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ABSTRACT

Forestry activities account for over 17 percent of human-caused greenhouse gas emissions. Since 2005, parties to the United Nations Framework Convention on Climate Change have been negotiating a mechanism known as REDD—Reducing Emissions from Deforestation and Degradation—to provide an incentive for developing countries to reduce carbon emissions and limit deforestation at the same time. When REDD was first proposed, many commentators argued this mechanism

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would not only mitigate climate change but also provide biodiversity and forests with the hard international law regime that had so far been missing. These commentators appeared to hope REDD would develop into this kind of hard international law regime. Their hope is unlikely to be fulfilled.

This Article focuses on two aspects of REDD negotiations between 2005 and 2012—the changing scope of the REDD mechanism and the parties' decisions about the level of international oversight—and situates these developments within an overall international legal framework. Placing the negotiations in the context of REDD's international legal framework exposes their significance. The true story of REDD demonstrates that REDD is developing into a country-driven, voluntary mechanism with limited international oversight and with a scope that makes it extremely difficult to implement. In that sense, REDD has far more in common with the international legal regime that currently governs forests and biodiversity than with the hard law of the international legal regime that governs climate change.

This Article concludes by pointing out two problems that result from not paying attention to the overall effect of the REDD negotiations. The first problem is misdirected focus. If the international community does not pay attention to the real story of REDD, it is likely to focus its energies on design questions at the international level and miss critically important aspects of REDD's implementation at the national and subnational level involving both private and public initiatives. The second problem is misdirected accountability. REDD's current scope makes it extremely difficult to administer and maintains an institutional infrastructure that lacks standardized and supranational oversight. Mechanisms for accountability for REDD's success or failure are lacking.

Many commentators have warned that the biggest threat to climate change mitigation and biodiversity would be failure to implement REDD. This Article counters that the biggest threat to climate change mitigation and biodiversity is for REDD to go forward as it is currently being negotiated. If the international community does not pay attention to the real story of REDD, it will likely become nothing more than a cover for limited emissions reduction, weak forest protection, infringement of indigenous and local peoples' rights, and harm to biodiversity.

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I. INTRODUCTION

Forestry activities account for over 17 percent of human-caused greenhouse gas emissions.[1] Climate change and forests are therefore inextricably linked. Any comprehensive, worldwide strategy to mitigate the pressing problem of climate change by limiting emissions should, it appears, take deforestation into account. Deforestation also exacerbates poverty, contributes to water pollution, and harms biological diversity.[2] If countries could make gains in efforts to combat climate change and address other critical issues at the same time by tackling deforestation, why not incorporate deforestation within the international legal regime for climate change?

The mechanism known as REDD, Reducing Emissions from Deforestation and Degradation, is intended to do exactly that.[3] Simply put, a REDD mechanism would reward countries or private parties for limiting deforestation and, potentially, protecting forests by providing direct funding, issuing emissions credits that could be traded on a market, or combining both in a hybrid system. In doing so, REDD would provide incentives for countries to reduce carbon emissions and limit deforestation at the same time. However, this

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1. INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE 2007: SYNTHESIS REPORT 36, fig. 2.1(c) (R.K. Pachauri & A. Reisinger eds., 2007) [hereinafter IPCC, 2007 SYNTHESIS REPORT] (stating that forestry activities account for 17.4 percent of global anthropocentric greenhouse gas emissions); *see also* G.J. NABUURS ET AL., INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, FORESTRY IN CLIMATE CHANGE 2007: MITIGATION 541, 543 (B. Metz et al. eds., 2007) (stating that deforestation is the single most important source of carbon) [hereinafter IPCC, MITIGATION]. Although some commentators have revised this figure since 2007, this figure represents the most recent scientific consensus published by the Intergovernmental Panel on Climate Change (IPCC).

2. *See* IPCC, MITIGATION, *supra* note 1, at 544 (noting that forestry mitigation could improve employment and income generation, biodiversity, and watershed conservation).

3. Although this mechanism is now known as REDD+ or REDD plus, for the sake of readability, it will be referred to throughout this Article as REDD. The mechanism began as RED, referring to "reducing emissions from deforestation." United Nations Framework Convention on Climate Change, Montreal, Can., Nov. 28–Dec. 9, 2005, *Reducing Emissions from Deforestation in Developing Countries: Approaches to Stimulate Action*, FCCC/CP/2005/Misc.1, at 2 (Nov. 11, 2005) [hereinafter *Deforestation*]. It then became known as REDD, referring to "reducing emissions from deforestation and degradation," when degradation was added to its scope. United Nations Framework Convention on Climate Change, Bali, Indon., Dec. 3–15, 2007, *Report of the Conference of the Parties on Its Thirteenth Session, Decision 2/CP.13*, FCCC/CP/2007/6/Add.1, at 8 (Mar. 14, 2008) [hereinafter *Decision 2/CP.13*]. It became known as REDD+ or REDD plus when its scope expanded so that it became, in its most recent form, "reducing emissions from deforestation and forest degradation, and the role of conservation, sustainable management of forests and enhancement of forest carbon stocks in developing countries." United Nations Framework Convention on Climate Change, Copenhagen, Den., Dec. 7–19, 2009, *Report on the Conference of the Parties on Its Fifteenth Session, Decision 4/CP.15*, FCCC/CP/2009/11/Add.1, at 11 (Mar. 30, 2010) [hereinafter *Decision 4/CP.15*].

Article argues that, as it is currently being negotiated, REDD is unlikely to fulfill this promise.

Despite some dissenting voices, a broad international consensus has supported REDD, and as such, commentators have generally focused on questions of design of REDD at the international level.[4] This Article challenges the central assumption that lies behind this typical focus on design questions at the international level. The focus implicitly assumes that REDD will be a mechanism embedded within hard international law instruments with international institutional oversight and infrastructure. As such, commentators presume REDD will be largely effective. This assumption is particularly strong for commentators concerned about biodiversity and deforestation because the international legal regime for biodiversity and forest protection has historically been made up of weaker international law, with fewer binding provisions than the international legal regime for climate change. For these commentators in particular, REDD offers the promise of a harder system of international laws and with it, they hope, improved forest and biodiversity protection.

This Article demonstrates that this hope for REDD is unlikely to be satisfied. As REDD has been negotiated by parties to the United Nations Framework Convention on Climate Change (UNFCCC)[5] since 2005, it has developed into a country-driven, voluntary mechanism with limited international oversight. Its scope has expanded so much that it is increasingly difficult to determine how to administer it. Not only is participation voluntary, but the manner of implementation is being made increasingly flexible and ad hoc.

