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**Implementation of the recommendations of the**

**Working Group on the Right to Development, endorsed**

**by the Human Rights Council in resolution 12/23:**

**Millennium Development Goal 8, Target F,**

**on technology transfer**

## **Climate Change and the Right to Development: International Cooperation, Financial Arrangements, and the Clean Development Mechanism\***

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## Contents

	<i>Paragraphs</i>	<i>Page</i>
Introduction .....	1–4	4
Background .....	5	5
I. The Right to Development .....	6–29	5
A. Conceptual Framework of the Right to Development .....	8–9	5
B. Content and Principles of the Right to Development .....	10–17	7
C. A Human Rights-Based Approach to Development .....	18–20	8
D. Duties and Obligations under the Declaration of the Right to Development .....	21–23	9
E. International Cooperation and the Right to Development .....	24–27	9
F. Practical Implementation of the Right to Development .....	28–29	10
II. International Cooperation and Climate Change .....	30–44	11
A. The UN Framework Convention on Climate Change .....	33–38	12
B. The Kyoto Protocol .....	39–40	13
C. COP 15 and the Copenhagen Accord .....	41–44	13
III. Financial Arrangements for Climate Change .....	45–52	14
A. The Global Environment Facility (GEF) .....	47–49	15
B. The Kyoto Protocol’s Adaptation Fund .....	50–51	16
C. The Copenhagen Accord .....	52	16
IV. The Clean Development Mechanism (CDM) .....	53–67	17
A. Background .....	55–56	17
B. Basic Requirements of a CDM Project .....	57–58	18
C. Core Actors of the CDM .....	59	19
D. Stages in the CDM Project Cycle .....	60	20
E. Project Types .....	61–62	20
F. Critiques of the CDM .....	63–64	21
G. CMP 5 Decisions relating to the CDM .....	65–67	23
V. The CDM under Right to Development Criteria .....	68–95	24
A. Human Rights-Based Process and Outcomes .....	70–73	24
B. Sustainable Development .....	74–75	25
C. International Cooperation and Assistance .....	76–77	25
D. Rule of Law and Governance .....	78–81	26
E. Improving right to development criteria .....	82–95	26
Conclusions .....	96–106	29

## List of Acronyms

CBDR	Common but Differentiated Responsibilities
CDM	Clean Development Mechanism
CERs	Certified Emission Reductions
CESCR	Committee on Economic, Social and Cultural Rights
COP	Conference of the Parties to the United Nations Framework Convention on Climate Change
COP 15	15 <sup>th</sup> Conference of the Parties to the United Nations Framework Convention on Climate Change
CMP	Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol
CMP 5	5 <sup>th</sup> Session of the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol
DNA	Designated National Authority
DOE	Designated Operational Entities
DRD	Declaration on the Right to Development
GEF	Global Environment Facility
GHG	Greenhouse Gas
HLTF	High-level task force on the implementation of the right to development
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
IPCC	Intergovernmental Panel on Climate Change
LDCs	Least Developed Countries
LDC Fund	Least Developed Country Fund
OHCHR	Office of the High Commissioner for Human Rights
PDD	Project Design Document
RBA	Rights-Based Approach
REDD	Reducing Emissions from Deforestation and Forest Degradation
UNDP	United Nations Development Programme
UNEP	United Nations Environment Programme
UNFCCC	United Nations Framework Convention on Climate Change
UN-ISDR	United Nations International Strategy for Disaster Reduction
WSSD	World Summit on Sustainable Development

## Introduction

1. This paper was prepared by the Center for International Environmental Law (CIEL) for the High Level Task Force (HLTF) on the Implementation of the Right to Development,<sup>1</sup> established by the Open-ended Working Group on the Right to Development created by the (former) Commission on Human Rights.<sup>2</sup>
2. This paper explores the interface between the right to development and climate change, with a focus on international cooperation, financial arrangements and the Clean Development Mechanism (CDM). The paper analyzes the international community's legal response to the climate change threat, with particular emphasis on the institutional and normative elements that channel international cooperation. The paper also describes various financial arrangements mobilizing support for climate change mitigation and adaptation.
3. The main focus of the paper is on the CDM. This is because the CDM provides a clear example of an international partnership between the global South and the industrialized North to achieve the twin objectives of promoting sustainable development and mitigating climate change. A focus on the CDM also raises issues of technology transfer, environmental integrity, and the meaning and operationalization of a rights-based approach to development, all of which are central to effective and equitable climate change mitigation and to the implementation of the right to development. The CDM section further examines the CDM under right to development criteria; this examination enables the elaboration of recommendations on how to strengthen the contribution of the climate change regime to the implementation of the right to development.
4. This study on climate change and the right to development, with a focus on the CDM, proceeds as follows. After this Introduction and a Background discussion, the first part analyzes the right to development: its content, principles and main obligations. Part II provides a synoptic overview of the institutional and normative channels for international cooperation and the international community's response to climate change. Part III describes the financial arrangements set up in the UN Framework Convention on Climate Change (UNFCCC) and its Kyoto Protocol, as well as in the 15<sup>th</sup> Conference of the Parties to the UNFCCC, held in Copenhagen in December 2009 (COP 15). Part IV addresses the CDM, describes its institutional design and project cycle, examines it from a right to development perspective, and makes recommendation for improving right to development criteria. This is followed by Conclusions.

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<sup>1</sup> See U.N. Commission on Human Rights (CHR) Res. 2004/7, The right to development (Sixtieth Session, 2004), U.N. Doc E/CN.4/2004/L17, para. 9 (the HLTF was convened to act as an advisory body to the Working Group and to render operational the terms of the Declaration on the Right to Development). The HLTF's current mandate is to "examine the Clean Development Mechanism..." from a right to development perspective. See Report of the Working Group on the Right to Development on its Ninth Session (Geneva, 18-22 August 2008), U.N. Doc A/HRC/9/17 (Sept. 10, 2008). See also Report of the High-Level Task Force on the Implementation of the Right to Development on its Fifth Session (Geneva, 1-9 April 2009), U.N. Doc A/HRC/12/WG.2/TF/2 (June 17, 2009).

<sup>2</sup> See CHR Res. 1998/72, U.N. Doc. E/CN.4/1998/72 (1998). See also Economic and Social Council decision 1998/269.

## Background

5. The United Nations has been the leading institution in the domain of development policy and practice, offering equal opportunities among countries to create a consensus on the ordering of international relations. In this light, the (former) Commission on Human Rights undertook a serious effort to define, implement, and recommend ways and means towards the realization of the right to development. In 1998, the Commission on Human Rights established the Open-ended Working Group on the Right to Development with the mandate to monitor and review progress made in the promotion and implementation of the right to development, as elaborated in the Declaration on the Right to Development, at the national and international levels.<sup>3</sup> Within the framework of the Working Group, the HLTF was established in 2004, in order to assist it in fulfilling its mandate. Since then, the HLTF has carried out studies on the implementation of the right to development. It has also analyzed and evaluated global partnerships and dialogues between North-South countries, and developed right to development criteria.<sup>4</sup> Currently, the HLTF is assessing the implications of climate change for the right to development, and the role its principles and criteria could play in efforts by the international community to adapt to and mitigate the impact of global warming.

### I. The Right to Development

6. The right to development is a relatively new concept in human rights law. In the inter-governmental arena, the process of building a political consensus on its meaning and practical implementation has been highly politicized. Generally, the right to development addresses the economic imbalances between the industrialized and the developing worlds, and integrates human rights and economic development.

7. Sections A and B, below, provide an overview of the right to development, including its conceptual framework, content and principles. Sections C through E address the human rights-based approach to development and the duties and obligations embodied under the 1986 UN Declaration on the Right to Development (DRD), with special focus on international cooperation. Section F raises issues related to the practical implementation of the right to development.

#### A. Conceptual Framework of the Right to Development

8. The DRD was the first instrument that formally recognized the right to development.<sup>5</sup> It defined the meaning of development as “a comprehensive economic, social and political process, which aims at the constant improvement of the well-being of the entire population and of all individuals on the basis of their active, free and meaningful participation in development and in the fair distribution of benefits resulting therefrom.”<sup>6</sup>

<sup>3</sup> See CHR Res. 1998/72 U.N. Doc E/CN.4/1998/72 (1998). See also Economic and Social Council decision 1998/269.

<sup>4</sup> See Human Rights Council (HRC) Report of the Working Group on the Right to Development on its Ninth Session (18-22 August 2008) and Report of the High Level Task Force on the Implementation of the Right to Development on its Fifth Session (Geneva, 1-9 April 2009). Supra note 1

<sup>5</sup> Declaration on the Right to Development, G.A. Res. 41/128 (Dec. 4, 1986), annex 41 UN GAOR Supplement. (No. 53) 186, U.N. Doc. A/41/53 (1986) [hereinafter DRD or Declaration], at Preamble.

<sup>6</sup> *Id.* at Preamble, para. 2. The UN has moved towards integrating social and cultural elements into the concept of development by introducing the Human Development Index, which is used to measure

Before the DRD, the UN Charter,<sup>7</sup> the International Covenant on Civil and Political Rights<sup>8</sup> (ICCPR) and the International Covenant on Economic, Social and Cultural Rights<sup>9</sup> (ICESCR), had already acknowledged the close relationship between development and human rights. During the 1990s, this linkage was affirmed in world summits, including the 1992 Earth Summit in Rio de Janeiro,<sup>10</sup> the 1993 World Conference on Human Rights in Vienna,<sup>11</sup> and the 2000 UN Millennium Declaration.<sup>12</sup>

9. According to the DRD, the right to development is “an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized.”<sup>13</sup> The Independent Expert on the Right to Development, Arjun Sengupta, commented that the right to development is “a right to a process of development in which all human rights and fundamental freedoms can be fully realized.”<sup>14</sup> This “process of development” should be carried out on the basis of a rights-based approach, in accordance with international human rights standards, such as transparency, participation, non-discrimination, and accountability.<sup>15</sup> Closely connected to this process is the “partnership approach” to development, based on shared responsibilities and mutual commitments between industrialized and developing countries and international organizations.<sup>16</sup>

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progress toward development. However, as pointed out by Stephen Marks, the meaning of development, in general perception and practice, has been limited to the capacity of consumption and accumulation and does not incorporate cultural components. See Stephen Marks, *The Human Right to Development: Between Rhetoric and Reality*, 17 HARV. HUM. RTS. J 137, 164 (2004).

<sup>7</sup> Charter of the United Nations (June 26, 1945), entered into force October 24, 1945, 59 Stat. 1031; TS 993; 3 Bevans 1153 [hereinafter UN Charter], at Preamble and Articles 55 and 56.

<sup>8</sup> International Covenant on Civil and Political Rights (December 19, 1966), entered into force March 23, 1976, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966); 999 UNTS 171 [hereinafter ICCPR]. The ICCPR’s Preamble states that the “ideal of free human beings enjoying civil and political freedom and freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his civil and political rights, as well as his economic, social and cultural rights.”

<sup>9</sup> International Covenant on Economic, Social and Cultural Rights (December 16, 1966), entered into force January 3, 1976, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966); 993 UNTS 3, [hereinafter ICESCR]. Its core provisions address the immediate consequences of underdevelopment, such as disease, illiteracy, starvation and homelessness.

