechanism. In the first phase, developed countries would make voluntary bilateral or multilateral contributions to REDD. These ad hoc contributions would simply respond to the urgency in which climate mitigation actions are needed. It would provide quick start financing for REDD projects to get up and running as soon as possible. In this respect, the UK has given 50 million pounds to the Congo Basin Forest, Norway has pledged \$2.5 billion over five years through its Climate Change and Forestry Mechanism, Australia has pledged \$75 million, and Germany has committed to \$800 million over four years and a further \$500 million a year after 2013 to protect forests.<sup>33</sup> The second phase would establish a fund based instrument creating a predictable stream of REDD financing for developing countries. As noted above, some of this funding is likely to come in the form of ODA and would be in addition to the \$500 million a year averaged over 2001 to 2006 that was put into the forestry sector.<sup>34</sup> However, the Norwegian proposal specifically states that any ODA funding for REDD should be additional to the current levels of ODA.<sup>35</sup> Lastly, in the third phase, a transition would be made from a global fund into a market-based mechanism.<sup>36</sup> As stated in this proposal this market transition should be made as soon as it is feasible, limiting the amount of ODA funds given to REDD.<sup>37</sup> As a result of the financing gap, the hybrid-phased approach seems most likely to be chosen as the financing mechanism for the operationalization of REDD.

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<sup>30</sup> Eliasch Review (n 6) 122; Cost of implementing methodologies and monitoring systems relating to estimates of emissions from deforestation and forest degradation, the assessment of carbon stocks and greenhouse gas emissions from changes in forest cover, and the enhancement of forest carbon stocks at para 46; Michael Dutschke and Sheila Wertz-Kanounniko et al (n 16) 5; Michael Dutschke and Sheila Wertz-Kanounnikof et al. *Moving Ahead with REDD* (n 16) 47; David Brown, Frances Seymour and Leo Peskett, 'How do we achieve REDD co-benefits and avoid doing harm?' in Arild Angelseat (ed) *Moving Ahead with REDD: Issues, Options and Implications* (CIFOR, Bogor Indonesia 2008) 110.

<sup>31</sup> Michael Dutschke and Sheila Wertz-Kanounniko et al (n 16) 5.

<sup>32</sup> Options Assessment (n 17).

<sup>33</sup> Eliasch Review (n 6) 223.

<sup>34</sup> OECD, "Measuring Aid to Forestry" Online: <http://www.oecd.org/dataoecd/53/10/41699327.pdf>.

<sup>35</sup> Options Assessment (n 17) 5.

<sup>36</sup> Ibid, 5-6.

<sup>37</sup> Eliasch report (n 6) 222; Michael Dutschke and Sheila Wertz-Kanounnikof et al, 'How do we match country needs with financing sources?' (n 16) 47.

### 3. ODA Law and Policy

As a result of the strong call for ODA as a REDD financing instrument, it is pertinent to look at the law and policy relating to ODA. The international and domestic law and policy frameworks relating to ODA dictate how ODA can be spent, and prioritizes development goals. Hence, for REDD ODA finance to move beyond capacity building projects, or into the second category of ongoing financing as mentioned in the Eliash Report, REDD ODA spending must qualify as ODA within the domestic and international ODA law and policy frameworks. This section will review the law and policy on ODA of a selected group of donors, namely, the U.K., Canada, the U.S., Norway and Germany as well as the international legal framework.

#### 3.1 Domestic Law and Policy

The UK, Canada, and the US all have ODA legislation while in other countries ODA is governed solely by policy. In the countries with legislation, this legislation governs what qualifies for ODA, the quality of ODA, and development priorities.

In the U.K., ODA is governed by the *International Development Act 2002*<sup>38</sup> and the *International Development (Reporting and Transparency) Act 2006*.<sup>39</sup> Article 1(2) of the 2002 Act states that the U.K.'s development assistance is "provided for the purpose furthering sustainable development in one or more countries outside of the United Kingdom" for the purpose of "improving the welfare of the population of one or more such countries."<sup>40</sup> Sustainable development is defined as "any development that [...] generat[es] lasting benefits for the population of the country ..."<sup>41</sup> Further, the UK's 2006 Act refers to the 0.7% of GDP expenditure target for ODA,<sup>42</sup> as well as the Millennium Development Goals (MDG) as forms of policy guidance.<sup>43</sup> The 2006 Act does not add anything to the 2002 Act's definition of development assistance. Based on the broad definition of development assistance in article 1(2) of the Act, the brevity of the Act, and the lack of other guiding principles to direct ODA, REDD is likely to be considered ODA-eligible. REDD will provide long-term benefits to developing countries as it will help stabilize climate change and provides financial compensation to developing countries in exchange for protecting their forests. Furthermore, as it will be detailed below, REDD is in line with goal 7 of the MDGs entitled "Environmental Sustainability." Thus, under U.K. law on ODA REDD will most likely be considered ODA eligible.

Similarly, the 2008 Canadian *Development Assistance Accountability Act* is also framed in broad terms, with little guidance as to what may be excluded from ODA. Article 2 of that Act states that the Act's purpose is to ensure that Canadian ODA is focused on poverty reduction, and aligned with "Canadian values, Canadian foreign policy, the

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<sup>38</sup> *International Development Act 2002* (UK) 2002 c.1.

<sup>39</sup> *International Development (Reporting and Transparency) Act 2006* (UK) c.31, s.5.

<sup>40</sup> *International Development Act 2002* (n 38) art 1(2).

<sup>41</sup> *Ibid*, art 1(3).

<sup>42</sup> *International Development (Reporting and Transparency) Act* (n 39) art 3.