In short, parties at the international level are negotiating a soft-law mechanism with severe implementation difficulties. In that

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4. These design questions include whether a REDD mechanism should be market based or fund based, whether credit should be awarded to projects or to countries, and how collateral harmful effects on biodiversity and indigenous peoples can be avoided. *See generally* CHARLIE PARKER ET AL., THE LITTLE REDD+ BOOK (3d ed. 2009) (setting out many of the questions about design of a REDD+ mechanism and where the parties and various governmental and nongovernmental groups stand on those issues); CENTER FOR INT'L FORESTRY RESEARCH, MOVING AHEAD WITH REDD: ISSUES, OPTIONS AND IMPLICATIONS (Arid Angelson ed., 2008); Claire Stockwell, William Hare & Kirsten Macey, *Designing a REDD Mechanism: The TDERM Triptych, in* CLIMATE LAW AND DEVELOPING COUNTRIES: LEGAL AND POLICY CHALLENGES FOR THE WORLD ECONOMY 151 (Benjamin J. Richardson et al. eds., 2009) (outlining the issues that must be resolved prior to an effective REDD mechanism and proposing a Tropical Deforestation Emission Reduction Mechanism Triptych); *see also* Leo Peskett, *REDD+ and Development, in* LAW, TROPICAL FORESTS AND CARBON: THE CASE OF REDD+ 230, 231–32 (Rosemary Lyster, Catherine MacKenzie & Constance McDermott eds., 2013) [hereinafter LAW, TROPICAL FORESTS AND CARBON] (noting that early definitions of REDD+ "tended to take a top down approach" but that more recently there has been increased attention to national level implementation).

5. United Nations Conference on Environment and Development, May 9, 1992, *Framework Convention on Climate Change*, 31 I.L.M. 849 [hereinafter UNFCCC].

sense, REDD has far more in common with the international legal regime that currently governs forests and biodiversity than with the hard law of the international legal regime that governs climate change. The consequences of these developments in REDD's negotiation are significant because the technical expertise and international oversight necessary to ensure that REDD will be effective will now be harder to achieve.

By placing the negotiations surrounding REDD within the context of its international legal framework, this Article presents a picture of REDD that differs from many standard and more optimistic narratives. Aspects of the story in this Article are already known to many working in the field. The story of REDD's changing scope is clear from its changing name. [6] Further, commentators and negotiators within the climate change regime are rarely so naïve as to believe that strong international law is an inevitable outcome of international negotiations or the only thing required for an effective REDD mechanism. Yet, the implications of the true story of REDD are not being fully addressed in the literature. To date, the standard narrative of the development of REDD has not focused on the real implications of the contrast between the hopes for REDD in its earliest days and the reality of what it is becoming.

This Article identifies two significant problems that result from reliance on the standard story of REDD: misdirected focus and misdirected accountability. I term the first problem misdirected focus. If the international community assumes that a REDD mechanism being created within the UNFCCC will include strong international oversight and hard-law principles, commentators will likely spend energy advocating specific design reforms at the international level while possibilities for improvement at the domestic level may go unnoticed. This is not to suggest that commentators should disregard the international level completely. Nevertheless, the international community should not ignore the importance of national and even subnational level activity.

The second problem is misdirected accountability. Assuming that REDD is being developed at an international level and will involve international oversight could lead commentators and negotiators to believe that accountability for its success or failure lies with the UNFCCC and related international bodies. Instead, accountability lies more heavily with national implementation bodies, private participants in the REDD mechanism, and subnational actors. Yet, mechanisms for holding these groups to account are so far largely missing.

These two problems result from reliance on any narrative of REDD that fails to view the arc of its negotiation in the context of its

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6. *See supra* note 3 and accompanying text.

international legal framework. If the international community fails to understand the true story of REDD, these problems could undermine REDD's ability to achieve the goals set out for it—climate change mitigation and the protection of biodiversity and forests. Failing to understand the true story of REDD could even result in REDD becoming a cover for limited emissions reduction, weak forest protection, infringement of indigenous and local peoples' rights, and harm to biodiversity.

The true story of REDD also has important lessons for international lawyers more broadly, as we consider the role of international law in global environmental problems. Success in REDD can only come from a full understanding of the multilevel and polycentric governance necessary to manage this kind of complex environmental problem. [7] These lessons will be addressed in a separate article. [8] Nevertheless, it is worth keeping in mind throughout this Article that the true story of REDD suggests that the role of international law as a global body of supranational hard law does not present an accurate picture of the real face of international environmental law.

To uncover the true story of REDD, I examined the public statements and decisions of the countries that are party to the international legal regime on climate change between 2005, when REDD was first proposed, to the end of 2012, the time of writing this Article. Specifically, I examined the submissions of States Party to the climate change convention, official UNFCCC records of discussions about REDD at Meetings of the Parties and Conferences of the Parties (CoP), and the official decisions and reports that came out of those meetings and conferences. This Article discusses two particular aspects of those negotiations: the changing scope of the REDD mechanism and the parties' decisions about the level of international institutional oversight and support when it comes to the implementation of REDD.[9]

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7. *See* Andrew Long, *REDD+, Adaptation, and Sustainable Forest Management: Toward Effective Polycentric Global Forest Governance*, 6 (3) TROPICAL CONSERVATION SCI. (SPECIAL ISSUE) 384, 391 (2013) (arguing that "[d]esign of an effective global forestry program will require attention not only to international and national rules, but also to the relationships and incentives among a complex matrix of governmental authorities across all scales." (citation omitted)); William Boyd, *Climate Change, Fragmentation, and the Challenges of Global Environmental Law: Elements of a Post-Copenhagen Assemblage*, 44 U. PA. J. INT'L L. 457, 523 (2010–2011) (describing REDD as "an emerging global assemblage of people, practices, organizations, laws, technologies, and territories that is taking shape at multiple sites around the world").

8. *See* Hari M. Osofsky, *Climate Change and Crises of International Law: Possibilities for Geographic Reenvisioning*, 44 CASE W. RES. J. INT'L L. 423 (2011) (discussing the complexity and multiple levels of governance involved in addressing climate change globally).

9. I do not present any particular causal explanation for the story I present. For discussion analyzing the reasons for particular choices in the international climate change regime and the international forests regime, see Sjur Kasa et al., *The Group of*

Part II discusses the impetus for the broad support of REDD, particularly among the biodiversity- and forest-protection community and the core assumption that underlies that support—namely, that REDD is likely to provide a harder system of international law than other regimes that address biodiversity and forest protection. Part III presents the true story of REDD between 2005 and 2012, focusing on two particular issues: the expansion of the scope of REDD and the level of international oversight agreed to by the parties. Part IV discusses the consequences of these developments for REDD's likely effectiveness. Part IV also discusses two problems—misdirected focus and misdirected accountability—that result from the standard narrative of REDD.