<sup>10</sup> Rio Declaration on Environment and Development (June 13, 1992), U.N. Doc. A/CONF.151/26 (vol. I); 31 ILM 874 (1992), Principle 3: “The right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations.”

<sup>11</sup> Vienna Declaration and Programme of Action, U.N. GAOR, World Conf. On Hum. Rts., 48th Sess., 22d plen. mtg., pt. 1, U.N. Doc. A/CONF.157/23 (1993) [hereinafter Vienna Declaration], Articles 10 and 11. The Vienna Declaration sanctioned the right to development as an “integral part of fundamental human rights” (Article 10). It also recognized the right to development as a human right that integrates economic, social and cultural rights with civil and political rights. The Vienna Declaration reiterated the commitment contained on Article 56 of the U.N. Charter, which determines all States to cooperate with each other in ensuring development and eliminating obstacles to development.

<sup>12</sup> U.N. Millennium Declaration, G.A. Res. A/55/2, September 18, 2000.

<sup>13</sup> DRD, *supra* note 5, Article 1(1).

<sup>14</sup> Study on the current state of progress in the implementation of the right to development submitted by Mr. Arjun K. Sengupta, Independent Expert, Fifty-sixth Session Open-ended Working Group on the Right to Development (Geneva, 13-17 September 1999), U.N. Doc. E/CN.4/1999/WG.18/2, (July 27, 1999) para. 47.

<sup>15</sup> *Id.*

<sup>16</sup> Laure-Hélène Piron, *The Right to Development: a Review of the Current State of the Debate for the*

## B. Content and Principles of the Right to Development

10. The content and principles of the right to development serve as tools to appraise the system of international governance and highlight certain weaknesses.<sup>17</sup> The following elements constitute the core content of the right to development.<sup>18</sup>

11. *Comprehensive Development.* Development is not defined solely in terms of economic growth, but as a multi-faceted “process,” with social, cultural, political and economic and environmental elements.<sup>19</sup>

12. *Respect for all human rights.* The DRD places the human person at the center of development.<sup>20</sup> The development process must respect all human rights and fundamental freedoms, and contribute to the realization of rights for all.<sup>21</sup> Also, the realization of the right to development may not justify violations of other human rights.<sup>22</sup>

13. *Participation.* Under the DRD, the human person is the active participant of the right to development;<sup>23</sup> additionally, “States should encourage popular participation in all spheres as an important factor in development and in the full realization of all human rights.”<sup>24</sup>

14. *Equality of Opportunities and Non-discrimination.* Under the DRD, all States should promote universal respect for and observance of “all human rights and fundamental freedoms for all without any distinction as to race, sex, language or religion.”<sup>25</sup> The DRD obliges States to ensure equality of opportunity for all in their access to education, health services, food, housing, employment and the fair distribution of income.<sup>26</sup> Moreover, with respect to gender equality, the DRD specifically requires States, “to ensure that women have an active role in the development process.”<sup>27</sup>

15. *Equity.* The right to development requires that considerations of equity and justice determine the whole structure of the development process. For example, poverty has to be eradicated and the structure of production has to be adjusted through development policy.<sup>28</sup>

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Department for International Development 5-6, at <http://www.odi.org.uk/resources/download/1562.pdf>.

<sup>17</sup> MARGOT E. SALOMON, GLOBAL RESPONSIBILITY FOR HUMAN RIGHTS: WORLD POVERTY AND THE DEVELOPMENT OF INTERNATIONAL LAW, 143 (2007)

<sup>18</sup> According to the Working Group, the principles that underlie the right to development are equality, non-discrimination, participation, transparency and accountability, as well as equity, the rule of law and good governance at all levels. See Report of the Working Group on the Right to Development on its Seventh Session (Geneva, 9-13 January 2006), E/CN.4/2006/26, (February 22, 2006) at para. 40.

<sup>19</sup> See DRD, *supra* note 5 Preamble and Rio Declaration, *supra* note 10, Principle 3.

<sup>20</sup> See *id.* at Preamble, para. 12 and Article 2(1): “The human person is the central subject of development and should be the active participant and beneficiary of the right to development.”

<sup>21</sup> *Id.* at Articles 1 and 6.

<sup>22</sup> Vienna Declaration, *supra* note 11, para. 10: “While development facilitates the enjoyment of all human rights, the lack of development may not be invoked to justify the abridgement of internationally recognized human rights.”

<sup>23</sup> DRD, *supra* note 5, Article 2(1).

<sup>24</sup> *Id.* at Article 8(2).

<sup>25</sup> *Id.* at Article 6(1).

<sup>26</sup> *Id.* at Article 8(1).

<sup>27</sup> *Id.*

<sup>28</sup> Arjun Sengupta, *On the Theory and Practice of the Right to Development*, 24 HUM. RTS. Q. 837, 849 (2002).

Accordingly, the majority of the population, who are currently poor and deprived, should have their living standards raised, leading to increased well-being of the entire population.<sup>29</sup>

16. *Social Justice.* The DRD obligates that the development process promote social justice, including the “fair distribution of the benefits” of development for individuals<sup>30</sup> and “equality of opportunity for all” in access to basic resources and services.<sup>31</sup>

17. *International Cooperation.* The DRD identifies international cooperation as a key element to assist developing countries to secure the enjoyment of basic human rights.<sup>32</sup> The realization of the right to development requires appropriate national policies and also suitable international conditions for development, with appropriate international policies and cooperation.<sup>33</sup> The duty to formulate appropriate international development policies and the provision of effective international cooperation is one of the DRD’s most controversial elements.

### C. A Human Rights-Based Approach to Development

18. The debate about the nature of the right to development includes questions such as what kind of a right it is, who are the duty-holders and rights-bearers, and how it can be implemented and enforced. A human rights-based approach to development aims to foster development with a particular attention to the promotion, the protection and the fulfillment of all human rights.<sup>34</sup>

19. The view that places human rights at the center of development differs from the approach generally held by industrialized countries and international financial institutions, which argue that the objective of development assistance is to eradicate poverty and not principally to respect and protect human rights.<sup>35</sup>

20. A human rights-based approach to development requires a clear identification of the rights-holders and duty-bearers, and an assessment of “whether the state parties or the other duty holders have fulfilled their obligations and whether the procedures followed are consistent with the rights-based approach to development.”<sup>36</sup> At the heart of this assessment is the DRD’s articulation of duties and rights.

<sup>29</sup> *Id.* at 848.

<sup>30</sup> DRD, *supra* note 5, Article 2(3).

<sup>31</sup> *Id.* at Article 8(1).

<sup>32</sup> See Salomon, *supra* note 17, at 3-6.

<sup>33</sup> DRD, *supra* note 5, Articles 3 and 4.

<sup>34</sup> See Fifth Report of the Independent Expert on the Right to Development Open-ended Working Group on the Right to Development (Geneva, 7-18 October 2002). U.N. Doc E/CN.4/2002/WG.18/6 (September 18, 2002) para. 46. The Working Group, at its Sixth Session in 2005, recognized the “multi-faceted nature of the right to development [and] agreed that a rights-based approach to economic growth and development contributes to the realization of the right to development while it does not exhaust its implications and requirements at both the national and international levels.” See Report of the Working Group on the Right to Development on its Sixth Session (Geneva, 14-18 February 2005), E/CN.4/2005/25 (March 3, 2005).

<sup>35</sup> S. Nwauche & J.C. Nwobike, *Implementing the Right to Development*, E2 SUR – INT’L J. on Hum Rts. 93, 96 (2005). See also Piron, *supra* note 16, at 31.

<sup>36</sup> See Forth Report of the Independent Expert on the Right to Development (Open-ended Working Group on the Right to Development (Geneva, 18-22 February 2002) E/CN.4/2002/WG.18/2 (December 20, 2001) para. 42.



## D. Duties and Obligations under the Declaration of the Right to Development

21. The DRD clearly identifies the obligations of all participants in the development process: individuals, States and the international community.

22. *Rights-holders.* The DRD recognizes individuals as the primary rights-holders: “the human person is the central subject of development and should be the active participant and beneficiary of the right to development.”<sup>37</sup> Even though the DRD does not explicitly mention States as rights-holders, it affirms that States have the right to formulate appropriate national development policies.<sup>38</sup>

23. *Duty-bearers.* The DRD establishes that the primary responsibility for implementing the right to development rests with States acting at the national level<sup>39</sup> and cooperating at the international level.<sup>40</sup> States have a negative duty to avoid hindering the right to development and a positive duty to ensure an international enabling environment conducive to the realization of this right.<sup>41</sup> Individuals also have duties in the realization of the right to development, as they are called to be active participants<sup>42</sup> and also to act collectively, as members of a community.<sup>43</sup>

## E. International Cooperation and the Right to Development

24. The duty to cooperate is critical for the implementation of the right to development, including on account of the economic disparities between developing and industrialized countries.<sup>44</sup> Its implementation, as well as the determination of duties and responsibilities, requires cooperation among all the relevant stakeholders at the international level.

25. The duty to cooperate is grounded in the UN Charter, the ICESCR, and the DRD. While the UN Charter requires all UN members to work together to combat global threats to human rights,<sup>45</sup> the ICESCR includes an explicit provision for international cooperation, requiring each State party to take steps individually and “through international... cooperation,” toward the progressive realization of the rights it recognizes.<sup>46</sup> The DRD also explicitly specifies obligations for international cooperation,<sup>47</sup> including with respect

<sup>37</sup> DRD, *supra* note 5, Article 2(1).

<sup>38</sup> *Id.*, Article 2(3).

<sup>39</sup> DRD, *supra* note 5, States’ duties at national level: Articles 2 para. 3; 3 para. 1; 5; 6 paras. 2 and 3; 8, paras. 1 and 2.

<sup>40</sup> *Id.*, States’ duties at the international level: Articles 3, para. 3; 4, paras. 1 and 2; 6, para. 1; 7.

<sup>41</sup> See Salomon, *supra* note 17.

<sup>42</sup> DRD, *supra* note 5, Article 2(1).

<sup>43</sup> *Id.*, Article 2(2). This paper does not focus on analyzing the human rights obligations of inter-governmental organizations and elements of civil society

<sup>44</sup> See Sengupta, *supra* note 28, at 877.

<sup>45</sup> U.N. Charter, *supra* note 7, Article 55: the UN shall promote, inter alia, “universal respect for, and observance of, human rights and fundamental freedoms for all.” Article 56: “all Members pledge themselves to take joint and separate action in cooperation with the Organization for the achievement of the purposes set forth in Article 55.”

<sup>46</sup> ICESCR, *supra* note 9, Articles 2 para. 1; 11 para. 2; 15 para. 4; 22 and 23.