<sup>43</sup> *Ibid*, art 4.



principles of the Paris Declaration on Aid Effectiveness [...], sustainable development and [...] human rights.<sup>44</sup> The Canadian Act adopts the OECD DAC definition of ODA which states that ODA “is administered with the principal objective of promoting the economic development and welfare of developing countries, that is concessional in character, that conveys a grant element of at least 25%”<sup>45</sup> and “that is provided for the purpose of alleviating the effects of a natural or artificial disaster or other emergency occurring outside Canada.”<sup>46</sup> Further, article 4 of the Act states that ODA “may be provided only if the competent minister is of the opinion that it (a) contributes to poverty reduction; (b) takes into account the perspectives of the poor; and (c) is consistent with international human rights standards.”<sup>47</sup> Although the Canadian Act places an emphasis on poverty reduction, as a general legislative framework, it defines ODA eligibility in very broad terms. In this sense although the primary purpose of REDD is poverty reduction, as noted above in relation to the U.K. legislation, REDD will provide long term development benefits. Furthermore, the criteria stated in article 4 of the Act are not objective, but are simply subject to the Minister’s approval. While it can be argued that these criteria need to be considered, and that ODA should not directly support projects that are contrary to these criteria, these criteria are still very broad. Thus, REDD projects are also unlikely to be excluded as ODA eligible under the Canadian legislation.

In the United States ODA is governed by the *Foreign Assistance Act of 1961*.<sup>48</sup> Section 101 of this Act details the five policy goals of US ODA. These goals include the alleviation of the worst physical manifestations of poverty among the world’s poor, the promotion of conditions enabling developing countries to achieve self-sustaining economic growth with equitable distribution of benefits, and the encouragement of development processes in which individual civil and economic rights are respected and enhanced.<sup>49</sup> These goals are further reinforced in section 102, which outlines the U.S. Development Assistance Policy. This section places further emphasis on poverty reduction in the context of both bilateral and multilateral aid.<sup>50</sup> Thus, the US Act is based on wide ranging policy goals, which like the legislation in Canada and the U.K., most likely mean that REDD will not be excluded based on black letter law. Moreover, the U.S. legislation also contains a specific section related to foreign assistance and tropical forests. Section 118 of the Act, entitled “Tropical Forests,” notes concern for deforestation and support for conservation and sustainable management.<sup>51</sup> This section mandates assistance for projects and activities that offer employment and income alternatives to local populations who would otherwise cause deforestation.<sup>52</sup> In addition to that section the *Tropical Forest Conservation Act* of 1998 also provides a debt for nature swap mechanism for developing countries with tropical forests.<sup>53</sup> Thus, ODA

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<sup>44</sup> *Official Development Assistance Accountability Act*, S.C. 2008, c. 17 at 2(1).

<sup>45</sup> *Ibid*, art 3.

<sup>46</sup> *Ibid*.

<sup>47</sup> *Ibid*, art 4.

<sup>48</sup> US, *US Legislation on Foreign Relations Through 2002* July 2003. Online: <http://www.usaid.gov/policy/ads/faa.pdf>.

<sup>49</sup> *Ibid*, s 101.

<sup>50</sup> *Ibid*, s 102.

<sup>51</sup> *Ibid*, 118 c(1).

<sup>52</sup> *Ibid*, 118c(3)a.

<sup>53</sup> *Ibid*, art. 801. Part v.

funds for avoided deforestation are specifically provided for in the US legislation and therefore, REDD projects are eligible to receive US ODA.

Other major donor countries such as Germany and Norway do not have ODA legislation and rely on policy to guide their ODA expenditures.<sup>54</sup> Currently, German ODA policy is set by the cabinet-level Ministry of Economic Cooperation and Development (BMZ). German ODA policy is based on six priority areas, one of which is sustainable poverty reduction.<sup>55</sup> Within these areas, German development policy examines eight cross-cutting issues. These issues attempt to “identify positive spin-offs of projects and programmes and also to help avert conceivable negative impacts” of German development projects.<sup>56</sup> The cross cutting issues also ensure that all German ODA is aligned with their overall development strategy. Notably, tropical forests are mentioned as a cross-cutting issue to be considered when implementing development projects.<sup>57</sup> Further, a recent joint BMZ and Environment, Nature Conservation, and Nuclear Safety position paper on climate change states that Germany has made mitigation a development priority, and supports REDD as a development tool.<sup>58</sup> Thus, between including tropical forests as a cross-cutting consideration and the recent joint policy paper on climate change German ODA policy appears to support REDD eligibility.

Lastly, Norwegian ODA is also based solely on policy.<sup>59</sup> Norwegian development assistance is governed by various policy position papers among other documents. Norwegian development policy stresses the achievement of the MDG's, attaining the 1% ODA/GNI target, aid effectiveness, governance reform, and results and quality assurance.<sup>60</sup> In a recent 2007 policy document on Norwegian development assistance, Proposition No. 1, climate change was noted as the greatest threat facing the world.<sup>61</sup> In this position paper Norway affirmed its commitments to funding climate mitigation, pledging funds to “support new multilateral climate change and clean energy

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<sup>54</sup> OECD, *Norway Development Assistance Committee Peer Review 2008*, Online: <http://www.oecd.org/dataoecd/10/40/41847146.pdf>; OECD, *Germany Development Assistance Committee Peer Review 2010*, Online: <http://www.oecd.org/dataoecd/61/51/46439355.pdf>.

<sup>55</sup> Germany, Federal Ministry for Economic Cooperation and Development, *Priority Areas of German Development Cooperation*, (Federal Ministry for Economic Cooperation and Development, 2010) Online: [http://www.bmz.de/en/what\\_we\\_do/principles/aims/index.html](http://www.bmz.de/en/what_we_do/principles/aims/index.html).