Those interested in REDD generally share a common desire for success in both climate change mitigation and biodiversity and forest conservation. This is true of commentators who are strongly in favor of REDD and those who are wary of or opposed to it.[10] Many commentators warn that the biggest threat to climate change mitigation and biodiversity would be failure to implement REDD.[11]

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77 in the International Climate Negotiations: Recent Developments and Future Directions, 8 INT'L ENVTL. AGREEMENTS 113 (2008); Emily Boyd et al., *UNFCCC Negotiations (Pre-Kyoto to COP-9): What the Process Says About the Politics of CDM-Sinks*, 8 INT'L ENVTL. AGREEMENTS 95 (2008); Radoslav S. Dimitrov, *Hostage to Norms: States, Institutions and Global Forest Politics*, 5.4 GLOBAL ENVTL. POL. 1 (2005); Deborah S. Davenport, *An Alternative Explanation for the Failure of the UNCED Forest Negotiations*, 5.1 GLOBAL ENVTL. POL. 105 (2005). While some of the reasons proposed in these articles to explain outcomes may also be applicable for REDD, resolving these questions is beyond the scope of this Article.

10. Some groups oppose REDD completely, either because they believe REDD will fail to achieve the goals it is designed to achieve and could even undermine them or because they are very concerned about the effect of REDD on indigenous peoples or biodiversity or both. *See, e.g.*, FRIENDS OF THE EARTH INT'L, REDD MYTHS: A CRITICAL REVIEW OF PROPOSED MECHANISMS TO REDUCE EMISSIONS FROM DEFORESTATION AND DEGRADATION IN DEVELOPING COUNTRIES (2008) (challenging the myths associated with REDD); INT'L UNION FOR CONSERVATION OF NATURE, THE GLOBAL ALLIANCE OF INDIGENOUS PEOPLES AND LOCAL COMMUNITIES AGAINST REDD (2011), *available at* https://www.iucn.org/about/union/commissions/ceesp/what_we_do/wg/tger.cfm?8786/The-Global-Alliance-of-Indigenous-Peoples-and-Local-Communities-against-REDD (discussing the problems associated with REDD and calling for a moratorium on it). Fears over the effect of REDD on indigenous peoples and their rights in forests are warranted. They are, however, beyond the scope of this Article. *See generally* Robert Fisher & Rosemary Lyster, *Land and Resource Tenure: The Rights of Indigenous Peoples and Forest Dwellers*, *in* LAW, TROPICAL FORESTS AND CARBON, *supra* note 4, at 187–206 (characterizing REDD+ as a "double-edged sword").

11. *See, e.g.*, Harro van Asselt, *Integrating Biodiversity in the Climate Regime's Forest Rules: Options and Tradeoffs in Greening REDD Design*, 20(2) R. EUR. CMTY. & INT'L ENVTL. L. 139, 148 (2011) (arguing that the search for the 'best' REDD mechanism might lead to no REDD mechanism, which would be a missed opportunity for both climate change mitigation and biodiversity conservation); JOHANNES EBELING & JAN FEHSE, ECO SECURITIES, CHALLENGES FOR A BUSINESS CASE FOR HIGH-BIODIVERSITY REDD PROJECTS AND SCHEMES 10 (2009) (discussing the importance of implementing a "workable REDD scheme . . . in as short a timeframe as possible"); *c.f.* Katia Karousakis, *Promoting Biodiversity Co-Benefits in REDD* 9 (OECD Envtl.

This Article counters that the biggest threat to climate change mitigation and biodiversity is for a REDD mechanism to go forward with a scope that is impossible to administer and an institutional infrastructure that lacks standardized and supranational oversight without anyone even realizing it. Yet, this is the mechanism that is currently being developed.

II. LINKING CLIMATE CHANGE, BIODIVERSITY, AND FORESTS

A. *The Impulse to Link Climate Change and Forests*

In 2005, Papua New Guinea and Costa Rica—two countries rich in forest cover—heralded a new way to think about involving forests in climate change mitigation. They offered a proposal to the parties to the UNFCCC that recognized deforestation as a source of greenhouse gas emissions.[12] Instead of urging compensation for the creation of carbon sinks, a more contentious approach,[13] this proposal urged the international community to find a way to compensate countries for protecting their forests and limiting deforestation. As the proposal stated, with standing forests not currently economically valued and with no incentives to protect them, "communities must bear losses of the services from forests that are not currently valued economically, while globally, we all must assume the consequences of increased greenhouse gases in the Earth's atmosphere."[14] This was the launch of the program that began as RED, Reducing Emissions from Deforestation, and has developed into REDD+, Reducing Emissions from Deforestation and Degradation, and the Role of Conservation, Sustainable Management of Forests and Enhancement of Forest Carbon Stocks.[15] For consistency, I refer to it throughout this Article as REDD.

Working Papers, Paper No. 11, 2009) (arguing that successful agreement on a future REDD mechanism "could make a significant contribution to addressing the global climate change challenge").

12. *See Deforestation*, *supra* note 3, at 8, 11 (discussing how Papua New Guinea and Costa Rica are rich in biodiversity and susceptible to natural hazards and climate change and that "[i]t must be highlighted that our emphasis is carbon emissions—not 'sinks'"). The proposal was supported by Bolivia, the Central African Republic, Chile, Congo, Costa Rica, the Democratic Republic of the Congo, the Dominican Republic, and Nicaragua. *See also* William Boyd, *Ways of Seeing in Environmental Law: How Deforestation Became an Object of Climate Governance*, 37 ECOLOGY L.Q. 843, 872 (2010) (discussing the proposal by Papua New Guinea and Costa Rica).

13. *See Deforestation*, *supra* note 3, at 8 (noting that compensation for sinks "may have been impediments in the past"); United Nations Framework Convention on Climate Change, Marrakesh, Morocco, Oct. 29–Nov. 10, 2001, *Report of the Conference of the Parties on Its Seventh Session, Decision, 7/CP.7*, FCCC/CP/2001/Add.1 (Jan. 21, 2002).

14. *Deforestation*, *supra* note 3, at 4.

15. *See supra* note 3 and accompanying text.

Commentators generally point to two reasons for enhancing the links between efforts to mitigate climate change and efforts to address biodiversity and forest loss globally. First, scientific research indicates that these issues are inextricably linked. Second, and related, commentators worry that a failure to connect international law addressing climate change and international law addressing biodiversity and forests will result in harmful collateral consequences for biodiversity and forests.