<sup>47</sup> DRD, *supra* note 5, Articles 3, 4 and 6. See also OHCHR, Report of the Office of the United Nations High Commissioner for Human Rights on the Relationship between Climate Change and Human Rights, U.N. Doc. A/HRC/10/61 (January 15, 2009), [hereinafter OHCHR Report] at para. 85.

to international development policies<sup>48</sup> and promotion of universal respect for and observance of all human rights and fundamental freedoms.<sup>49</sup>

26. The right to development makes international cooperation an obligation of conduct rather than an obligation of result.<sup>50</sup> It entails a particular process that includes different variables and agents, and for which there may be less control over the outcome. In this sense, the obligation of conduct is more exacting than that of result.<sup>51</sup> Moreover, obligations of conduct require the implementation of policies conducive to the realization of human rights.<sup>52</sup>

27. Finally, if international cooperation is not forthcoming to the extent desired, developing countries are still responsible for implementing the right to development, following the human rights-based approach.<sup>53</sup> Within this context, developing countries must enact legislation, adopt appropriate measures, engage in public actions, formulate schemes that empower the beneficiaries at the grass-roots level, and allocate investment and restructure production to promote a process of development with whatever resources they have in a given framework of international cooperation.<sup>54</sup>

## F. Practical Implementation of the Right to Development

28. Perhaps the most controversial and important aspect of the right to development lies in its implementation. In the past, debate centered on the obligation of industrialized States and international organizations to provide development assistance to developing States. The current controversy focuses on the process of globalization, including the equal participation of developing countries in that process, and its relation to human rights.<sup>55</sup> The Working Group on the Right to Development has made positive contributions to this debate, presenting four reports with the objective of identifying a manner in which the right to development can be realized and implemented immediately.<sup>56</sup>

29. The Independent Expert on the Right to Development proposed a “development compact” mechanism, based on the interpretation of the right to development as a right to a

<sup>48</sup> *Id.* at Article 4.

<sup>49</sup> *Id.* at Article 6(1).

<sup>50</sup> See Salomon, *supra* note 17, at 133. The obligations of conduct are “best efforts obligations”, whereas obligations of result are “tantamount to guarantees of outcome.” (International Law Commission (ILC, Report of the International Law Commission (Fifty-first Session, 1999) U.N. Doc A/54/10 (1999), para. 132)). See also CESCR, General Comment no 3, The Nature of States Party’s Obligations, para. 1 (affirming that the States Parties’ obligations under Article 2(1), including international obligations of assistance and cooperation, are both obligations of conduct and obligations of result). See Salomon, *id.*

<sup>51</sup> See, *id.* at 134.

<sup>52</sup> *Id.*

<sup>53</sup> See Sengupta, *supra* note 28, at 877.

<sup>54</sup> *Id.*

<sup>55</sup> Piron, *supra* note 16.

<sup>56</sup> See Reports of the Independent Expert on the Right to Development, Mr. Arjun K. Sengupta: Study on the current state of progress in the implementation of the right to development, *supra* note 14; Second Report of the Independent Expert on the Right to Development, Fifty-seventh Session Open-ended Working Group on the Right to Development (Geneva, 18-22 September 2000), U.N. Doc E/CN.4/2000/WG.18/CPR.1 (September 11, 2001); Third Report of the Independent Expert on the Right to Development, Fifty-seventh Session Working Group on the Right to Development Second Session (Geneva, 29 January-2 February 2001), U.N. Doc. E/CN.4/2001/WG.18/2 (January 2, 2001); Fourth Report of the Independent Expert on the Right to Development. Open-ended Working Group on the Right to Development (Geneva, 18-22 February 2002) *supra* note 36..

particular process of development, which facilitates and enables all fundamental freedoms and rights to be realized, and which expands basic capabilities and the abilities of individuals to enjoy their rights. This “development compact” should be established between specific countries and the international community as a way to realize the right to development at the national level. However, the development compact proposal did not receive unanimous support.<sup>57</sup> There are costs to setting up new development processes, and it is not clear to what extent the compact image is used as a way of presenting a “partnership approach to development,” based on human rights as the main objective of development.<sup>58</sup>

## II. International Cooperation and Climate Change

30. Greenhouse gas (GHG) emissions from anthropogenic sources, primarily fossil fuel use, have increased dramatically, causing an increase in Earth’s average temperature. The Intergovernmental Panel on Climate Change (IPCC), in its Fourth Assessment Report (2007), raised its estimate of warming in this century to a possible range between 2.4°C to 6.4°C.<sup>59</sup> The impacts of this unprecedented warming – e.g., increased floods and drought, rising sea levels, spread of deadly diseases such as malaria and dengue fever, increasing numbers of violent storms – threaten to be more severe and imminent than previously believed. To respond to growing scientific concern, governments have come together to figure out how to address the climate change problem.

31. In this regard, the UN Human Rights Council has affirmed that climate change “poses an immediate and far-reaching threat” for the “full enjoyment of human rights.”<sup>60</sup> The Office of the High Commissioner on Human Rights (OHCHR), in its March 2009 study on climate change and human rights,<sup>61</sup> maintained that the human costs of climate change have directly threatened fundamental human rights, including the rights to life, health, water, food, shelter, work and self-determination. Moreover, the study found that vulnerable peoples, including women, children, disabled and indigenous peoples, are particularly at risk. The OHCHR study concluded that measures to address climate change should be informed and strengthened by international human rights standards and principles, emphasizing States’ obligations under international human rights law to protect individuals whose rights are affected either by the physical impacts of climate change or by policies and measures to address climate change. Moreover, the OHCHR study noted that climate change is a truly global problem that can only be effectively addressed through international cooperation, as climate change disproportionately affects poorer countries with the weakest capacity to protect their populations.

<sup>57</sup> For instance, the compact development has been opposed by the United States, which proposed a different mechanism, namely the Millennium Challenge Account. For a comparison of the development compact and the Millennium Challenge Account (MCA), see Marks, *supra* note 6.

<sup>58</sup> Piron, *supra* note 16, at 33.

<sup>59</sup> See Intergovernmental Panel on Climate Change (IPCC), 2007, *Summary for Policymakers in: CLIMATE CHANGE 2007: THE PHYSICAL SCIENCE BASIS. CONTRIBUTIONS OF WORKING GROUP I TO THE FOURTH ASSESSMENT REPORT OF THE INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE* 13 (Solomon, S., D. Qin, M. Manning, Z. Chen, M. Marquis, K.B. Averyt, M. Tignor & H.L. Miller eds., 2007) available at <http://www.ipcc.ch/pdf/assessment-report/ar4/wg1/ar4-wg1-spm.pdf>.

<sup>60</sup> United Nations Human Rights Council (UNHRC), *Res. 7/23: Human Rights and Climate Change* (2008), available at [http://www2.ohchr.org/english/issues/climatechange/docs/Resolution\\_7\\_23.pdf](http://www2.ohchr.org/english/issues/climatechange/docs/Resolution_7_23.pdf). See also UNHRC, *Res. 10/4: Human Rights and Climate Change* (2009).

<sup>61</sup> OHCHR Report, *supra* note 47.

32. To respond to growing scientific concern, the international community under the auspices of the United Nations has come together to figure out how to address the climate change problem. Its efforts have led to the development of the United Nations Framework on the Convention on Climate Change (UNFCCC) and the Kyoto Protocol. Under this framework, a number of financial arrangements have been established to address the costs associated with climate change.

## A. The UN Framework Convention on Climate Change

33. The United Nations Framework Convention on Climate Change (UNFCCC) was signed and adopted in 1992, and entered into force in 1994. The goal of the UNFCCC is “stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system.”<sup>62</sup> To do so, and taking into account Parties’ “common but differentiated responsibilities,” industrialized countries are to “take the lead in combating climate change.”<sup>63</sup>

34. COP 13 (Bali) in 2007 adopted the Bali Action Plan. Therein, the COP decided that a “comprehensive process, to enable the full, effective and sustained implementation of the Convention through long-term cooperative action, now, up to and beyond 2012,” was to be launched.<sup>64</sup> The process would address a shared vision for long-term cooperative action; and enhanced action on mitigation and adaptation, technology development and transfer, and the provision of financial resources and investment.<sup>65</sup> This process included COP 15 (Copenhagen), which extended the negotiating mandate up to COP 16 (Mexico City).

35. It is impossible to effectively mitigate or adapt to climate change without coordinated international action. To that end, the UNFCCC requires all parties to “promote and cooperate in the development, application and diffusion, including transfer, of technologies, practices and processes that control, reduce or prevent anthropogenic emissions of greenhouse gases.”<sup>66</sup> In this vein, the duty to cooperate in the climate change context requires States to negotiate and implement international agreements under the auspices of the UNFCCC, which features the necessary membership, experience and expertise.<sup>67</sup>

36. The magnitude and complexity of the challenges posed by climate change demand immediate action. The failure to adopt effective measures and policies in a timely manner will directly affect human livelihoods and people’s rights. Impending impacts of climate change range from increased diseases and mortality to food insecurity, water scarcity, and threats to the survival of communities and future generations.<sup>68</sup> Yet, so far, governments have been unable to adequately respond to challenges of climate change.

37. Evaluating the effectiveness of international cooperation in addressing climate change is a complex undertaking. From one perspective, the fact that States have negotiated and are implementing two major international treaties on the topic, namely the UNFCCC and the Kyoto Protocol, in addition to undertaking a significant negotiating effort

<sup>62</sup> United Nations Framework Convention on Climate Change (1992), U.N. Doc. A/AC.237/18 (Part II)/Add.1, Article 2 [hereinafter UNFCCC].

<sup>63</sup> *Id.* at Articles 3 and 4.

<sup>64</sup> UNFCCC, COP, Decision 1/CP.13, *Bali Action Plan* (2007).

<sup>65</sup> *Id.*

<sup>66</sup> UNFCCC, *supra* note 62, at Article 4(1)(c).

<sup>67</sup> John H. Knox, *Climate Change and Human Rights Law*, 50 Va. J. Int’l L. 163, 24 (2009).

<sup>68</sup> See Marcos Orellana, *A Rights-based Approach to Climate Change Mitigation*, in CONSERVATION WITH JUSTICE: A RIGHTS-BASED APPROACH 37,37 (Thomas Greiber ed., 2009).

over the past two years to define the post-Kyoto climate framework, would suggest that they have clearly sought to cooperate. From another angle, if the duty to cooperate requires effective solutions to the climate change problem, then the fact that the actual and impending consequences of climate change are increasing in intensity due to the failure to arrive at a binding agreement providing for effective mitigation, adaptation and other climate measures could be regarded as a failure of States to effectively cooperate.

38. In light of the difficulties associated with evaluating the effectiveness of international cooperation in addressing climate change, a science-based approach to decision-making, explored further below, provides an objective basis for a more rigorous evaluation of climate change partnerships.

## **B. The Kyoto Protocol**

39. In line with the objective and principles of the UNFCCC, the Kyoto Protocol was finalized in 1997 and entered into force in 2005.<sup>69</sup> Under the Protocol, 37 industrialized countries and the European Community made legally binding commitments to reduce their GHG emissions through various mechanisms including, inter alia, the implementation of domestic measures to increase energy efficiency and phase-out financial incentives and tax policies for GHG emitting sectors; participation in a joint implementation program (Article 4), a mechanism to allow for the transfer of emission reduction units from projects aimed at reducing emissions by sources or sinks (Article 6), a CDM (Article 12), and an emissions trading program (Article 17); and through the provision of financial resources and technology transfer to developing countries (Article 11). However, the emission reduction targets of the Protocol expire in 2012, and what happens next remains unknown and subject to ongoing international negotiations.

40. The Kyoto Protocol's CDM has provided a mode of cooperation between industrialized and developing countries. The HTLF has described the CDM as "an arrangement of value to the climate change dimension of the right to development insofar as the transfer of green technology can enhance the prospects for sustainable development in developing countries."<sup>70</sup> Nonetheless, the CDM still needs to be improved in order to be an effective tool to assist Annex I Parties in meeting their emissions targets while promoting sustainable development in non-Annex I countries.