<sup>56</sup> Germany, Federal Ministry for Economic Cooperation and Development, *For positive results – the cross cutting topics* (Federal Ministry for Economic Cooperation and Development, 2010) Online: [http://www.bmz.de/en/what\\_we\\_do/principles/rules/crosscuttingissues/index.html](http://www.bmz.de/en/what_we_do/principles/rules/crosscuttingissues/index.html).

<sup>57</sup> Ibid.

<sup>58</sup> Germany, Federal Ministry for the Environment, Nature Conservation and Nuclear Safety, *Climate Changes: Germany's International Approach* (2010) 14.

<sup>59</sup> See generally *Norway Development Assistance Committee Peer Review 2008* (n 54) 10. The Norwegian development aims and interventions are outlined in the government's policy platform, in the government's addresses to the Storting, and in successive White Papers. Until a new White Paper is published in 2009, one of the most important documents remains White Paper Report No. 35 (2003-2004) to the Storting, *Fighting Poverty Together: A Comprehensive Development Policy*.

<sup>60</sup> Ibid.

<sup>61</sup> Norway, Minister of Foreign Affairs, *Norwegian Development Assistance in 2008 - Priority Areas*, Extract from the Ministry of Foreign Affairs' budget proposal for 2008 (part of Proposition No. 1 (2007-2008) to the Storting) Online: [http://www.regjeringen.no/en/dep/ud/selected-topics/development\\_cooperation/norwegian-development-assistance-in-2008.html?id=493308](http://www.regjeringen.no/en/dep/ud/selected-topics/development_cooperation/norwegian-development-assistance-in-2008.html?id=493308).

initiatives”, using, for example, the UN system and the development banks, including carbon partnerships to combat deforestation.<sup>62</sup> Furthermore, as noted above, Norway commissioned the work proposing a phased financing approach and they have since pledged funds towards REDD. Thus, REDD is eligible for Norwegian ODA funding.

Based on this brief review of selected major donors’ domestic ODA law and policy, it would be reasonable to find REDD, or climate mitigation activities which would include REDD, eligible for ODA funds.

### 3.2 International ODA Law and Policy

From an international perspective there are also law and policy instruments that govern ODA. The international framework defines ODA empirically and in relation to its quality, and outlines its priorities.

Although there exists no universal custom or multilateral treaty that defines ODA in the international system, the OECD’s definition is commonly used. The OECD defines ODA as “flows of official financing administered with the promotion of the economic development and welfare of developing countries as the main objective, and which are concessional in character with a grant element of at least 25 percent (using a fixed 10 percent rate of discount).”<sup>63</sup> Notably, Canada has adopted this definition of ODA in its domestic legislation. Based on this definition of ODA, it appears that REDD would fulfill the qualifying provisions of economic development and welfare. More specifically, the OECD has also defined climate change mitigation related aid. Mitigation-related aid is defined as “activities that contribute to the objective of stabilization of greenhouse gas (GHG) concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system by promoting efforts to reduce or limit GHG emissions or to enhance GHG sequestration.”<sup>64</sup> This is a clear recognition that aid may be given for mitigation purposes. Thus, on an international scale, mitigation activities including REDD are also ODA eligible.

Further, deforestation is also mentioned as an international development priority.

The MDG’s are a set of eight development goals agreed upon by the international community in 2000 which have set the global development priorities. Goal 7 of the MDG’s is dedicated to ensuring environmental sustainability. To achieve this goal, specific targets related to environmental sustainability have been developed. Notably, target 7.A focuses on “integrat[ing] the principles of sustainable development into country policies and programmes and revers[ing] the loss of environmental resources.”<sup>65</sup> In relation to this target, reducing high levels of deforestation is specifically

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<sup>62</sup> Ibid.

<sup>63</sup> OECD, Glossary of Statistical Terms, Online: <http://stats.oecd.org/glossary/detail.asp?ID=6043>.

<sup>64</sup> OECD, *Tracking aid in support of climate change mitigation and adaptation in developing countries*, July 2010 Online: <http://www.oecd.org/dataoecd/33/60/45906157.pdf?contentId=45906158>

<sup>65</sup> UN, Millennium Development Goals, Online: <http://www.un.org/millenniumgoals/enviro.n.shtml>

mentioned.<sup>66</sup> Thus, avoided deforestation has been specifically placed on the international development priority agenda.

Finally, international instruments also dictate the quality of ODA. The 2005 *Paris Declaration on Aid Effectiveness* is an international agreement to which over one hundred ministers, heads of agencies and other senior officials agreed upon.<sup>67</sup> These parties agreed to continue to increase efforts in harmonization, alignment and managing aid for results and mutual accountability. This was followed up with the 2008 *Accra Agenda for Action*.<sup>68</sup> This agenda reinforces the need for country ownership over development, effective and inclusive partnerships, and development results that are accountable. While these two agreements may only be considered soft law, they should guide ODA. Thus, if REDD is financed using ODA funds it should be aligned and integrated with domestic development goals.

In summary, both domestic and international ODA law and policy frameworks appear to support REDD ODA eligibility.