From a scientific perspective, it makes sense to think about climate change and deforestation together. Global scientific consensus estimates that 17.4 percent of anthropogenic greenhouse gas emissions stem from forestry.[16] Thus, curbing deforestation and forestry-related emissions could significantly enhance the success of efforts to mitigate climate change. Beyond this, healthy tropical forests contribute to overall biodiversity, which benefits the health of those ecosystems. It can also enhance our ability to adapt to climate change—one of the goals of the UNFCCC.[17] Biodiversity contributes to resilience, which in turn enhances a system's capacity to adapt to change, even human-induced change.[18] And, to bring the connections full circle, mitigation of climate change will also benefit biodiversity, since the effects of climate change are already being felt by species and ecosystems.[19]

Furthermore, there is increasing recognition that efforts to curb greenhouse gas emissions within the international legal regime for climate change could have harmful consequences for biodiversity.[20]

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16. *See supra* notes 1–2 and accompanying text.

17. UNFCCC, *supra* note 5, at art. 2.

18. *See* Ian D. Thomson, *Forest Biodiversity and the Delivery of Ecosystem Goods and Services: Translating Science into Policy*, 61(12) BIOSCIENCE 972, 974 (2011) ("[D]iverse forests are . . . more resilient than those with less diversity." (citation omitted)).

19. *See generally* Alison Campbell et al., Secretariat of the Convention on Biological Diversity, *Review of the Literature on the Links Between Biodiversity and Climate Change: Impacts, Adaptation and Mitigation* (CBD Technical Ser. No. 42, 2009) (discussing the impact of climate change on biodiversity).

20. *See, e.g.*, A. Caparrós & F. Jacquemont, *Conflicts Between Biodiversity and Carbon Sequestration Programs: Economic and Legal Implications*, 46 ECOLOGICAL ECON. 143 (2003) (discussing the relationship between carbon sequestration programs and biodiversity); C.P. Carlarne, *Good Climate Governance: Only a Fragmented System of International Law Away?*, 30 LAW & POL'Y 450 (2008) (discussing the relationship between international climate change laws and biodiversity laws); Andrew Long, *Global Climate Governance to Enhance Biodiversity and Well-Being: Integrating Non-State Networks and Public International Law in Tropical Forests*, 41 ENVTL. L. 95 (2011); James S. Paterson et al., *Mitigation, Adaptation, and the Threat to Biodiversity*, 22 CONSERV. BIOLOGY, 1352 (2008); Concetta Maria Pontecorvo, *Interdependence Between Global Environmental Regimes: The Kyoto Protocol on Climate Change and Forest Protection*, 59 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 709 (1999); Imke Sagemüller, *Forest Sinks Under the United Nations Framework Convention on Climate Change and the Kyoto Protocol: Opportunity or Risk for Biodiversity?*, 31 COLUM. J. ENVTL. L. 189 (2006); Annalisa Savaresi, *Reducing*

This is fueled by recognition that the design of instruments under the climate change regime can exacerbate conflicts between climate change mitigation goals and biodiversity protection goals. [21] If handled well, however, the design of REDD could instead reduce those conflicts.[22] A few examples illustrate these conflicts.[23]

First, efforts to reduce greenhouse gas emissions can cause harmful collateral effects on biodiversity even when those efforts are not focused on land use and forestry. Dams, for example, approved under the Kyoto Protocol's Clean Development Mechanism for their contributions to climate change mitigation, have come under attack by nongovernmental organizations worried about their impact on biodiversity and local peoples.[24]

Second, decisions about the design of mechanisms that expressly recognize the role of forests in carbon emissions can be critical. One example of this is the question of whether to award emission credits to reforestation projects that are essentially monocultures replacing forest ecosystems that were previously destroyed by logging. [25] Another example is the question of whether to reward the planting of new forests—afforestation—in traditionally unforested areas even if that afforestation harms the flora and fauna that were present before afforestation began.[26]

Emissions from Deforestation in Developing Countries Under the UNFCCC: Caveats and Opportunities for Biodiversity, 21 Y.B. INT'L ENVTL. L. 81 (2011) (discussing the design issues for a REDD mechanism and their likely impact on biodiversity); Harro van Asselt, *Managing the Fragmentation of International Environmental Law: Forests at the Intersection of the Climate and Biodiversity Regimes*, 44 N.Y.U. J. INT'L L. & POL. 1205, 1232–33.33 (2011–2012) (discussing the potential for conflict between biodiversity and climate change treaties).

21. *See* sources cited *supra* note 20.

22. *See* van Asselt, *supra* note 20, at 1238 (discussing ways in which REDD design questions will affect REDD's impact on biodiversity and whether that impact will be harmful or beneficial); *see also id.* at 1238 n.168 (emphasizing that, even beyond the examples the author elaborates in his article, in general the design of REDD matters for biodiversity); Savaresi, *supra* note 20 (discussing design issues for a REDD mechanism and their likely impact on biodiversity); Long, *supra* note 20.

23. This Article does not repeat the extensive literature documenting these potential conflicts but highlights here a few examples by way of illustration. *See supra* note 20 and accompanying text.

24. *See, e.g.*, *The CDM: Kyoto's Carbon Offsetting Scheme*, INT'L RIVERS, http://www.internationalrivers.org/resources/the-cdm-kyoto-s-carbon-offsetting-scheme-3521 (last visited Dec. 29, 2013).

25. *See* Sagemüller, *supra* note 20 (discussing the effects of different kinds of incentives on biodiversity conservation); Secretariat of the Convention on Biological Diversity, *REDD-plus and Biodiversity* (CBD Technical Ser. No. 59, 2011) (discussing the effects of forest restoration on biodiversity and how to comanage the two); Frédéric Jacquemont & Alejandro Caparrós, *The Convention on Biological Diversity and the Climate Change Convention 10 Years After Rio: Towards a Synergy of the Two Regimes?*, 11 REV. EUR. COMP. & INT'L L. 169, 174 (2001) (discussing carbon credits and reforestation).

26. *See* Sagemüller, *supra* note 20 (discussing the potential for afforestation and reforestation to have positive, neutral, and adverse effects on biodiversity);

A REDD mechanism that focuses exclusively on carbon emissions without taking biodiversity into account could fail to protect biodiversity and even forests in areas that are not carbon intensive and therefore would not reap high carbon-emissions credits. "Leakage"—the idea that limiting emissions in one area may result in emissions increasing in another area—is a particular concern in this regard.[27] First, the design of any mechanism under the climate change regime must account for the possibility of leakage to ensure that net greenhouse emissions go down. Second, focusing on avoiding deforestation in high-carbon areas without paying attention to impacts on biodiversity could result in increased activity in low-carbon high-biodiversity areas, thus harming biodiversity even as greenhouse gas mitigation targets are being met.[28]

If those concerned about forests and biodiversity fail to participate in discussions about climate change mitigation efforts that deal directly with forests, the promise of cobenefits for biodiversity and forests could quickly turn into the realized fear of harmful collateral consequences. The internal fragmentation of the international environmental law regime exacerbates this concern.[29] International legal regimes differ in their goals and approaches.[30] For the climate change regime, the focus is on mitigation of climate change, as described in Article 2 of the UNFCCC.[31] As Harro van

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Secretariat of the Convention on Biological Diversity, *supra* note 25, at 24 (noting that afforestation may "increase threats to native biodiversity").