## **C. COP 15 and the Copenhagen Accord**

41. The fifteenth Conference of the Parties to the UNFCCC (COP 15) and the fifth session of the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol (CMP 5) took place in Copenhagen, Denmark, December 7 to 18, 2009. The purpose of COP 15 was to complete negotiations under the Bali Action Plan. Despite two years of intense negotiations, the Parties were unable to reach agreement on all the issues. Instead, the main outcomes from the negotiations include the Copenhagen Accord,<sup>71</sup> a non-binding agreement drafted by heads of State, and a number of more detailed COP decisions.

<sup>69</sup> UNFCCC and Kyoto Protocol Fact Sheet.

<sup>70</sup> Report of the High Level Task Force on the Implementation of the Right to Development on its Fifth Session, *supra* note 1, para. 83.

<sup>71</sup> UNFCCC, COP 15, *Copenhagen Accord*, Draft, [hereinafter Copenhagen Accord] of 18 December 2009"). [http://unfccc.int/files/meetings/cop\\_15/application/pdf/cop15\\_cph\\_auv.pdf](http://unfccc.int/files/meetings/cop_15/application/pdf/cop15_cph_auv.pdf). (COP 15 took "note of the Copenhagen Accord of 18 December 2009").

42. The architecture of the Copenhagen Accord is set up so that each State registers and commits to abide by its domestic climate commitments, whether those are in the form of laws or regulations or multi-year development plans. The Accord states that “Annex I Parties commit to implement individually or jointly the quantified economy-wide emissions targets for 2020” and the countries shall submit the numbers to the UNFCCC Secretariat by 31 January 2010.<sup>72</sup> Non-Annex I Parties may implement mitigation actions and submit a list of these to the UNFCCC Secretariat by 31 January 2010.<sup>73</sup> Least Developed Countries (LDCs) and Small Island Developing States may undertake actions voluntarily and on the basis of support.<sup>74</sup> These mitigation actions shall be subject to their domestic measurement, reporting and verification which will be reported through their national communications every two years.<sup>75</sup> The Copenhagen Accord also establishes financial goals and arrangements, addressed below.

43. COP 15 and CMP 5 adopted a total of twenty-two decisions on different issues, e.g., guidance for activities relating to reducing emissions from deforestation and degradation (REDD) capacity-building; compliance; and the Secretariat’s budget for the biennium 2010-2011.<sup>76</sup> The two main negotiating bodies (the Ad-Hoc Working Group on Long-Term Cooperative Action and the Ad-Hoc Working Group on the Kyoto Protocol) have been directed to continue their work and provide the results to COP 16 and CMP 6 in Mexico in December 2010.<sup>77</sup> Another key decision provided guidance relating to the CDM,<sup>78</sup> including with respect to governance, regional distribution, and capacity-building.

44. There is significant ambiguity surrounding the legal status and implementation of the Copenhagen Accord. The Accord, acknowledged by its drafters as non-binding, is nevertheless designed to be operational immediately. However, the fact that the COP took “note” of the Accord rather than “adopting” it leaves many open questions of how implementation will take place in advance of the next meeting of the UNFCCC COP in Mexico at the end of 2010. Moreover, the extent to which the Accord will be implemented through institutions or structures outside the UNFCCC structure remains unclear at the time this paper is being finalized. Despite this ambiguity, the Accord provides the possibility that short term financial resources may become available in a manner that helps build a greater level of trust within the climate negotiations.

### III. Financial Arrangements for Climate Change

45. The costs associated with climate change, both in respect of mitigation of GHGs and of adaptation to a changing climate, pose a severe challenge to the international community. It is estimated that global additional investment and financial flows of USD 200 – 210

<sup>72</sup> See *id.*, para. 4.

<sup>73</sup> See Copenhagen Accord; *supra* note 71, at para. 5.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> The decisions adopted by COP 15 and CMP 5 are available at the Climate Change Secretariat’s (UNFCCC) website at <http://unfccc.int/2860.php>.

<sup>77</sup> UNFCCC, COP 15 Decision, Outcome of the work of the Ad Hoc Working Group on Long-term Cooperative Action under the Convention, Draft, [http://unfccc.int/files/meetings/cop\\_15/application/pdf/cop15\\_lca\\_auv.pdf](http://unfccc.int/files/meetings/cop_15/application/pdf/cop15_lca_auv.pdf); UNFCCC, CMP 5 Decision, Outcome of the Work of the Ad Hoc Working Group on Further Commitments for Annex I Parties under the Kyoto Protocol, Draft, [http://unfccc.int/files/meetings/cop\\_15/application/pdf/cmp5\\_awg\\_auv.pdf](http://unfccc.int/files/meetings/cop_15/application/pdf/cmp5_awg_auv.pdf).

<sup>78</sup> UNFCCC, CMP 5 Decision, Further guidance relating to the clean development mechanism, Draft, [http://unfccc.int/files/meetings/cop\\_15/application/pdf/cmp5\\_cdm\\_auv.pdf](http://unfccc.int/files/meetings/cop_15/application/pdf/cmp5_cdm_auv.pdf).

billion will be necessary in 2030 to return global GHG emissions to current levels.<sup>79</sup> Developing countries in particular generally lack the resources to address this new environmental and social threat. LDCs are especially vulnerable to climate change, since their budget is stretched to meet basic needs, such as access to food, water, and housing. International cooperation in the form of financial assistance thus acquires critical relevance. In this regard, financial arrangements for climate change, whereby resources from the North are channeled to the South, also express the principle of common but differentiated responsibilities, which is central to the climate change regime.

46. Financial arrangements for climate change are numerous and dispersed. The UNFCCC and the Kyoto Protocol have established mechanisms to channel financial assistance to developing countries. A number of international organizations are actively engaged in administering and/or operating climate change funds, including the United Nations Development Programme (UNDP), United Nations Environment Programme (UNEP), and the United Nations International Strategy for Disaster Reduction (UN-ISDR). Similarly, a number of multilateral development banks have set up dedicated funds to address climate change. Further, several industrialized countries have established climate change funds to assist climate change mitigation and adaption in the developing world. It is possible that some large developing countries might also establish such funds. For lack of space, however, this section will only discuss those financial arrangements established in the climate change regime.

#### A. The Global Environment Facility (GEF)

47. The Global Environment Facility GEF was assigned as an operating entity of the financial mechanism of the UNFCCC on an on-going basis, subject to review every four years.<sup>80</sup> In addition, the GEF manages two special funds established by the Parties: the Special Climate Change Fund; and the Least Developed Country Fund (LDC Fund).

48. The climate change portfolio of the GEF oversees mitigation and adaptation. Mitigation is addressed in five different areas: (1) renewable energy; (2) energy efficiency; (3) sustainable transport; (4) sustainable management of land use, land-use change, and forestry; and (5) new low-carbon and energy technologies.<sup>81</sup> Unlike climate change mitigation, climate change adaptation focuses on helping the most vulnerable countries through specific funds.<sup>82</sup> Strategic Priority on Adaptation is a program under the GEF Trust Fund; the LDC Fund addresses the needs of 48 countries; and the Special Climate Change Fund assists all developing countries.<sup>83</sup>

49. The climate change focal area of the GEF, since its inception, has “generated \$18.31 billion in assistance, consisting of \$2.57 billion in GEF investment and \$15.76 billion in co-financing from GEF partners worldwide.”<sup>84</sup> Under the adaptation area of Special Climate Change Fund and LDC Fund, the focal area has “mobilized more than \$250 million earmarked for activities related to adaptation and technology transfer.”<sup>85</sup> The LDC Fund, as

<sup>79</sup> See UNFCCC, *Investment and Financial Flows to Address Climate Change*, at 5, [http://unfccc.int/cooperation\\_and\\_support/financial\\_mechanism/items/4053.php](http://unfccc.int/cooperation_and_support/financial_mechanism/items/4053.php).

<sup>80</sup> See *id.*, Ch 8 at 162, [http://unfccc.int/cooperation\\_and\\_support/financial\\_mechanism/items/4053.php](http://unfccc.int/cooperation_and_support/financial_mechanism/items/4053.php).

<sup>81</sup> See Global Environment Facility (GEF), *Focal Area: Climate Change* at 2-3 (June 2009), <http://www.thegef.org/uploadedFiles/Publications/ClimateChange-FS-June2009.pdf>.

<sup>82</sup> See *id.*

<sup>83</sup> See *id.*

<sup>84</sup> See *id.*

<sup>85</sup> See *id.* at 2.

of 2008, has mobilized more than \$180 million.<sup>86</sup> The Special Climate Change Fund was established “to finance activities, programs, and measures emphasizing adaptation to climate change.”<sup>87</sup> Adaptation measures under the Special Climate Change Fund address various areas, including agriculture, water resources, infrastructure, and health.<sup>88</sup> More than \$110 million dollars have been financed through Special Climate Change Fund.<sup>89</sup> The current resources for adaptation are \$215 million with \$50 million going to the Strategic Priority on Adaptation, \$115 million to LDC Fund, and \$50 million to the Special Climate Change Fund.<sup>90</sup>

## B. The Kyoto Protocol’s Adaptation Fund

50. The Kyoto Protocol establishes two main financial arrangements.<sup>91</sup> First is the operation of the market mechanisms, including (1) emission trading, (2) clean development mechanism (CDM), and (3) joint implementation, and a carbon market creating economic incentives for trading and capping the six-major GHGs.<sup>92</sup> Participating countries purchase or trade in carbon instruments to meet their Kyoto reduction commitments.

51. The Kyoto Protocol has a specific Adaptation Fund to assist developing countries to adapt to the adverse effects of climate change.<sup>93</sup> The Adaptation Fund only provides financial support to developing countries that have ratified the Protocol. The Adaptation Fund Board supervises and manages the Adaptation Fund and has sixteen members and sixteen alternates who meet no less than twice a year.<sup>94</sup> The Adaptation Fund is replenished through contributions from the CDM: it receives 2% of the certified emission reductions resulting from CDM projects.<sup>95</sup> In December 2008, the Parties to the Kyoto Protocol established rules of procedure, priorities, policies, and guidelines for the Adaptation Fund.<sup>96</sup>

## C. The Copenhagen Accord

52. The Copenhagen Accord, which was acknowledged but not formally adopted by COP 15 in December 2009, contains financial elements including both short term and long term targets for industrialized countries: a short term total “approaching USD 30 billion” over the 2010-2012 period and a long term goal of USD 100 billion a year by 2020. In addition, the Accord directs the establishment of the Copenhagen Green Climate Fund as an operating entity under the financial mechanism of the UNFCCC. This fund would cover a broad range of mitigation (including forest-related mitigation), adaptation, capacity building

<sup>86</sup> See *id.* at 4; see also GEF, *Annual Report* (2008), at 48, <http://www.thegef.org/uploadedFiles/Publications/annual-report-2008-lowres.pdf>.

<sup>87</sup> See GEF: *Focal Area*, *supra* note 81 at 4.

<sup>88</sup> See *id.*

<sup>89</sup> See *id.*, See also GEF, *Annual Report*, *supra* note 86, at 51.

<sup>90</sup> See GEF, *Frequently Asked Questions about GEFs Work on Adaptation* at 1, [http://www.thegef.org/projects/focal\\_areas/climate/documents/adaptationFAQs.pdf](http://www.thegef.org/projects/focal_areas/climate/documents/adaptationFAQs.pdf).