#### **4. Policy Perspectives on a Legal Framework for REDD ODA**

On its face, REDD ODA eligibility offers several potential benefits to developed countries. Developed countries have the opportunity to move closer to the long elusive 0.7% of GDP to ODA expenditures promise while concurrently fulfilling their Kyoto Protocol obligations, or other obligations under a post-2012 legally binding climate change agreement. However, with simultaneous investments in rural forest dependent communities, REDD also has an enormous potential to bring development benefits to developing countries. While to a large extent the development benefits derived from REDD are dependent on how individual countries operationalize REDD, the decisions made throughout 2011 on the international level with respect to REDD finance will dictate whether or not development issues should be taken into account when financing REDD. In this respect, the question of whether REDD, a mitigation activity, should be financed by ODA where there exists no concrete law or policy requiring tangible development benefits requires further analysis.

##### **4.1 REDD Development?**

There are three commonly made policy arguments with respect to REDD ODA: a strict mitigation approach, a co-benefits approach, and additionality.

###### *A Strict Mitigation Approach*

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<sup>66</sup> Ibid.

<sup>67</sup> OECD, The Paris Declaration on Aid Effectiveness and the Accra Agenda for Action Paris Declaration on Aid Effectiveness, Online: <http://www.oecd.org/dataoecd/11/41/34428351.pdf>

<sup>68</sup> Ibid.

The strict mitigation approach is one of two schools that has developed in relation to using existing ODA as REDD financing. The strict mitigation approach centers around REDD being primarily a mitigation and not a development activity. While advocates of the strict approach note that climate mitigation brings inherent development benefits to developing countries vis-a-vis lower emissions and a more stable climate, they state that financing climate mitigation activity may compromise ODA spending on other development goals such as poverty reduction and education. In short, they argue that financing REDD with pre-existing ODA funds without knowing how REDD will be operationalized risks diverting scarce ODA resources to an activity that may not produce any tangible local or community development benefits. Here, with respect to climate related ODA, it is pertinent to distinguish climate mitigation and adaptation activities.

Adaptation, as defined by the IPCC, is the “adjustment in natural or human systems in response to actual or expected climatic stimuli or their effects, which moderates harm or exploits beneficial opportunities.”<sup>69</sup> Thus, adaptation is fundamentally in line with poverty reduction and other development goals. Further, the link between the development benefits and adaptation activities is well established.<sup>70</sup> By contrast, the development benefits of mitigation are more ambiguous. Unlike adaptation, mitigation actions are not primarily targeted at the human aspects of climate change or development. The primary purpose of mitigation actions is mitigation. Hence, the strict approach is not adverse to all climate related ODA. Further, if REDD policy or legislation ensured that tangible development benefits could be considered, then there would be no policy questions as to whether ODA should be used as a REDD finance tool. However, as there is not yet a legal or strong policy basis that ensures that REDD will deliver development benefits to the poor, advocates for the strict mitigation approach argue that it would be a mistake to reallocate current ODA away from purposes such as poverty reduction, health, and education to finance REDD.

### *A Co-benefits Approach*

Conversely, advocates of the co-benefits approach argue that the operationalization of REDD provides an important opportunity to address poverty and climate change in developing countries insisting that as a secondary objective REDD may also address development issues. They argue that ODA can and should be used for REDD finance as REDD has the potential to deliver benefits to rural forest dependent communities through programs targeted at these communities and financed by REDD revenues. For example, the operationalization of REDD could also lead to education, training, and

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<sup>69</sup> See IPCC, *Climate Change 2001 Impacts, Adaptation, and Vulnerability. Third Assessment Report*, Cambridge University Press.

<sup>70</sup> OECD, *Policy Statement on Integrating Climate Change Adaptation into Development Co-Operation for Endorsement by the Joint DAC-Epoc High Level Meeting* (Paris, May 2009); *Declaration on Integrating Climate Change Adaptation into Development* (n 8); Jessica Brown, Nicola Cantore, Dirk Willem te Velde, ‘Climate financing and Development *Friends or foes?*’ (2010) Overseas Development Institute [Friends of Foes] 8; See also Jessica M. Ayers and Saleemul Huq, ‘Supporting Adaptation to Climate Change: What role for Official Development Assistance?’ (2009) 27 *Development Policy Review*.

employment opportunities in monitoring and verification of avoided deforestation on a local scale.<sup>71</sup>

The Noel Kempff Mercado Climate Action Project in Bolivia, although not a project under the UNFCCC, was the first and one of the best known examples of REDD in practice. While the objective of the project was not to implement a co-benefits approach, numerous development benefits were derived by the communities neighboring the Noel Kempff forest through targeted programs. While there was an initial negative impact on employment in the communities as a result of the newly imposed conservation areas which closed local timber concessions and sawmills, alternative employment was created.<sup>72</sup> The implementation of the Program for the Sustainable Development of Local Communities improved access to basic services such as health, education, and communication. This was a step towards community development that would not have been possible without the REDD project. Further, the Community Development Program emphasized community development by securing land titles, assisting self-organization, and supporting income-generating activities such as community forestry and micro enterprise.<sup>73</sup> For example, local people worked in surveying positions, as park guards, and as tourist guides.<sup>74</sup> Thus, the co-benefits approach can provide tangible development benefits. While other REDD projects are getting under way, as noted by Wertz-Kanounnikoff and Kongphan-apira, a thorough analysis of the development benefits of REDD is currently challenging due to a lack of public information on this topic and the new activities which are rapidly developing.<sup>75</sup>

Moreover, in legal terms, the co-benefits approach is consistent with various provisions of the UNFCCC. The preamble of the UNFCCC affirms:

*that responses to climate change should be coordinated with social and economic development in an integrated manner with a view to avoiding adverse impacts on the latter, taking into full account the legitimate priority needs of developing countries for the achievement of sustained economic growth and the eradication of poverty*<sup>76</sup>

This is further echoed in article 4(7) of the UNFCCC that states:

The extent to which developing country Parties will effectively implement their commitments [...] will take fully into account that *economic and social development and poverty eradication are the first and overriding priorities of the developing country Parties*.<sup>77</sup>

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<sup>71</sup> Leo Peskett, David Huberman, Evan Bowen-Jones, et al. 'Making REDD work for the poor: The socio-economic implications of mechanisms for reducing emissions from deforestation and degradation' (2008) A Poverty Environment Partnership Report 20.