27. *See, e.g.*, Secretariat of the Convention on Biological Diversity, *supra* note 25, at 23–24 (discussing the concept of leakage and the need to prevent it for REDD+ to be successful).

28. *See* Paulo A. Lopes, *Is REDD Accounting Myopic?: Why Reducing Emissions from Deforestation and Forest Degradation Programs Should Recognize and Include Other Ecosystems and Services Beyond CO2 Sequestration*, 11 SUSTAINABLE DEV. L. & POL'Y 25, 30 (2011) (arguing that the "focus on carbon concentration in biomass results in a preference for high-biomass ecosystems even if the low-biomass ecosystems has a higher conservation value pertaining to biodiversity, soil, and water, since the focus of REDD is on biomass concentration and not biodiversity" (citation omitted)); Bernardo B.N. Strassburg et al., *Global Congruence of Carbon Storage and Biodiversity in Terrestrial Ecosystems*, 3 CONSERV. LETTERS 98, (2009) (noting that a purely carbon-focused mechanism does not necessarily focus on forests where biodiversity conservation is most needed); Ebeling, *supra* note 11, at 37 (noting that carbon markets, on their own, do not value biodiversity).

29. *See* van Asselt, *supra* note 20 (discussing the fragmented nature of international environmental law and the potential for conflicts between climate and biodiversity treaties); *see also* Richard Caddell, *The Integration of Multilateral Environmental Agreements: Lessons from the Biodiversity-Related Conventions*, 22 Y.B. INT'L ENVTL. L. 37 (2012).

30. *See generally* Pontecorvo, *supra* note 20 (discussing the desire for harmonization among regimes within international environmental law because of the interconnectedness of environmental issues).

31. UNFCCC, *supra* note 5, at art. 2 (providing that "[t]he ultimate objective of this Convention and any related legal instruments that the Conference of the Parties may adopt is to achieve . . . stabilization of greenhouse gas concentrations in the

Asselt describes, even though negotiators in the climate change regime have slowly started to address the nonmitigation aspects of forests, the potential mitigation benefits of forests still provide the main rationale for the REDD mechanism. [32] By contrast, the Convention on Biological Diversity (CBD)[33] treats forests in a more holistic manner, embedding their protection within the CBD's ecosystem approach and emphasizing the multiple benefits that forests provide.[34] With these differences in goal and method, those working to protect biodiversity and forests through the CBD cannot assume that the climate change regime will protect their interests. It makes sense to avoid collateral harmful effects on biodiversity by strengthening the links between the two regimes.[35] Since REDD itself combines both issues, it also makes sense to ensure that REDD is designed with both interests in mind.

B. *The Promise of Hard Law*

As the previous subpart discussed, science and concern about collateral consequences provide two motivations for linking the climate change regime and the biodiversity- and forest-protection regimes. A third motivation—the promise of hard law—also runs through the literature on REDD, particularly the literature stemming from commentators with a focus on the protection of biodiversity and forests. For these commentators, REDD seemed to offer the possibility that incorporating biodiversity and forests into the climate change regime would result in more international oversight and binding international legal commitments regarding biodiversity and forests. [36] This motivation carries with it the very assumption

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atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system").

32. van Asselt, *supra* note 20, at 1224, 1241.

33. United Nations Conference on Environment and Development, Rio de Janeiro, Braz., June 5, 1992, *Convention on Biological Diversity*, 31 I.L.M. 818 [hereinafter CBD].

34. *See* van Asselt, *supra* note 20, at 1228 (describing how the ecosystem approach used in the CBD leads to "the CBD's view of forests being generally broader in scope than that of the climate regime"); Savaresi, *supra* note 20, at 103 (describing the CBD's approach, which "includes an extensive set of goals, objectives and activities for the conservation of forest biodiversity, the sustainable use of its components, and the fair and equitable sharing of benefits arising from the utilization of their genetic resources").

35. It also makes sense to increase synergies among the two regimes because funding available through REDD could increase capacity to protect biodiversity more generally. *See* Cordula Epple et al., U.N. Environment Programme & World Conservation Monitoring Centre, *Making Biodiversity Safeguards for REDD+ Work in Practice: Developing Operational Guidelines and Identifying Capacity Requirements, Summary Report* 15 (May 9, 2011) (arguing that processes related to the implementation of both the CBD and the biodiversity-related aspects of REDD+ could inform each other in order to enhance synergy).

36. *Id.*

challenged by this Article: the assumption that incorporating forests into the climate change regime will lead to hard-law protections for forests that are embedded in an international legal institution.

The motivation to bring biodiversity and forests into the climate change regime is understandable. The international legal regime governing biodiversity and forests has limited hard-law obligations and substantial deference to state sovereignty and national implementation. [37] Within international environmental law, this regime is considered to be weaker legally than the international legal regime for climate change.[38] Within international law more broadly, it is far weaker than the international trade law regime. [39] To elaborate on this, I focus here on aspects of the international legal regime for biodiversity and forests that could be relevant for forest protection and not on those instruments that are relevant for biodiversity and species protection but do not implicate forests.

The international legal regime governing forests and deforestation is barely a legal regime in the sense that it contains barely any concrete legal obligations.[40] Although deforestation was a

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37. *See* Stuart R. Harrop & Diana J. Pritchard, *A Hard Instrument Goes Soft: The Implications of the Convention on Biological Diversity's Current Trajectory*, 21 GLOBAL ENVTL. CHANGE 474 (2011) (describing how developments in the CBD are making it a soft rather than hard-legal regime).

38. *See id.* (noting that climate change and carbon emissions regulation receives more attention as a global priority than biodiversity protection); *see also* Natasha Gilbert, *Biodiversity Hope Faces Extinction*, 467 NATURE 764 (2010), *available at* http://www.nature.com/news/2010/101011/full/467764a.html (documenting the different levels of attention given to biodiversity protection as a global priority compared with climate change and carbon emissions regulation).

39. *See* Harrop & Pritchard, *supra* note 37, at 475–76 (comparing international regulatory efforts to protect biodiversity with the global regulatory system governing the multilateral trading system); CBD, *supra* note 33, at art. 22 (subjugating the CBD's provisions to "the rights and obligations . . . deriving from any existing international agreement" with the only exception for "a serious damage or threat to biological diversity"); *see also* Pascal Lamy, *The Place of the WTO and Its Law in the International Legal Order*, 17 EUR. J. INT'L L. 969 (2006) (discussing international trade law in relation to other facets of international law).