<sup>91</sup> See UNFCCC, *About Clean Development Mechanism (CDM)*, <http://cdm.unfccc.int/about/index.html>.

<sup>92</sup> CO<sub>2</sub>, CH<sub>4</sub>, N<sub>2</sub>O, HFCs, PFCs, and SF<sub>6</sub>.

<sup>93</sup> See Kyoto Protocol to the United Nations Framework Convention on Climate Change (December 11, 1997), entered into force February 16, 2005, U.N. Doc. FCCC/CP/1997/L.7/Add.1 [hereinafter Kyoto Protocol].

<sup>94</sup> See UNFCCC, *Adaptation Fund*, [http://unfccc.int/cooperation\\_and\\_support/financial\\_mechanism/adaptation\\_fund/items/3659.php](http://unfccc.int/cooperation_and_support/financial_mechanism/adaptation_fund/items/3659.php).

<sup>95</sup> See *id.*

<sup>96</sup> See *id.*



and technology development and transfer. It also directs that adaptation funding be delivered through “effective and efficient fund arrangements,” with equal representation among industrialized and developing countries, but does not provide further details.

## IV. The Clean Development Mechanism (CDM)

53. The Clean Development Mechanism (CDM), created under the Kyoto Protocol to the UNFCCC, was designed to achieve cost-effective emissions reduction and promote sustainable development in developing countries. It does so by encouraging investments in developing countries that achieve emission reductions additional to what would otherwise have occurred. CDM projects have so far generated more than 365 million Certified Emission Reductions (CERs) and are anticipated to generate more than 2.9 billion CERs within the first commitment period of the Kyoto Protocol (2008-2012). The CDM has passed more than 2000 projects registered in less than two years.<sup>97</sup>

54. This section first provides a brief background on the CDM and its structure. It then analyzes the CDM’s requirements, scope, and actors. The last part addresses certain criticisms that have been leveled to the CDM, concluding with an analysis of options for its improvement.

### A. Background

55. Under the Kyoto Protocol, industrialized Annex I Parties<sup>98</sup> must reduce their GHG net emissions by an average of 5% below 1990 levels over a five-year reporting period, 2008-2012.<sup>99</sup> The CDM is one of the three market-based mechanisms created by the Kyoto Protocol to assist industrialized country Parties to meet their emissions reduction target.<sup>100</sup> Under the CDM, Annex I Parties (or private entities from those countries) may fund activities in non-Annex I Parties that result in Certified Emissions Reductions CERs. Industrialized countries are then able to apply CERs toward their emissions targets.

56. The CDM has a two-fold purpose. First, it aims at promoting sustainable development in developing countries. Accordingly, the CDM is expected to lead to investments into the developing world and to the transfer of environmentally safe and sound technology.<sup>101</sup> Second, the CDM is critical to addressing GHG mitigation by assisting industrialized countries in achieving compliance with their quantified emission reduction commitments under the Kyoto Protocol. In this context, the main rationale behind the CDM is cost effectiveness, which means that the projects will take place where GHG emissions reductions are cheaper.<sup>102</sup>

<sup>97</sup> UNFCCC, CDM Home, *Clean Development Mechanism passes 2000th registered project milestone in less than two years*, 6 January 2010, [http://unfccc.int/files/pressreleases/application/pdf/press\\_release\\_cdm\\_passes\\_2000th\\_registered\\_project.pdf](http://unfccc.int/files/pressreleases/application/pdf/press_release_cdm_passes_2000th_registered_project.pdf).

<sup>98</sup> Annex I Parties includes OECD member countries and countries undergoing the process of transition to a market economy.

<sup>99</sup> Kyoto Protocol, *supra* note 93, Article 3(1).

<sup>100</sup> *Id.* at Article 12. The two other mechanisms are Joint Implementation and Emissions Trading. *See id.* at Articles 6 and 17.

<sup>101</sup> *See* UNFCCC, Decision 17/CP.7, Modalities and Procedures for a Clean Development Mechanism as Defined in Article 12 of the Kyoto Protocol, Annex, 1, U.N. Doc. FCCC/CP/2001/13/Add.2.

<sup>102</sup> *See* Harro van Asselt & Joyeeta Gupta, *Stretching Too Far? Developing Countries and the Role of Flexibility Mechanisms Beyond Kyoto*, 28 STAN. ENVTL. L. J. 311, 331 (2009).

## B. Basic Requirements of a CDM Project

57. Under Kyoto Protocol Article 5, CDM projects have to fulfill three basic requirements:<sup>103</sup>

- a) Voluntary participation by each Party.<sup>104</sup> Written approval of voluntary participation is a requirement for validation.<sup>105</sup>
- b) *Real, measurable, and long-term mitigation of climate change.* CDM projects must lead to real, measurable reductions in GHG emissions, or lead to the measurable absorption (or “sequestration”) of GHGs in a developing country.<sup>106</sup> The “project boundary” defines the area within which emissions reductions occur.<sup>107</sup>
- c) *Additionality.* The ‘additionality’ element requires emission reductions that are additional to any that would occur in the absence of a certified project activity.<sup>108</sup> Stated differently, “additionality” requires that GHG emissions from a CDM project activity must be reduced below those levels that would have occurred in the absence of the project.<sup>109</sup> In fact, it must be shown that the project would not have been implemented without the CDM.

58. A CDM project should also contain a “sustainability” element. All CDM projects must contribute towards sustainable development in the host country and must also be implemented without any negative environmental impacts.<sup>110</sup> To ensure that these conditions are met, the host country determines whether the CDM project meets its sustainable development objectives, and also decides whether an environmental assessment of the project is required.<sup>111</sup> In connection with the sustainability element, some have challenged the prerogative of the host country to define sustainable development, given the linkage between human rights and development and the need for external accountability of the State with respect to human rights issues.

<sup>103</sup> Beyond these requirements, the Kyoto Protocol provided almost no guidance for operation the CDM. To develop the necessary institutional framework to operate the CDM, the Parties have adopted a substantial body of Decisions at meetings of the Parties. See CHRIS WOLD, DAVID HUNTER, & MELISSA POWERS. (2009). *CLIMATE CHANGE AND THE LAW*. 233 (2009).

<sup>104</sup> See UNFCCC, Decision 3/CMP.1, *Modalities and procedures for a clean development mechanism as defined in Article 12 of the Kyoto Protocol*, U.N. Doc FCCC/KP/CMP/2005/8/Add.1, Annex, para. 28: “Participation by Parties in a CDM project activity is voluntary.”

<sup>105</sup> *Id.* at Annex, para. 40.

<sup>106</sup> See Pembina Institute for Appropriate Development, *A User's Guide to the CDM (Clean Development Mechanism)*, (2d ed. 2003), at p. 4-5, available at [http://pubs.pembina.org/reports/user\\_guide\\_2nd\\_ed.pdf](http://pubs.pembina.org/reports/user_guide_2nd_ed.pdf).

<sup>107</sup> See UNFCCC, Report of the Conference of the Parties on its Seventh Session, Held at Marrakesh from 29 October to 10 November 2001, Annex G (52), U.N. Doc. FCCC/CP/2001/13/Add.2 (Jan. 21, 2002), [hereinafter Marrakech Accords] available, [http://cdm.unfccc.int/Reference/COPMOP/decisions\\_17\\_CP.7.pdf](http://cdm.unfccc.int/Reference/COPMOP/decisions_17_CP.7.pdf).

<sup>108</sup> Kyoto Protocol, *supra* note 93, at Article 12(5).

<sup>109</sup> “A CDM project activity is additional if anthropogenic emissions of GHG by sources are reduced below those that would have occurred in the absence of the registered CDM project activity.” See Marrakech Accords, *supra* note 107, Annex G (43).

<sup>110</sup> See Decision 17/CP.7, para. 4, *supra* note 101.

<sup>111</sup> See Pembina Institute for Appropriate Development, *supra* note 106.

## C. Core Actors of the CDM

59. CDM projects involve several participants:<sup>112</sup>

- a) **Project Proponent.** This is the entity that develops and implements a CDM project.
- b) **CER Purchaser.** This invests in the project and/or purchases the project's CERs.
- c) **Stakeholders.** These include the public, or any individuals, groups or communities affected, or likely to be affected, by the proposed CDM project activities.<sup>113</sup>
- d) **Host Country.** This is the developing country in which the CDM project takes place. The host country approves the project prior to its implementation.
- e) **Executive Board.** This supervises implementation of the CDM and reports to the COP/CMP. It is comprised of ten members representing Kyoto Protocol Parties.<sup>114</sup> It also maintains the CDM registry for issuance of CERs, approves methodologies for measuring baselines and additionality, and accredits DOEs.<sup>115</sup>
- f) **Designated National Authority (DNA).** The DNA is established by the host country and decides whether the proposed CDM is consistent with the country's sustainable development goals. The DNA serves as a focal point for consideration and approval of CDM project proposals.<sup>116</sup> The DNA accepts or rejects the CDM component of particular projects.<sup>117</sup>
- g) **Designated Operational Entities (DOEs).** DOEs are accredited by the CDM Executive Board as such.<sup>118</sup> They have varying responsibilities during different stages of the CDM project cycle, including: reviewing and assessing the Project Design Document (PDD); certifying the projects proposed methodology for measuring emissions reductions; validating project proposals; and verifying the emissions reductions resulting from the project that could be considered for issuance of CERs. There are two DOEs involved in the CDM process. The first DOE prepares a validation report evaluating the PDD against the CDM requirements, which it submits to the Executive Board for registration.<sup>119</sup> The second DOE verifies and certifies the emissions reductions, and then provides a report to the Executive Board for CER issuance.

<sup>112</sup> See Pembina Institute for Appropriate Development, *supra* note 106.

<sup>113</sup> See Marrakech Accords, *supra* note 107, at Annex A (e).

<sup>114</sup> See *id.* Marrakech Accords, *supra* note 107, at Annex C (5).

<sup>115</sup> *Id.*

<sup>116</sup> See Decision 3/CMP.1, *supra* note 104, at Annex, para. 29.

<sup>117</sup> See UNDP/BDP Energy and Environment Group, The Clean Development Mechanism: a User's Guide 26 (2003), at <http://www.undp.org/energy/docs/cdmchapter1.pdf>.

<sup>118</sup> See Decision 3/CMP.1, *supra* note 104 at Annex G. See also WOLD ET AL., *supra* note 103, at 234.

<sup>119</sup> Mindy G. Nigoff, *Clean Development Mechanism: Does The Current Structure Facilitate Kyoto Protocol Compliance?* 18 GEO. INT'L ENVTL. L. REV. 249, 257-258 (2006). In small-scale projects the same designated operational entity can carry out both the validation (at project outset) and verification (during project operation), in order to avoid expenses of using two DOEs. See also UNDP/BDP Energy and Environment Group, *supra* note 117, at 20-22.