<sup>72</sup> The Nature Conservancy, 'The Noel Kempff Mercado Climate Action Project: A Case Study in Reducing Emissions From Deforestation and Forest Degradation' (2009) 15.

<sup>73</sup> Ibid, 15.

<sup>74</sup> Ibid.

<sup>75</sup> Sheila Wertz-Kanounnikoff and Metta Kongphan-Apira, 'Emerging REDD+ A preliminary survey of demonstration and readiness activities' (2009) CIFOR Working Paper (No 46) 6.

<sup>76</sup> *United Nations Framework Convention on Climate Change*, 9 May 1992, Can T.S. 1994 No. 7, 1771 U.N.T.S., preamble.

<sup>77</sup> Ibid, art 4(7).

More recently, the preamble in a 2007 UNFCCC Conference of the Parties decision on REDD explicitly states that REDD “can promote co-benefits and may compliment the aims and objectives of other relevant international conventions and agreements.”<sup>78</sup> A co-benefits approach is also consistent with the REDD guidelines in the Cancun Agreement.<sup>79</sup> Article 1(g) of these guidelines states that “activities [...] should: be implemented in the context of sustainable development and reducing poverty, while responding to climate change.”<sup>80</sup> From a quality of aid perspective, the co-benefits approach would also be supported by the *Paris Declaration on Aid Effectiveness* and the *Accra Agenda for Action*.

While the co-benefits argument is optimistic about the benefits of a sophisticated participatory REDD model, currently there are significant shortcomings to REDD development. Notably, there is a lack of policy coordination on a domestic level. A recent World Bank study found that only 12 out of 43 Poverty Reduction Strategy Papers reviewed in the study offered a coherent strategy for policy reform to improve forest management within the context of broader development objectives.<sup>81</sup> This lack of policy coordination could be exacerbated by a potential lack of access to markets by rural communities as REDD develops from a fund to a market based mechanism. Thus, the financial benefits derived from REDD may never make it to rural communities. Notwithstanding these issues, the co-benefits approach would satisfy the traditional purpose ODA by focusing on poverty reduction while simultaneously achieving the goals of the climate change framework.

### *Additionality*

A third line of thinking states that ODA should be used for mitigation finance; however, these funds should come solely from additional ODA. In this respect it should be noted that additionality will not subtract current ODA funds from other development goals. However, it would also be possible to finance REDD with additional ODA while not achieving development co-benefits; this is an issue that has been raised by advocates of a strict approach. While the discussion on additionality is more prevalent with respect to adaptation funding, it is equally applicable to mitigation actions in developing countries. With respect to adaptation actions, it has been noted that distinguishing the additional costs of climate change impacts from baseline development needs would become extraordinary difficult, if not impossible.<sup>82</sup> However, mitigation actions are much easier to distinguish from traditional development activities. Thus, the additional funds should be able to be more easily tracked. Here, it is pertinent to note that ODA funds that are used for REDD and subsequent development activities should be flagged so as to not

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<sup>78</sup> Report of the Conference of the Parties on its thirteenth session, held in Bali from 3 to 15 December 2007 Part Two: Action taken by the Conference of the Parties at its thirteenth session FCCC/CP/2007/6/Add.1 14 March 2008 2/CP.13 Reducing emissions from deforestation in developing countries: approaches to stimulate action, preamble.

<sup>79</sup> Cancun Agreements, *supra* note 9 at art. 69. Article 69 of the Cancun Agreement refers to the REDD guidelines.

<sup>80</sup> *Ibid*, Appendix I art. 1(g).

<sup>81</sup> PROFOR. 2007. Poverty and Forests Linkages: A Synthesis of Six Case Studies. The Program on Forests at the World Bank. Washington D.C., USA, 7.

<sup>82</sup> Jessica M. Ayers and Saleemul Huq (n 70) 4.

double count these expenditures as both ODA and climate finance.<sup>83</sup> Thus, additional funds must actually be “additional” and not just funds that are re-allocated or double counted.

In supporting their arguments for additional mitigation funding, many authors rely upon article 4(3) of the UNFCCC.<sup>84</sup> However, this argument does not stand up against scrutiny. While article 4(3) of the UNFCCC does mention “new and additional” funds, this is specifically in relation to article 12 of the Convention, a provision on national communications. The second sentence of article 4(3) of the Convention then goes on to state that developed States “shall also provide such financial resources” for their commitments under article 4(1) of the Convention.<sup>85</sup> Based on the terminology of article 4(3), it is clear that this provision only calls for additional funds with respect to national communications, and not for mitigation and adaptation. Similarly, article 11(2)(a) of the Kyoto Protocol echoes article 4(3) of the UNFCCC, stating that “new and additional” funding shall be provided for “existing commitments under Article 4, paragraph 1 (a), of the Convention.” Article 4(1)(a) of the Convention states that all parties to the Convention must submit national emissions inventories.<sup>86</sup> Thus, support for additional funding is also not found in the Kyoto Protocol. However, more recently both the Copenhagen Accord and the Cancun Agreements have included provisions to increase mitigation funding through new and additional funding.