40. *See* Dimitrov, *supra* note 9, at 5 (noting that the international regime governing forests and deforestation rests primarily on nonbinding international norms rather than formal institutions); *see also* DAVID HUMPHREYS, LOGJAM: DEFORESTATION AND THE CRISIS OF GLOBAL GOVERNANCE 190 (2006) (describing an international legal regime for forests, albeit with limited hard-law components); Boyd, *supra* note 7, at 524 ("[E]fforts to fashion a comprehensive international legal instrument for forests, which began in earnest during the early 1990s, have been a spectacular failure, foundering on the fundamental conflict between the view of tropical forests as the 'common heritage of mankind' and forests as 'national patrimony,' as well as the perennial inadequacy of donor country financing." (citation omitted)); Boyd, *supra* note 12, at 863–66, 888 n.144 (discussing the effort to develop a comprehensive international legal instrument on forests—the UN Forum on Forests—which secured a new legal instrument: the "Non-Legally Binding Instrument on Sustainable Management of All Types of Forests"); Constance McDermott, *REDD+ and Multi-Level Governance: Governing For What and For Whom?*, *in* LAW, TROPICAL FORESTS AND CARBON, *supra* note 4, at 84, 90 (exploring the history of international initiatives to confront forest governance problems).

topic of concern at the United Nations Conference on Environment and Development at Rio de Janeiro (The Earth Summit of 1992), any plan to include negotiations on a forest convention on the agenda was abandoned early on. [41] The UNFCCC and the CBD were both concluded in Rio, but the only agreement to come out of Rio for forests was the Non-Legally Binding Authoritative Statement of Principles for a Global Consensus on the Management, Conservation and Sustainable Development of All Types of Forests. It has limited participation by states.[42] As its title indicates, the agreement was nonbinding.

Since Rio, new institutions and agreements regarding forests have not resulted in binding commitments to address forest conservation. There are over forty international organizations and over twenty international agreements that address forests,[43] which some argue constitute a complex international regime governing forests.[44] This regime, however, is largely based on soft law. Indeed, of these agreements, the only ones that approximate hard law by adopting traditional, binding legal commitments among states address forests only as a subset of their general work.[45] Further, even if the collection of forest agreements could be considered an international forest regime with some normative force, the consensus is that this regime has been ineffective in protecting forests.[46]

For forests and biodiversity more generally, the CBD is the most holistic and—by that metric alone—important of the hard-law instruments to govern.[47] It is technically hard law because it is a legally binding treaty agreed to by states. [48] The UN General Assembly has referred to it as the "key international instrument on

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41. Dimitrov, *supra* note 9, at 7.

42. *See id.* at 8 (discussing the small number of states involved in the text's negotiation as a reflection of the insignificance of the document).

43. Long, *supra* note 20, at 111.

44. *See* HUMPHREYS, *supra* note 40, at 190 (arguing that a distinct forests regime has evolved).

45. *See, e.g.*, CBD, *supra* note 33; Convention on International Trade in Endangered Species of Wild Fauna and Flora, Mar. 3, 1973, 27 U.S.T. 1087 [hereinafter CITES].

46. *See* Long, *supra* note 20, at 115–17 (noting the ineffectiveness of international efforts to protect forests); Boyd, *supra* note 12, at 869–71 (discussing the failure of efforts to protect forests); Davenport, *supra* note 9 (discussing failed attempts at creating binding forestry agreements).

47. *See* HUMPHREYS, *supra* note 40, at 191 (identifying the CBD as the most important of the hard legal instruments "that contribute to the [international forests] regime").

48. *See* Statute of the International Court of Justice art. 38(1)(a), June 26, 1945, 59 Stat. 1055, 33 U.N.T.S. 933 (June 26, 1945); Kal Raustiala, *Form and Substance in International Agreements*, 99 AM. J. INT'L L. 581, 586 (2005) (arguing that "legality is best understood as a binary, rather than a continuous attribute"); Dinah Shelton, *Norm Hierarchy in International Law*, 100 AM. J. INT'L L. 291, 320– 21 (2006) (discussing the binary system of law and nonlaw).

biodiversity." [49] Yet, on the scale of hard-versus-soft legal commitments, the CBD falls at the softer end. [50] Under some commentators' understandings of soft law, the CBD could be considered an example of soft law because its obligations are broad and States Party to the treaty have not accepted any identifiably concrete commitments. [51] The treaty is highly deferential to state sovereignty over natural resources, and its obligations generally direct parties to develop strategies and approaches domestically.[52] Significantly, these obligations are qualified throughout by phrases like "subject to national legislation" and "as far as possible and appropriate."[53] Monitoring and enforcement under the convention have been minimal, and the treaty's effectiveness at protecting biodiversity at the global level has been subject to question.[54]

In the years since the CBD was negotiated, the parties have not chosen to develop more binding commitments under the treaty.[55] In this regard, the parties have followed a different path from that followed in the UNFCCC. [56] Both treaties can be considered framework treaties; they establish certain principles and lay the foundation for subsequent hard-law protocols to be negotiated. For the climate change regime, this happened with the negotiation of the Kyoto Protocol, which supplemented the broad provisions of the UNFCCC with specific, identifiable targets.[57] Two protocols have

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49. Harrop, *supra* note 37, at 475 (citation omitted).

50. *See* Annecoos Wiersema, *The New International Law-Makers? Conferences of the Parties to Multilateral Environmental Agreements*, 31 MICH. J. INT'L L. 231, 259–64 (2009) (discussing classifications of what makes law hard or soft).

51. *See* Christine Chinkin, *Normative Development in the International Legal System, in* COMMITMENT AND COMPLIANCE: THE ROLE OF NON-BINDING NORMS IN THE INTERNATIONAL LEGAL SYSTEM 21, 30–31 (Dinah Shelton ed., 2000) (detailing what makes an international instrument soft law); Alan E. Boyle, *Some Reflections on the Relationship of Treaties and Soft Law*, 48 INT'L & COMP. L.Q. 901, 907 (1999) (discussing ways in which the UNFCCC might be considered soft law because its treaty provisions are "so cautiously and obscurely worded and so weak that it is uncertain whether any real obligations are created"); *c.f.* Raustiala, *supra* note 48, at 586 ("[A] norm-based obligation is not the same as a legal obligation, even if the two often overlap.").

52. *See, e.g.*, CBD, *supra* note 33, at pmbl., arts. 3, 8, 14 (acknowledging and deferring to state sovereignty over natural resources).

53. *Id.*; *see also* Harrop, *supra* note 37, at 476 (giving additional examples of the qualifications contained throughout the CBD that limit the commitments the treaty imposes on States Party).