## D. Stages in the CDM Project Cycle

60. Several steps must be undertaken to obtain CERs:<sup>120</sup>
- a) **Design and formulation of the proposed project-by-project participants.** Project proponents submit a PDD to the host country's DNA. The PDD should include the technical and financial details of the project, including: the proposed baseline methodology for calculating emissions reductions; project's estimated operational life time; description of the additionality requirements; documentation of environmental impacts; stakeholder comments; sources of funding; and a monitoring plan.<sup>121</sup>
  - b) **Approval by the DNA.** The DNA approves the development of the proposed CDM project. The DNA also confirms whether a CDM project activity will contribute to the sustainable development of the host State.
  - c) **Validation.** The project design, expressed in the PDD, must be evaluated by the first DOE against the requirements of the CDM. Validation also includes assurance that the host country agrees to the following: that the project contributes to sustainable development; that any required environmental assessment has been carried out; and that there has been adequate opportunity for public comment on the project.
  - d) **Registration.** The validated project must be formally accepted and registered by the Executive Board, based on the recommendations from the first DOE.
  - e) **Verification.** Once the CDM project is underway, the monitored emissions reductions that result from it must be reviewed periodically by the second DOE.
  - f) **Issuance of certification.** Upon written assurance provided by the second DOE, the CDM Executive Board issues the CERs. The CERs are then assigned to the Annex I country where the CER purchaser is located.

## E. Project Types

61. Current CDM statistics (January, 2010),<sup>122</sup> show more than 2000 registered CDM projects, of which large-scale projects represent 55.43% and small-scale projects<sup>123</sup> represent 44.57%. Most CDM projects involve energy industries (renewable and non-renewable sources), energy efficiency, waste handling and disposal, agriculture,

<sup>120</sup> See Pembina Institute for Appropriate Development, *supra* note 106. See also Charlotte Streck & Jolene Lin, *Making Markets Work: a Review of CDM Performance and the Need for Reform*, 19 EUR. J. INT'L. L. 409 (2008), at 409.

<sup>121</sup> See Decision 3/CMP.1 *supra* note 104, at Annex B. See also Wold, C., Hunter, D., & Powers, M., *supra* note 103, at 14.

<sup>122</sup> See UNFCCC, CDM-Home, <http://cdm.unfccc.int/Statistics/Registration/RegisteredProjByScalePieChart.html>.

<sup>123</sup> The definition of small scale projects is provided by the COP/CMP as: (I) renewable energy project activities with a maximum output capacity equivalent of up to 15 megawatts; (II) energy efficiency improvement project activities which reduce energy consumption by up to the equivalent of 15 gigawatt hours per year; and (III) other project activities that both reduce anthropogenic emissions by sources and directly emit less than 15,000 kilotons of CO<sub>2</sub> equivalent per year (See Decision 17/CP.7, *supra* note 101, para. 6 (c), amended by 1/CMP.2, para. 28). A project which is eligible to be considered as a small-scale CDM project activity can benefit from the simplified modalities and procedures (See Decision 4/CMP.1 *Guidance relating to the clean development mechanism*, U.N. Doc. FCCC/KP/CMP/2005/8/Add.1, Annex II).

manufacturing industries, fugitive emissions from fuels (solid, oil and gas), chemical industries, afforestation and reforestation, mining production, among others.<sup>124</sup> China, India, Brazil, Mexico, and Malaysia are the major countries hosting CDM projects, accounting for approximately 80% of the total number of projects.<sup>125</sup>

62. Although the CDM does not have an explicit technology transfer mandate, it contributes to technology transfer by encouraging investments that use technologies currently not available in the host countries. According to a UNFCCC Secretariat report on technology transfer in CDM projects, technology transfer is more common for larger projects involving agriculture, energy efficiency, landfill gas, nitrogen dioxide (N<sub>2</sub>O), hydrofluorocarbon (HFC) and wind projects.<sup>126</sup> Also technology transfer is more common for projects that involve foreign participants. The report concludes that the technology transferred mostly originates (over 70%) from Japan, Germany, the USA, France, and Great Britain. Although technology transfer from Non-Annex I countries is less than 10% of all technology transfer, Brazil, China, India, South Korea and Chinese Taipei are the main sources of equipment (94%) and knowledge (70%) transfers from Non-Annex I sources.<sup>127</sup>

## F. Critiques of the CDM

63. Criticisms leveled to the CDM in the scholarly literature<sup>128</sup> concern, inter alia, governance practices, environmental integrity, and contribution to sustainable development.<sup>129</sup>

- a) ***A rights-based approach (RBA) to CDM.*** The current CDM's emphasis on emissions reductions does not ensure that its projects minimize impacts deleterious to the rights of people or conservation.<sup>130</sup> Measures and projects adopted under the CDM can have direct and indirect impacts on human communities and livelihoods. For example, dam projects may involve displacement of communities and cause irreversible environmental impacts.
- b) ***No requirement of prior informed consent.*** The CDM requires only that affected communities be consulted, and not that they give their prior informed consent (or free, prior and informed consent in the case of indigenous and tribal peoples).<sup>131</sup> This can result in a direct violation of human rights.
- c) ***Lack of equitable geographical distribution*** exists between developing countries that are eligible and those that are favored for project development. In other words, countries like

<sup>124</sup> See <http://cdm.unfccc.int/Statistics/Registration/RegisteredProjByScopePieChart.html>. The energy industries sector represents 60.31% of the total projects registered under the CDM.

<sup>125</sup> See UNFCCC, CDM technology transfer report, *Key Findings of "Analysis of Technology Transfer in CDM - Update 2008" Study*, <http://cdm.unfccc.int/Reference/Reports/TTreport/TTkey08.pdf>.

<sup>126</sup> See Stephen Seres, *Analysis of Technology Transfer in CDM Projects*, Report prepared for the UNFCCC Registration & Issuance Unit CDM/SDM (December, 2008), at <http://cdm.unfccc.int/Reference/Reports/TTreport/TTrep08.pdf>.

<sup>127</sup> *Id.*

<sup>128</sup> This section is based on the scholarly debate and does not necessarily reflect the author's or CIEL's views. Moreover, the discussion does not purport to evaluate the merits of the various critiques.

<sup>129</sup> See Charlotte Streck, *Expectations and Reality of the Clean Development Mechanism: A Climate Finance Instrument between Accusations and Aspirations*, in CLIMATE FINANCE: REGULATORY AND FUNDING STRATEGIES FOR CLIMATE CHANGE AND GLOBAL DEVELOPMENT 67, 67 (Richard Stewart, Benedict Kingsbury & Bruce Rudyk eds., 2009)

<sup>130</sup> See Orellana, *supra* note 68.

<sup>131</sup> *Id.*

China, India, and Brazil are receiving the lion's share of project investment, while African countries, for instance, are languishing.<sup>132</sup>

- d) **Equity.** Market systems, such as the CDM, seek technological solutions and efficiency. The unequitable distribution of access to technologies, however, reinforces power and wealth disparities.<sup>133</sup> In addition, market-based systems treat pollution as a commodity to be bought or sold, raising complex ethical issues.<sup>134</sup>
- e) **Failure to promote sustainable development or green technology transfer.** As a market mechanism, the CDM searches for the cheapest emissions reductions. In that regard, while the CDM has been effective in reducing mitigation costs, it has not been equally effective in contributing more broadly to sustainability.<sup>135</sup> The greatest amounts of CERs are being generated by projects with low or negligible contribution to sustainable development. For example, most of the non-renewable energy projects that are now flooding the carbon market do not score high on certain sustainable development indicators.<sup>136</sup> Similarly, renewable energy, energy efficiency and transport project activities—smaller in scale and more diffuse by nature—are less competitive in the CDM market.<sup>137</sup>
- f) **Lack of access to remedies and jurisdiction.** There is no accountability mechanism at the CDM, such as the World Bank's Inspection Panel. In addition, the CDM rules do not provide recourse to private parties to challenge Executive Board decisions. Instead, the Executive Board, as is the case with other international institutions, has immunity to enable it to exercise its functions or fulfill its purposes without the threat of litigation.<sup>138</sup>
- g) **Lengthy CDM process.** The bureaucratic CDM process significantly slows an already strained project pipeline. The steps along the pipeline substantially increase the transaction costs of moving from the design and formulation of a project to issuance of CERs.<sup>139</sup> Moreover, the approval process is considered by some to be guided by political considerations rather than factual competence.<sup>140</sup>
- h) **Lack of transparency.** The lack of transparency is associated to DOEs' role in verifying emissions reductions, as DOEs are composed of private consultants.<sup>141</sup> In addition, lack of

<sup>132</sup> According to the UN Environment Programme (UNEP), the number of CDM projects that are being planned or have been registered across the African region is increasing. UNEP reports that a total of 112 CDM projects in Africa are at the stage of validation, requesting registration or have been registered. This is an increase from previous years, with 78 projects in 2008 and two in 2004. See UNEP, *UN Carbon Markets Powering Green Energy Growth in Africa*, November 17, 2009, <http://www.grida.no/news/press/3948.aspx>.

<sup>133</sup> See Maxine Burkett, *Just Solutions to Climate Change: A Climate Justice Proposal for a Domestic Clean Development Mechanism*, 56 Buff. L. Rev. 169, 234 (2008). See also Alice Kaswan, *Justice in a Warming World*, 26 ENVTL. FORUM 48, 50-51 (2009).

<sup>134</sup> See Kaswan, *id.* at 50-51.

<sup>135</sup> See Streck, *supra* note 129.

<sup>136</sup> See Asselt & Gupta, *supra* note 102 at 350.

<sup>137</sup> See Burkett, *supra* note 133, at 210.

<sup>138</sup> See WOLDET AL., *supra* note 103, at 236, citing Ernestine E. Meijer, *The International Institutions of Clean Development Mechanism Brought Before National Courts: Limiting Jurisdictional Immunity to Achieve Access to Justice*, 39 N.Y.U.J.INT'L L. & POL 873 (2007). See also Streck & Lin in *supra* note 120.

<sup>139</sup> See Burkett, *supra* note 133, at 210.

<sup>140</sup> See Streck, *supra* note 129, at 71.

<sup>141</sup> See Burkett, *supra* note 133, at 236.

transparency relates to deficiencies of the regulatory process to guarantee the private sector's confidence in the CDM.<sup>142</sup>

- i) **Additionality.** Most CDM projects are non-additional and therefore do not represent real emissions reductions. The additionality screening is criticized for being imprecise and subjective, as well as for being unable to prevent non-additional projects from entering the CDM.<sup>143</sup>
- j) **Limited use.** The use of CDM is limited to reducing emissions on a single project-basis, and is not designed to address whole sectors of the economy.

64. Despite the criticisms, the CDM is mobilizing large amounts of funds from the private sector towards mitigation in developing countries. In addition, it can contribute to building institutional capacity and keeping developing countries engaged in the Kyoto Protocol's process. The CDM thus remains an important mechanism under the climate change regime for GHG mitigation and for promoting sustainable development and technology transfer. Therefore, one of the questions facing the climate change regime is how to reinvigorate and improve the CDM including enhancing its effectiveness and ensuring its social and environmental integrity. In this sense, there is room for enhancing the CDM's role within the climate change regime, including post-2012.

## G. CMP 5 Decisions relating to the CDM

65. CMP 5 provided further guidance relating to the CDM. While a detailed analysis of this decision is beyond the scope of this paper, in order to inform an assessment of the CDM under criteria pertaining to the right to development, the following aspects merit attention.

66. CMP 5 set in motion a process of study of baseline and monitoring methodologies and additionality to increase CDM projects in under-represented project activity types or regions.<sup>144</sup> This is relevant to increasing investments in projects that may achieve significant sustainable development benefits and emissions reductions, as well as to channeling investments to more developing countries, including LDCs, instead of just a few.