Article 8 of the Copenhagen Accord provides for “scaled up, new and additional, predictable and adequate funding” for mitigation “including, substantial finance to reduce emissions from deforestation and forest degradation.”<sup>87</sup> Here, developed State parties agreed to new and additional resources “approaching” \$30 billion balanced between adaptation and mitigation actions for the 2010-2012 period.<sup>88</sup> Further, developed States agreed to mobilize 100 billion dollars by the year 2020 for mitigation actions in developing countries. This commitment to additional funds was reaffirmed in the Cancun Agreements. Notably, article 2(d) of these Agreements states that the “mobilization and provision of scaled up, new, additional, adequate and predictable financial resources” will “address [the] adaptation and mitigation needs of developing countries.”<sup>89</sup> Article 95 of the Agreements takes note of the \$30 billion promised over the 2010-2012 period and article 97, under the heading of Long-Term Finance, “decides” that “scaled up, new and additional, predictable and adequate funding shall be provided to developing countries.”<sup>90</sup> However, with respect to REDD, it should be noted that

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<sup>83</sup> Margreet Wewerinke and Vicente Paolo Yu III, “Addressing Climate Change through Sustainable Development and the Promotion of Human Rights” (2010) South Centre Research Paper (No 34) 28.

<sup>84</sup> *United Nations Framework Convention on Climate Change*, 9 May 1992, Can T.S. 1994 No. 7, 1771 U.N.T.S. art 4(3).

<sup>85</sup> *Ibid.*, art 4(3).

<sup>86</sup> *Kyoto Protocol to the United Nations Framework Convention on Climate Change*, 2303 U.N.T.S. 148 art 11(2)a.

<sup>87</sup> UNFCCC, *Report of the Conference of the Parties on its fifteenth session, held in Copenhagen from 7 to 19 December 2009 Addendum Part Two: Action taken by the Conference of the Parties at its fifteenth session, Decision-/ 2/CP.15, Copenhagen Accord to the United Nations Framework Convention on Climate Change*, December 18, 2009 art 8.

<sup>88</sup> *Ibid.*

<sup>89</sup> Cancun Agreement, art 2(d).

<sup>90</sup> *Ibid.*, art 95 and 97.



article 71 of the Agreements, the provision detailing REDD finance, solely calls for “adequate and predictable support, including financial resources.”<sup>91</sup> This somewhat puts “additional” funding for REDD into question. However, there is still a substantial amount of legal authority that may be used to support additional REDD funds. This additional funding could come in the form of ODA. However, for ODA to qualify or be termed “new and additional,” it must actually be new ODA funds and not simply the re-allocation of existing ODA. Such additional ODA for REDD is supported by Norway’s REDD finance proposal which states that any ODA used should be additional to current ODA levels.<sup>92</sup>

Thus, while additionality now seems clearly established within the UNFCCC the debate on additionality is now shifting to defining the exact nature of additionality under the Copenhagen Accord and Cancun Agreements. In this respect, the European Union (EU) is currently seeking to clarify this concept having set the goal of having a unified definition of additionality by 2013. Currently, in the EU, there are four prominent definitions:

- (i) Climate finance classified as aid, but additional to (over and above) the 0.7% ODA target.
- (ii) Increase on 2009 levels spent on climate actions.
- (iii) Rising ODA levels that include climate change finance but where it is limited to a specified percentage.
- (iv) Increase in climate finance not connected to ODA.

Thus, while additional funds have been promised, the extent of these funds still remains somewhat unclear.

In summary, it seems that a compromise may be struck between the strict and co-benefits approach. If REDD is operationalized utilizing a co-benefits approach, ODA would be contributing to both development and climate goals. From a policy perspective, this creates the potential for a win-win-win situation where developed countries may fulfill their obligations under the international climate change regime, while simultaneously progressing towards their 0.7% of GDP commitment and providing development benefits to developing countries. This would be a situation where advocates from both approaches are likely to agree. This is a preferable position from a policy stand-point. Further, while the concept of additionality remains unclear, it has been adopted in the UNFCCC framework. Although not diverting current ODA funds, it leaves the strict versus co-benefits debate open-ended. Thus, depending on the definition of additionality, an additionality-co-benefits approach would also be a preferable option.

## 4.2 Building Blocks for a Legal Framework on REDD ODA

Based on the above noted law and policy frameworks for ODA, the policy arguments regarding the operationalization of REDD, and the current legal best practices for ODA

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<sup>91</sup> Ibid, art 71.

<sup>92</sup> See n 35.

distribution, it is possible to draw some conclusions about a potential international legal framework regarding REDD ODA finance. The following section will outline current legal best practices that ensure an equitable distribution of REDD benefits and it will conclude with a review of building blocks for a legal framework on REDD finance.

The human rights approach stands to ensure development benefits throughout the operationalization of REDD. Human rights were mentioned in the preamble to the Cancun Agreement, which specifically addresses the effect of climate change on vulnerable groups such as indigenous peoples. Article 8 of the Agreement emphasizes, “that Parties should, in all climate change related actions, fully respect human rights.”<sup>93</sup> Notably, as the majority of the world’s forests are now concentrated in areas occupied by indigenous peoples the right to free prior and informed consent (FPIC) should be taken into account by the international REDD framework.<sup>94</sup> The right to FPIC is recognized in a myriad of international instruments, which include the *United Nations Declaration on the Rights of Indigenous Peoples*, the *OAS Draft American Declaration on the Rights of Indigenous Peoples* and the *ILO Convention 169 on Indigenous and Tribal Peoples*.<sup>95</sup> The importance of FPIC relating to environmental law and policy has also been recognized in international jurisprudence.<sup>96</sup> As defined in these instruments, the right to FPIC requires consultation prior to any action where indigenous interests may be at stake. With respect to consultation, all potential harms need to be disclosed to the full understanding of indigenous peoples. Further, indigenous groups may also withhold consent.<sup>97</sup> Thus, FPIC effectively gives indigenous peoples a seat at any bargaining table. In this sense, if the operationalization of REDD effects indigenous interests they should be entitled to consultation and must consent to the projects. Article 72 of the Cancun Agreements is a step towards recognizing the importance of FPIC as it notes the importance of stakeholder participation. Stakeholder participation is further emphasized by the REDD guidelines which directly refers to the *United Nations Declaration on the Rights of Indigenous Peoples*.<sup>98</sup> Thus, through FPIC, indigenous groups stand to benefit from REDD.