54. *See, e.g.*, Elisa Morgera & Elsa Tsioumani, *Yesterday, Today, and Tomorrow: Looking Afresh at the Convention on Biological Diversity*, 21 Y.B. INT'L ENVTL. L. 3, 9, 11 (2010) (discussing some of the shortcomings of the CBD).

55. *See* Harrop, *supra* note 37, at 476 (discussing the failure of the parties to the CBD to build on the treaty's aspirations and general commitments with more binding obligations).

56. *Id.*

57. Kyoto Protocol to the United Nations Framework Convention on Climate Change, Dec. 11, 1997, 37 I.L.M. 22 (entered into force Feb. 16, 2005) [hereinafter Kyoto Protocol].

been negotiated under the CBD: the Cartagena Protocol on Biosafety and the Nagoya Protocol on Access and Benefit-Sharing.[58] While both are more concrete than the CBD and address important issues that can affect biodiversity protection, neither sets out concrete legal obligations that are directly about conservation and protection of biodiversity and forests.[59] On questions related directly to *in situ* conservation of biodiversity, the CBD's parties and institutions have focused on developing soft-law instruments that are not backed by hard-law obligations.[60] Oversight of parties' national implementation has traditionally been weak and lacking in substantive force.[61]

Other hard-law instruments in international law that address biodiversity and species protection have limited obligations, a narrow scope, or both. The Ramsar Convention on Wetlands,[62] for example, whose scope covers some forests like mangrove forests, is another example of a technically hard-law treaty that falls at the softer end of the spectrum because of its limited substantive obligations. These obligations consist primarily of exhortations for parties to plan and stay informed about the condition of wetlands within their boundaries, and the treaty relies heavily on procedural requirements for a soft kind of enforcement.[63]

The Convention on International Trade in Endangered Species (CITES), another treaty with implications for forests, is hard law with firm commitments by states.[64] In recent years, a number of timber species have been listed on its Appendices, resulting in international regulation of trade in those species.[65] In addition,

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58. Cartagena Protocol on Biosafety to the Convention on Biological Diversity, Jan. 29, 2000, 39 I.L.M. 1027 (entered into force Sept. 11, 2003); CONVENTION ON BIOLOGICAL DIVERSITY, NAGOYA PROTOCOL ON ACCESS TO GENETIC RESOURCES AND THE FAIR AND EQUITABLE SHARING OF BENEFITS ARISING FROM THEIR UTILIZATION TO THE CONVENTION ON BIOLOGICAL DIVERSITY: TEXT AND ANNEX (2011), *available at* http://www.cbd.int/abs/doc/protocol/nagoya-protocol-en.pdf.

59. *See* Harrop, *supra* note 37, at 476 (discussing the focus of each protocol). For a more detailed elaboration of the Nagoya Protocol and the Cartagena Protocol, see Morgera, *supra* note 54, at 16–21, 35–37, respectively.

60. Harrop, *supra* note 37, at 478–79. *See generally id.* at 477–78 (detailing the CBD's reliance on target-based approaches that are not backed up by hard-legal commitments by or obligations for the parties).

61. Morgera, *supra* note 54, at 9.

62. Convention on Wetlands of International Importance Especially as Waterfowl Habitat, Feb. 2, 1971, T.I.A.S. No. 11,084 [hereinafter Ramsar Convention].

63. *See, e.g.*, *id.* at arts. 2, 3; *see also* Annecoos Wiersema, *A Train Without Tracks: Rethinking the Place of Law and Goals in Environmental and Natural Resources Law*, 38 ENVTL. L. 1239, 1285 (2008) (discussing the limited obligations on the parties to the Ramsar Convention and the ways in which the Ramsar Convention has developed more flexible approaches to enforcement, such as shaming).

64. CITES, *supra* note 45.

65. *Id.* at apps. I–III; *see also Summary of the Sixteenth Meeting of the Conference of the Parties to the Convention on International Trade in Endangered Species of Wild Fauna and Flora: 3-14 March 2013*, 21 EARTH NEGOTIATIONS BULL. No.

efforts to crack down on illegal logging and international trade in CITES-listed species have increased among a number of international and domestic enforcement bodies.[66] The CoP to CITES has also agreed to address timber trade in a programmatic way. Yet, the approach of CITES is narrowly targeted to a particular issue—species threatened by international trade—and, as a result, the treaty addresses only relatively few species.[67] It does not address the multiple and complex drivers of deforestation that may not even threaten the survival of the timber species being harvested. Indeed, not everyone involved in CITES believes that timber species should be a significant part of its agenda.[68]

Thus, despite a burgeoning number of international instruments that address biodiversity at the international level,[69] the international legal regime governing biodiversity and forests has limited legal force. For international proponents of biodiversity protection, the ability to point to hard-law obligations in international law for the protection of biodiversity and forests is limited.[70]

By contrast, the international legal regime governing climate change seems to carry a weight and significance in international law that the biodiversity and forests regime has not been able to match.[71] The Kyoto Protocol, negotiated under the auspices of the UNFCCC, contains binding commitments on many of the parties and embodies traditional hard international law in treaty form.[72] The Protocol's market-based approach has generated a bureaucracy to implement and monitor the market.[73] It has also resulted in a functioning market that carries its own momentum. Although legitimate concerns exist about the effectiveness of the Protocol's commitments and

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83, Mar. 18, 2013, at 25 (discussing decisions to list various timber species on CITES Appendix II).

66. *See, e.g.*, The International Consortium on Combating Wildlife Crime, *Information Note* (Apr. 2011), *available at* http://www.cites.org/eng/prog/iccwc.php.

67. For some countries, illegal logging is of paramount concern in their efforts to protect forests. However, overall, the primary cause of deforestation is conversion to agricultural land.

68. Soledad Aguilar, *On Caviar, Sharks, and Mahogany – Can CITES Promote Sustainable Management?*, 37 ENVTL. POL'Y & L. 376 (2007) (discussing key questions from the CoP 14 when a debate arose over how to approach sustainable management and whether to include a specific focus on timber species in the strategic vision to guide CITES from 2008 to 2013).

69. Caddell, *supra* note 29.

70. Many commentators deem the few obligations that do exist to be ineffective. *See, e.g.*, Harrop, *supra* note 37, at 476; Morgera, *supra* note 54, at 1; Boyd, *supra* note 12, at 863; Long, *supra* note 20, at 317, 319.

71. *See* Tseming Yang & Robert V. Percival, *The Emergence of Global Environmental Law*, 36 ECOLOGY L.Q. 615 (2009) (discussing the emergence of global environmental law with significant reliance on examples from the climate change regime).

72. *See generally* Kyoto Protocol, *supra* note 57.