67. CMP 5 also addressed the need for a wider distribution of CDM projects in developing countries. It adopted several measures to encourage CDM projects in countries with minor CDM participation, including a request to the Executive Board to use interest accrued within the Trust Fund for the CDM (and any voluntary contributions) to provide loans to countries with fewer than ten registered CDM projects to cover the costs of the development of PDDs, validation, and the first verification of project activities.<sup>145</sup> In addition, CMP 5 took note of the work of the DNA Forum, given its potential contribution to achieving broader participation in the CDM, including through the sharing of information

<sup>142</sup> See Streck, *supra* note 129, at 71. See also Streck & Lin, *supra* note 120.

<sup>143</sup> See Barbara Haya, *Measuring Emissions Against an Alternative Future: Fundamental Flaws in the Structure of the Kyoto's Protocol Clean Development Mechanism* (2009). Energy and Resources Group, University of California at [http://erg.berkeley.edu/working\\_paper/index.shtml](http://erg.berkeley.edu/working_paper/index.shtml).

<sup>144</sup> See UNFCCC, CMP-5 Decision, Further guidance relating to the clean development mechanism, *supra* note 78, at paras. 23 and 25.

<sup>145</sup> UNFCCC. CMP-5 Decision, Further guidance relating to the clean development mechanism, *supra* note 78 at paras. 47-50.

and experience, and encouraged the Executive Board to follow up on issues raised by the DNA Forum.<sup>146</sup>

## **V. The CDM under Right to Development Criteria**

68. Assessing the CDM under criteria pertaining to the right to development is helpful for evaluating proposals regarding CDM reform. The HLTF at its fifth session (2009) revised the right to development criteria and organized them under the three components of the right to development, namely: comprehensive human-centered development; enabling environment; and social justice and equity. In addition, the HLTF has identified operational clusters of criteria within each of these three components.

69. This section will focus on the following clusters of criteria, as defined by the HLTF: (1) human rights-based process and outcomes (criteria c, d & e); (2) sustainable development (criterion f); (3) international cooperation and assistance (criteria g, h, I & j); and (4) rule of law and governance (criteria l & m).

### **A. Human Rights-Based Process and Outcomes**

70. The right to development criteria concerning human-rights based process and outcomes calls for particular attention on the principles of equality, non-discrimination, participation, transparency, and accountability in the design of development strategies. With respect to the CDM, these criteria call for attention on the CDM's ability to define sustainable development objectives in an inclusive and participatory process, on the one hand, and on the CDM's ability to ensure that the rights of stakeholders are respected, on the other.

71. The question of the definition of sustainable development objectives is left by CDM design in the hands of the host State. The host State's DNA will determine whether a proposed CDM projects contributes or not to its sustainable development. The CDM regards this determination as an expression of the sovereignty of the host State, and it does not provide for international scrutiny of it. Therefore, the CDM does not require that the DNA establish an open and participatory process when defining sustainable development criteria, or when making determinations regarding the contribution of projects to sustainability.

72. The question of the CDM's ability to ensure that CDM projects respect the rights of stakeholders calls for analysis of the procedural safeguards in the CDM project cycle, in connection with the role of the Executive Board in that regard. Current CDM modalities and procedures already contain certain tools necessary to apply certain steps of a rights-based approach (RBA), although more could be done to ensure human rights protection.<sup>147</sup> Similarly, it remains possible that the CDM Executive Board will exercise its authority to supervise the CDM to exact compliance with all terms of the CDM modalities and procedures, including the rules that can contribute to avoiding any negative social and environmental spillover from projects. In the exercise of this authority, the CDM Executive Board could conclude that no CERs shall be issued in connection with projects involving negative social and environmental spillovers, especially if such impacts involve infringements of rights.

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<sup>146</sup> *Id.* at paras. 44-5.

<sup>147</sup> *See* Orellana, *supra* note 68, at 37-61.



73. An RBA to the CDM can be used to ensure that its future operations improve its contribution to sustainable development, including respect for human rights. An RBA will ensure that people's rights will not be affected by CDM projects, and will ensure environmental and procedural integrity. An RBA involves a series of steps oriented towards adequate consideration of the rights of individuals and communities that may be adversely affected by mitigation projects. In this respect, undertaking a situation analysis, providing adequate information on the project, and ensuring participation of rights-holders and other stakeholders are initial steps that enable early identification of the rights and interests that may be affected by the project. In addition, a process for taking reasoned decisions would ensure that adequate consideration is given to the rights at issue, which is central to avoid interference with protected rights as well as to balance competing rights where necessary. In addition, mechanisms for monitoring, evaluating, and adequate enforcement are important for operationalizing the RBA throughout the life of a project and for learning from the experience during implementation.<sup>148</sup>

## B. Sustainable Development

74. The criteria concerning sustainable development call for an evaluation of, *inter alia*, the fair distribution of development benefits, both within and among countries. As noted above, the CDM is a market mechanism driven by investments in the cheapest opportunities for reducing emissions. Whether these projects also contribute to sustainable development raises two issues: the process and outcomes pertaining to the host State DNA's determination of sustainable development criteria and contributions; and the extent of participation of developing countries in the CDM (addressed below in connection with international cooperation and assistance).

75. In addition to the discussion above concerning a rights-based process to the determination of sustainable development criteria and contributions, the CDM does not explicitly require that human rights considerations be taken into account in relation to sustainable development determinations. In the CDM's design, sustainable development determinations are the prerogative of the host State, which will thus determine whether and to what extent it considers human rights. While it could be argued that this design maximizes national policy space and autonomy, it is, however, in opposition to the notion that human rights issues are a matter of international concern, and that they are directly and indirectly implicated in sustainable development. In this regard, the right to development criterion concerning national policy space stresses that the determination of development policies should be conducted in a manner that is consistent with realizing all human rights.<sup>149</sup>

## C. International Cooperation and Assistance

76. The right to development criteria concerning international cooperation and assistance calls for an examination of, *inter alia*, the extent of participation of developing countries in the CDM. In this respect, as noted above, most CDM projects are implemented in just a few developing countries, which thus receive the lion's share of CDM investment. This situation is at odds with right to development criteria stressing equitable distribution of the benefits of sustainable development across the developing world, with particular

<sup>148</sup> See Orellana, *supra* note 68, at 37-61

<sup>149</sup> See Report of the High Level Task Force on the Implementation of the Right to Development on its Fifth Session (Geneva, 1-9 April 2009), *supra* note 1, Annex IV, Criterion (k).

attention to the needs of the most vulnerable and marginalized segments of the international community. Moreover, this situation aggravates international inequities pertaining to financial flows and transfer of technology for GHG mitigation.

77. Accordingly, a more equitable geographical distribution of CDM projects, in numbers and volume of investments, would enhance the CDM's ability to contribute to the right to development. Similarly, the implementation of a sectoral CDM initiative, in addition to individual CDM projects, could enhance the ability of smaller developing countries to participate in the CDM. As noted above, CMP 5 has taken certain steps in this direction.

## **D. Rule of Law and Governance**

78. Regard to rule of law and governance as a cluster of the right to development criteria calls for attention on the national and international institutions active in the CDM, including with respect to accountability, access to information, and effective measures for redress.

79. At the national level, the CDM can contribute to the host State's ability to establish institutional mechanisms to facilitate green investments and technology transfer. The creation of DNAs as a pre-requisite for CDM projects reflects the CDM's potential contribution to institutional improvement. To ensure that this contribution materializes, however, the CDM must establish adequate tools to ensure accountability of DNAs.

80. At the international level, the CDM has been criticized for its inability to provide affected stakeholders with recourse where required procedures have not been properly followed. It has been noted that a grievance mechanism could allow the CDM project to address and remedy situations before disputes aggravate or entrench opposing positions or result in violence. A grievance mechanism available to the various actors participating in the CDM could also lift the process to the level of an administrative procedure that meets due process standards, thereby enhancing good governance and the rule of law.<sup>150</sup>

81. With respect to CDM governance, there are no mechanisms established for affected individuals to challenge Executive Board decisions. It has been suggested that CDM administrative procedure must meet international due process standards, enhance the predictability of its decisions, and promote private-sector confidence in the system. In this vein, it has been proposed that a review mechanism of the decisions of the Executive Board should be established, in order to give project participants and stakeholders the right to obtain review of Executive Board decisions.<sup>151</sup> In this regard, CMP 5 has requested the Executive Board, as its highest priority, to continue to significantly improve transparency, consistency, and impartiality in its work, including through, inter alia, publishing detailed explanations of and the rationale for decisions taken and enhancing its communications with project participants and stakeholders.<sup>152</sup>

## **E. Improving the Right to Development Criteria**

82. The High-Level Task Force (HLTF) was requested to examine Millennium Development Goal 8, on global partnership for development, and suggest criteria for its

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<sup>150</sup> See Charlotte Streck & Thiago Chagas, *The Future of the CDM in a Post-Kyoto World*, 1 CARBON & CLIMATE LAW REV. 53, 61-62 (2007).

<sup>151</sup> *Id.*

<sup>152</sup> UNFCCC, CMP-5 Decision, Further guidance relating to the clean development mechanism, *supra* note 80, at paras. 6-15.

periodic evaluation.<sup>153</sup> The aim of this initiative was to improve the effectiveness of global partnerships with regard to the realization of the right to development.<sup>154</sup> In accordance with this mandate, the HLTF elaborated criteria to be applied, on a pilot-basis, for periodic evaluation of global development partnerships, as a concrete step towards clarifying the operational dimensions of the right to development.<sup>155</sup> Since, the criteria have been studied by the HLTF and the Working Group on the Right to Development, and its last draft was revised at the fifth session of the HLTF in 2009.<sup>156</sup>

83. The right to development criteria could be further refined and strengthened in order to evaluate climate change partnerships. Mostly these revisions concern the “sustainable development” cluster, and specifically criterion (f). In addition, criterion (t) could also be further clarified to allow for its more rigorous application to climate change partnerships. Recommendations for specific textual changes follow.

Recommendation 1:

84. Modify the first sentence of criterion (f) to read: (f) provide for a fair distribution of development benefits as well as sustainable use and access to natural capital and resources, both for current and future generations.

85. The deletion of the strikethrough phrase in criterion (f) above responds to two issues. First, its deletion allows for greater emphasis on the sustainable use and access to natural capital and resources, for current and future generations. This criterion is of central importance to sustainable development generally, and climate change in particular. Second, the deleted phrase is found verbatim in criterion (t), addressed below. Accordingly, this modification in the list of criteria avoids duplication and concentrates the issue of fair distribution of development benefits in a single location.

Recommendation 2:

86. Put the second sentence of existing criterion (f) into a new, focused criterion: (f bis) prevent environmental degradation and resource depletion, as well as enable mitigation and adaptation to negative impacts of climate change.

87. Currently, criterion (f) contains two sentences. It is the only criterion with two sentences in the whole list of criteria. In order to address this anomaly, as well as to streamline the operative verb at the beginning of the criterion, this recommendation would establish a new, stand-alone criterion focused on environmental degradation and resource depletion, including with respect to climate change.

Recommendation 3:

88. Add a new criterion regarding the scientific basis for decision-making: (f ter) adopt a science-based approach to decision-making, including application of the precautionary approach.