Secondly, best legal practices from other countries may be used to effectively operationalize REDD and to distribute its development benefits. For example,

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<sup>93</sup> Cancun Agreement, preamble and art 8.

<sup>94</sup> Sara Sherr, Andy White, David Kaimowitz (n 2) 25.

<sup>95</sup> UN Human Rights Council Resolution 2006/2, 13 Sept. 2007, UN Doc. A/RES/61/295 at 19, 28 and 32(2); Permanent Council of the Organization of American States, Committee on Juridical and Political Affairs, Eleventh Meeting of Negotiations in the Quest for Points of Consensus, Washington D.C. – 14-18 April, 2008, Record of the Current Status of the Draft American Declaration on the Rights of Indigenous Peoples, Working Group to Prepare the Draft Declaration on the Rights of Indigenous Peoples, OEA/Ser.L/V/II GT/DADIN/doc.334/08; International Labour Organisation Indigenous and Tribal Peoples Convention 1989 (No. 169) 72 ILO Official Bull. 59, entered into force Sept. 5, 1991, art 16(2).

<sup>96</sup> See e.g. I/A Commission H.R., *Maya Indigenous Communities and their Members against Belize (Case No. 12.053)*, Report No. 40/04, 12 October 2004, para. 142; <sup>96</sup> I/A Court H.R., *Saramaka People v. Suriname*, Preliminary Objections, Merits, Reparations, and Costs, Judgment of November 28, 2007, Series C No. 172, at para. 134.

<sup>97</sup> Sébastien Jodoin, Tracy Coates, Patricia Parkinson and Ayse Bayraktar Gauthier, ‘Respecting, Protecting and Fulfilling Human Rights in Copenhagen: Indigenous Peoples and REDD’, (2009) CISDL Legal Brief 3.

<sup>98</sup> Cancun Agreement, art 72 and Appendix I art 2(c).

Parkinson and Wardell note that Cambodia, Indonesia and Vietnam are developing innovative legal best practices with respect to REDD's operationalization. For example, Cambodia's 2005 *Sub-Decree on Community Forestry Management* ensures that locally elected community members will govern forest rights and forest management.<sup>99</sup> These ensure that local communities have a voice in how REDD is operationalized on the ground. REDD development goals are also seen in Indonesia's pioneering REDD regulations.<sup>100</sup> Article 2 of Indonesia's regulations state that the purpose of REDD is to "achieve sustainable management of the forest management and to improve the welfare of the community."<sup>101</sup> To operationalize this goal, the *Guidelines for REDD Implementation Recommendation[s] by Regional Government* provide that prior to local governments giving consent to REDD operations there must be "conformity between the implementation of the REDD plan with the development priorities including poverty reduction program."<sup>102</sup> Further, Vietnam is currently seeking to implement a REDD Compliant Benefit Distribution System (BDS).<sup>103</sup> The BDS will be a legal system based on equity, efficiency, and effectiveness, and it will focus on ensuring the distribution REDD revenues.<sup>104</sup> This framework will comply with human rights and deal with issues such as carbon rights, land rights, the legal status of beneficiaries and the entitlements to REDD benefits.<sup>105</sup> These types of domestic country plans are specifically called for in Art. 71 of the Cancun Agreements.<sup>106</sup>

Lastly, pro-development market mechanisms are available to ensure that long-term benefits may be derived from REDD. The Climate, Community and Biodiversity Alliance (CCBA) has developed draft standards for the validation of avoided deforestation and forest degradation projects which consist of eight principles broken down to 31 criteria and 81 indicators which among, other things, require demonstration that a project respect property rights, and that the prior free and informed consent of those affected by the project be obtained.<sup>107</sup> Similarly, the Gold Standard Rules and Procedure for CDM provide a robust standard allowing for verifiable and sustainable

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<sup>99</sup> Kingdom of Cambodia, Sub-Decree on Community Forestry Management, No: 79 Or Nor Krar. Bor Ka (2005) Online: <http://faolex.fao.org/docs/pdf/cam81979.pdf>; Patricia Parkinson and Andrew Wardell, 'Legal Frameworks to Support REDD Pro-Poor Outcomes', (2010) Working Paper Series, Centre for International Sustainable Development Law 4.

<sup>100</sup> Indonesia, Minister of Forestry, Regulation No.: P. 30/Menhut-II/2009 on Reduction of Emissions from Deforestation and Forest Degradation Procedure (2009) Online: <http://forestclimatecenter.org/files/Minister%20of%20Forestry%20Regulation%20on%20REDD%20Procedure%20P%2030%20-%202009.pdf>.

<sup>101</sup> Ibid, art 2.

<sup>102</sup> Ibid, Appendix I art 4.

<sup>103</sup> UN-REDD Programme, Design of a REDD-Compliant Benefit Distribution System for Viet Nam (2010).

<sup>104</sup> Ibid, 69, 70.

<sup>105</sup> Ibid, 71-72.

<sup>106</sup> Cancun Agreement, art 71.