89. The 2002 Johannesburg World Summit on Sustainable Development (WSSD) endorsed a science-based approach to decision-making. Specifically, paragraph 109(f) of the WSSD Plan of Implementation establishes science-based decision-making as the

<sup>153</sup> See Report of the Working Group on the Right to Development on its Sixth Session (Geneva, 14-18 February 2005), *supra* note 34.

<sup>154</sup> *Id.*

<sup>155</sup> See Report of the Working Group on the Right to Development on its Seventh Session (Geneva, 9-13 January 2006), *supra* note 18, para. 67.

<sup>156</sup> See Report of the High-Level Task Force on the Implementation of the Right to Development on its Fifth Session (Geneva, 1-9 April 2009), *supra* note 1, Annex IV.

preferred approach for making regulatory decisions.<sup>157</sup> Moreover, as explicitly noted in the WWSD Plan of Implementation, a science-based approach to decision-making includes the application of the precautionary principle or approach. In this connection, the precautionary principle has been included in major international environmental instruments, including the Rio Declaration on Environment and Development, which states that the lack of full scientific certainty will not be used as a reason for postponing cost-effective measures to prevent environmental degradation.<sup>158</sup>

90. The application of a science-based approach to decision-making is particularly important with respect to climate change. In order to evaluate the effectiveness of international arrangements established to channel international cooperation to address climate change, this criterion enables the utilization of scientific evidence. It thus avoids subjective evaluations of effectiveness by focusing on whether the measures established in the climate change regime are capable, on account of the scientific evidence, of achieving the objective of the UNFCCC (discussed above). In this connection, the Copenhagen Accord agrees that “deep cuts in global emissions are required according to science.”<sup>159</sup> It further underlines that “to achieve the ultimate objective of the UNFCCC,” and “recognizing the scientific view that the increase in global temperature should be below 2 degrees Celsius,” the Parties shall enhance cooperative action to combat climate change.<sup>160</sup>

#### Recommendation 4:

91. Add a new criterion regarding common but differentiated responsibilities: (f) quater recognize common but differentiated responsibilities, in view of the different contributions to global environmental degradation.

92. The principle of common but differentiated responsibilities (CBDR) affirms that all States have common responsibilities to protect the environment and promote sustainable development but with different burdens due to their different contributions to environmental degradation and to their varying financial and technological capabilities.<sup>161</sup> The CBDR principle was expressly recognized in the Rio Declaration on Environment and Development<sup>162</sup> and has been affirmed in various international environmental instruments including the Montreal Protocol on Substances that Deplete the Ozone Layer,<sup>163</sup> the UNFCCC and the Kyoto Protocol,<sup>164</sup> and the Stockholm Convention on Persistent Organic Pollutants.<sup>165</sup>

93. The endorsement of CBDR as a criterion regarding the right to development allows for an evaluation of particular climate change arrangements that may be established. Further, this criterion further affirms the central importance of the CBDR principle in the

<sup>157</sup> WSSD, Plan of Implementation of the World Summit on Sustainable Development, U.N. Doc. A/CONF.199/L.1, para. 109(f).

<sup>158</sup> Rio Declaration, *supra* note 10, Principle 15. *See also* Convention on Biological Diversity (June 5, 1992), entered into force December 29, 1993, 1760 UNTS 79; 31 ILM 818 (1992); Cartagena Protocol on Biosafety to the Convention on Biological Diversity (January 29, 2000), entered into force September 11, 2003, 39 ILM 1027 (2000); U.N.Doc. UNEP/CBD/ExCOP/1/3, at 42 (2000).

<sup>159</sup> Copenhagen Accord, *supra* note 71, at para. 2

<sup>160</sup> *Id.* at para 1.

<sup>161</sup> *See* DAVID HUNTER, JAMES ZALMAN & DURWOOD ZAELEKE, INTERNATIONAL ENVIRONMENTAL LAW AND POLICY 495 (2nd ed. 2002).

<sup>162</sup> Rio Declaration, *supra* note 10, Principle 7.

<sup>163</sup> Montreal Protocol on Substances that Deplete the Ozone Layer (September 16, 1987), entered into force January 1, 1989, Treaty Doc. No. 10, 100th Cong., 1st Sess. 1; 26 ILM 1550 (1987), Article 5.

<sup>164</sup> UNFCCC, *supra* note 62, Article 3.

<sup>165</sup> Stockholm Convention on Persistent Organic Pollutants (May 22, 2001), entered into force May 17, 2004, 40 ILM 532 (2001), Articles 1 and 8(9).

climate change regime, including with respect to its sustainable development dimension. In that regard, this criterion also clarifies the broader role of the CBDR principle in sustainable development, and this clarification in turn enables for the criterion's broader application to other sustainable development partnerships.

**Recommendation 5:**

94. Modify criterion (t) to read: (t) provide for a fair and equitable distribution of the benefits of development, within and among countries.

95. This recommendation clarifies and emphasizes the need to address distributional issues within and among countries. As currently drafted, it is uncertain whether the criterion contemplates an evaluation of the fair and equitable distribution of the benefits of development beyond the boundaries of the State. In other words, the current formulation of criterion (t) could be read to restrict its application to an evaluation of the distribution of development benefits solely within the State. This interpretation of the criterion diminishes its usefulness to evaluate climate change partnerships, and the CDM specifically, given that one of the shortcomings of the CDM, as elaborated above, has been its inequitable distribution of CDM projects and investments among developing countries. Thus, the phrase "within and among countries" would clarify the need to look at the distribution of developmental benefits among countries, which in turn would enable a more rigorous evaluation of climate change partnerships, and the CDM in particular.

## **Conclusions**

96. Over the last two decades, the UN has devoted substantial resources to elevating the significance of the right to development and promoting its implementation. These efforts have found important support in the Declaration on the Right to Development (DRD), which clarifies the content and principles of the right to development, as well as the rights and duties of States, international organizations and individuals, and in the Rio Declaration on Environment and Development, which clarified that the right to development has an environmental component. Given the impact of climate change on the ability of States to implement the right to development, the High Level Task Force (HTLF) on the Implementation of the Right to Development has begun studying the linkages between climate change and the right to development. Recently the HTLF has particularly focused on examining the Clean Development Mechanism (CDM) from the perspective of the right to development. This paper undertakes an initial assessment of the CDM under right to development criteria, with a view to strengthening the CDM's contribution to the implementation of the right to development.

97. International cooperation is critical to the realization of the right to development. In the context of climate change, a focus on international cooperation in the implementation of the right to development calls for an examination of the normative and institutional framework established by the international community to channel cooperation. In that regard, the UN Framework Convention on Climate Change (UNFCCC) and its Kyoto Protocol stand out as the principal legal response by the international community to the climate change threat. They provide avenues through which international cooperation occurs, including with respect to financial and technology transfers. The Copenhagen Accord and ongoing negotiations under the UNFCCC provide additional possibilities for international cooperation.

98. The linkages between the right to development and climate change are reflected in both the UNFCCC and the Kyoto Protocol. The UNFCCC noted that the largest share of historical global emissions of greenhouse gases (GHGs) has originated in industrialized countries and recognized that the share of global emissions originating in developing

countries will grow to meet their social and development needs. The Kyoto Protocol set targets for GHG emissions reductions for industrialized countries (Annex I Parties), and created three market mechanisms, including the CDM, to reduce the costs of reducing emissions.

99. The CDM is unique in light of its two-fold objective: mitigating climate change and contributing to sustainable development. In this regard, the CDM reflects a climate change partnership whereby investments from the North are channeled to the South in order to capture opportunities for the reduction of GHG emissions where they may be most cost-effective. The CDM thus promotes financial flows and technology transfer into developing countries. In addition, CDM projects are required to contribute to sustainable development, a determination that lies with the host State.

100. When examined from the perspective of the right to development, however, the CDM reveals certain issues that limit its contribution to the implementation of the right to development. Using right to development criteria, this study examined the CDM in connection with the following four issues: (1) human rights-based process and outcomes; (2) sustainable development; (3) international cooperation and assistance; and (4) rule of law and governance.

101. With regard to human rights-based processes and outcomes, the CDM needs to ensure that the host State's determination of whether a proposed CDM project contributes to sustainable development follows an inclusive and participatory process, based on clear sustainability criteria. In addition, the CDM does not explicitly require that human rights considerations be taken into account in relation to sustainable development determinations. By current CDM design, this determination is left to the host State, without involvement of the international institutions governing CDM operations. At a minimum, the CDM should clarify due process standards for the institutions at the national level making sustainability determinations with respect to CDM projects.

102. In addition, CDM projects need to respect the rights of stakeholders, which call for strengthened procedural safeguards and Executive Board authority to supervise the CDM to exact compliance with all terms of the CDM modalities and procedures, including the rules that can contribute to avoiding any negative social and environmental spillover from projects. In this vein, a rights-based approach (RBA) should be adopted to ensure that people's rights will not be affected by CDM projects and also to ensure environmental and procedural integrity. The RBA would provide adequate information on the projects, ensure participation and consultation of rights-holders and other stakeholders, secure free and prior informed consent where required, and provide potential conflict resolution mechanisms.

103. With regard to sustainable development and international cooperation and assistance, the need for fair distribution of development benefits, both within and among countries, calls on the CDM to ensure the equitable participation of developing countries. Currently, most CDM projects are implemented in just a few developing countries, which thus receive the lion's share of CDM investment. This situation is at odds with right to development criteria that stress equitable distribution of the benefits of sustainable development across the developing world, with particular attention to the needs of the most vulnerable and marginalized segments of the international community.

104. Regard to rule of law and governance calls for attention to the national and international institutions active in the CDM, including with respect to access to information and transparency, public participation, accountability and effective measures for redress. At the national level, the CDM lacks explicit tools to ensure accountability of Designated National Authority (DNAs), as this is an issue within the domain of the host State. At the international level, the CDM has been criticized for its inability to provide affected stakeholders with recourse where required procedures have not been properly followed.

105. CMP 5 in December 2009 adopted certain decisions that provide further guidance relating to the CDM. CMP 5 has requested the Executive Board, as its highest priority, to continue to significantly improve transparency, consistency, and impartiality in its work, including through, *inter alia*, publishing detailed explanations of and the rationale for decisions taken and enhancing its communications with project participants and stakeholders. CMP 5 also set in motion a process to study baseline and monitoring methodologies and additionality to increase CDM projects in under-represented project activity types or regions. Moreover, CMP 5 also addressed the need for a wider distribution of CDM projects in developing countries, and adopted several measures to encourage CDM projects in countries with minor CDM participation, including a request to the Executive Board to use interest accrued within the Trust Fund for the CDM (and any voluntary contributions) to provide loans to countries with fewer than ten registered CDM projects, to cover the costs of the development of Project Design Documents (PDDs), validation, and the first verification of project activities.

106. Finally, the criteria elaborated by the HLTF and the Working Group on the Right to Development to examine the effectiveness of partnerships in the implementation of the right to development could be further strengthened to address climate change partnerships in general, and the CDM in particular. In the cluster of criteria concerning sustainable development, a science-based approach to decision-making would provide an objective and rigorous basis to evaluate the effectiveness of international cooperation to address the climate change problem. Similarly, affirmation of the principle of common but differentiated responsibilities could enable the evaluation of climate change partnerships from a right to development perspective. Lastly, the right to development criteria could clarify and emphasize the need to address issues concerning the fair and equitable distribution of the benefits of development within and among countries.

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