<sup>107</sup> CCBA, Climate, Community and Biodiversity Project Design Standards, 2nd

Edition, Indicator G5, Online: <http://www.climatestandards.org/standards/index.html>.; Sebastien Jodoin, 'Rights Based-Frameworks for Climate Finance' (2010) Working Paper Series, Centre for International Sustainable Development Law 4; Leo Peskett, Cecilia Luttrell and Mari Iwat, 'Can Standards for Voluntary Carbon Offsets Ensure Development Benefits?' (2007) Overseas Development Institute Forestry Briefing (Number 13) 3-5.

development practices.<sup>108</sup> Both of these market mechanisms are sold as “premium credits” or special commodities, allowing them to be sold at higher prices because of their rigorous criteria and focus on co-benefits. Thus, as REDD moves from ODA to a market approach, these standards should be considered.

Assuming a phased approach as the financing mechanism, based on the above discussion on REDD ODA and legal best practices, it is possible to roughly sketch five elements that should be included in the legal framework for REDD finance. The elements are the following: ODA as a short term solution, a co-benefits approach, human rights, coherent domestic plans, and the use of progressive market tools. This framework should be put in place by the AWG-LCA, the body mandated by the UNFCCC to deal with these decisions and, eventually it should be adopted by the Conference of the Parties. These elements will now be further elaborated.

1. It must be recognized by the AWG-LCA that ODA is only a short-term solution.<sup>109</sup> This was explicitly noted in the Eliasch Review. Although ODA as REDD finance is permissible under domestic and international law and policies, its role should be limited and used only for a short period to build market capacity. Thus, ODA should be used to cover upfront REDD readiness costs and to ensure that REDD programs are initiated in numerous developing countries around world. Particular focus should be placed on countries with weak governance structures, notably countries in Sub-Saharan Africa. Once a transition to a market system becomes feasible, ODA financing of REDD should be phased out.
2. ODA should only be used to finance REDD if REDD is conducive to the co-benefits approach. As noted above, there is a strong link between forests and poverty. A co-benefits approach will bridge the gap between REDD and rural community development. Further, the international climate framework and the international soft law regarding development finance support the co-benefits approach. Here, it should be noted that the international community has endorsed the additionality principle in both the Copenhagen Accord and Cancun Agreements. Thus, the co-benefits approach could be financed primarily through additional ODA funds. While the co-benefits approach will create additional expenses, it will have a continued focus on poverty reduction. Thus, it should be specifically stated by the AWG-LCA that a co-benefits approach is necessary.
3. A specific reference to human rights should be included in the REDD finance provisions by the AWG-LCA. Specifically, FPIC should be integrated into the international framework and be used to guide domestic REDD plans. This will be key for indigenous people to derive lasting benefits from a co-benefits approach as REDD moves from a fund to a market-based system.
4. The international framework should ensure domestic policy coherence between REDD and poverty consideration. As noted above, many domestic poverty plans do not make the connection between forestry and poverty. Thus, before international

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<sup>108</sup>Gold Standard, Version 2.1, available at <http://www.cdmgoldstandard.org/Current-GSRules.102.0.html>; Ibid, Jodoin; Ibid, Peskett, L., C. Luttrell, and M. Iwata.

<sup>109</sup> Michael Dutschke and Sheila Wertz-Kanounniko et al, brief (n 16) at 5.

funds flow into a developing country, a review process of the domestic legislation with respect to REDD and poverty should occur. Such a review should ensure that a legal framework for a benefits distribution system is in place. In this respect, the work completed by Vietnam can be considered the basis for an initial model. Thus, a mechanism to ensure domestic policy coherence of a co-benefits approach should be included in the REDD finance framework by the AWG-LCA.

5. Voluntary standards such as those produced by the Climate, Community and Biodiversity Alliance, or the Gold Standard Rules, need to be supplemented by an international framework as the transition from a fund to a market occurs. As REDD finance moves from a fund to a market, these voluntary standards, or standards that are similar to them, should be required market standards. These market tools will ensure that the co-benefits system started under a fund will be continued in the marketplace. Thus, communities will continue to benefit. Therefore, the international framework should state that these market standards become law.

## 5. Conclusions

In summary, REDD, as a new element of international environmental law stands to be a dynamic and economic force under the UNFCCC. REDD may significantly reduce international emissions while providing development benefits if it is operationalized properly. However, many decisions relating to REDD have yet to be made. One of these decisions is the REDD financing mechanism.

In this respect, the phased approach appears to be the most probable financing mechanism. The phased approach will necessarily require public start up funds, most likely in the form of ODA. The international and domestic legal and policy frameworks surrounding ODA either explicitly consider climate mitigation projects, or more particularly REDD as ODA eligible, or based on their broad nature and purpose of long term benefits to developing countries appear to endorse climate mitigation actions. After the financing mechanism is chosen, a second decision will have to be made on whether pro-development provisions should be included in the financing mechanism. This decision will be based on one of three policy arguments set out above. If REDD is implemented based on a co-benefits approach, it may bridge the gap between the forest-poverty link, and help avoid further deforestation. Such an approach would be consistent with the purpose of ODA and would be the preferable outcome for which the international community should push.

All of these factors should be considered by the AWG-LCA when developing a legal framework on REDD finance. On the basis of this analysis of REDD finance, and based on the current best legal practices, five building blocks for an international framework on REDD finance have been developed. These building blocks are outlined above. They can be considered a starting point for the AWG-LCA. While a significant amount of work needs to be done with respect to REDD finance, if the proper decisions are made, REDD stands to provide an enormous benefit in terms of climate mitigation and development. However, these decisions will be left in the hands of the international community.