73. *See, e.g.*, CLEAN DEVELOPMENT MECHANISM, http://cdm.unfccc.int (last visited Dec. 29, 2013).

mechanisms, the history of the regime's approach and the amount of international effort spent on climate change overshadow the soft-law approach of the international legal regime governing biodiversity and forests.[74]

As a result, those frustrated with the biodiversity and forests regime have looked to the climate change regime to provide more protection.[75] As Andrew Long put it, the climate regime is "the last best hope for improving tropical forest management."[76] In this vein, REDD proponents have consistently invoked the cobenefits to biodiversity that could result from successful implementation of REDD.[77]

C. *The Assumption Behind the Hopes for REDD*

This Article tests and challenges the assumption underlying this third motivation for linking the two regimes. Much of the literature seems to assume implicitly that incorporating forests into the climate change regime will result in forests being brought into a global regime with the attributes of hard law, global governance mechanisms, and implementation and enforcement oversight.[78] The overall assumption—albeit often implicit—about REDD and the

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74. Indeed, Professor William Boyd describes the processes that allowed forests, long treated as an issue for sovereign states to deal with inside their borders, to be viewed "as components of the global carbon cycle and as providers of global public goods." Boyd, *supra* note 12, at 880. Boyd describes methodological developments and technical approaches that appear to echo the global, centralized approach of carbon markets that the climate change regime itself embodies and argues that the process of incorporating forests into the climate change regime was a process of decontextualizing forests. *Id.*

75. *See* Boyd, *supra* note 7, at 524 (arguing that "the recent support for a climate policy approach to deforestation stems in part from a recognition that past efforts to deal with the problem have not succeeded and a growing sense that deforestation and land use must be critical components of any climate protection effort given their significant contribution to global GHG emissions"); van Asselt, *supra* note 20, at 143 ("Given the failure of the international community to provide for adequate protection of the world's forests, the biodiversity regime could arguably 'hitch a ride' with the climate regime in a time where climate change is high on the agenda of policy makers. Drawing attention to the overlapping issues could lead to prioritization of climate change activities with positive spillovers for biodiversity protection." (citation omitted)).

76. Long, *supra* note 20, at 99; *see also* Boyd, *supra* note 12, at 845 (arguing that incorporating emissions from deforestation into climate governance at multiple levels "may represent the last chance to save tropical forests on any significant scale"); Ebeling & Fehse, *supra* note 11, at 36 ("Compared to the status quo of forest governance in most developing countries, almost any international REDD scheme is likely to entail positive biodiversity and social impacts."); *c.f.* McDermott, *supra* note 40, at 94–95 (noting that REDD+ faces many of the same challenges as past forest governance efforts).

77. *See, e.g.*, CBD, *supra* note 33, at 14 (outlining the potential cobenefits REDD+ might bring if successfully implemented).

78. *See, e.g.*, *supra* notes 76–77 and accompanying text.

course of its negotiation is that the result will be a strong international legal mechanism. Indeed, this assumption even leads some commentators to worry that the climate change regime will be so strong that it could override biodiversity protection goals.[79]

The assumption makes sense logically. It was my starting hypothesis when I began researching the story of REDD's negotiation. In addition to the biodiversity and forest conservation community discussed above, the climate change community, developed countries, and developing countries also have good reason to support REDD, making a hard international law approach more likely. REDD promises to address an important source of greenhouse gas emissions, thereby benefiting mitigation efforts and reducing the mitigation burdens placed on developed countries.[80] And for developing countries, it offers the promise of capacity building and resource transfers to help them with efforts to conserve forests and stop deforestation.[81]

This sense of the importance of REDD is reinforced by the feeling of success generated by outcomes on REDD from the CoP. Parties to the UNFCCC and Kyoto Protocol have struggled to reach agreement on binding commitments for mitigation of climate change at successive meetings.[82] At the time of writing, the outlook for the Kyoto Protocol looks relatively poor.[83] At those same meetings, parties have agreed to decisions on REDD and have continued to work on its development, giving the appearance that momentum on REDD is proceeding in spite of failures in the broader climate change negotiations.[84]

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79. *See supra* note 20 and accompanying text; *see also* Boyd, *supra* note 12, at 878, 903–08 (describing the incorporation of the deforestation problem into the climate change regime as a process of removing forests from their context as well as simplifying, reducing, and translating tropical forests into compliance carbon).

80. Michael L. Brown, Note, *Limiting Corrupt Incentives in a Global REDD Regime*, 37 ECOLOGY L.Q. 237, 239–40 (2010) (discussing the benefits of including deforestation and degradation in the international climate regime).

81. *See Deforestation*, *supra* note 3, at 10 (discussing the benefits for developing countries of bringing deforestation into the international climate regime).

82. *See, e.g.*, John M. Broder, *Climate Talks Yield Commitment to Ambitious, But Unclear, Actions*, N.Y. TIMES, Dec. 19, 2012, at A13 (detailing the successive failures of the parties to the Kyoto Protocol to reach agreement).

83. *See* Asheline Appleton et al., *Summary of the Doha Climate Change Conference: 26 November – 8 December 2012*, 12 EARTH NEGOTIATIONS BULL. No. 567, Dec. 11, 2012, at 26 (observing that while a second commitment period under the Kyoto Protocol was set to begin in January 2013, some countries had not renewed the commitments they had undertaken under the Kyoto Protocol's first commitment period).

84. *See, e.g.*, *Indonesia's Forests and REDD: Palming Off*, THE ECONOMIST (Dec. 6, 2012), http://www.economist.com/blogs/banyan/2012/12/indonesias-forests-and-redd ("[O]n December 5th a cheering announcement punctured the gloom: that Indonesia's government had formally approved the country's first project under the 'REDD' scheme . . . .").

However, my review of the negotiation history of REDD between 2005 and 2012 indicates that this assumption is flawed. For my research, I reviewed the submissions of the parties to the UNFCCC, the work of the subsidiary bodies assigned to work on REDD, the main issues of contention at meetings, and the outcomes of those meetings in the form of reports and decisions. My research shows that as REDD is being negotiated, it is developing into a mechanism that resembles the international legal regime for biodiversity and forests more than the hard-law regime that proponents of REDD seem to assume it will be. As such, it is unlikely to achieve its two main goals of emissions reduction and forest conservation.

This Article focuses on two main themes in the negotiations about REDD from 2005 to 2012. The Article first discusses the way in which the scope of REDD changed over the years from a mechanism focused on deforestation to one incorporating conservation, sustainable forest management, and conservation of carbon stocks. This change is consistent with a desire to promote biodiversity and forest protection as cobenefits of REDD. However, my research shows that the expanded scope likely changed the way in which REDD would operate, with significant implications for the relationship between international and national levels of governance.

Second, the Article discusses the way in which the parties have addressed the role of international institutions, both governmental and nongovernmental, for purposes of implementation and oversight of a REDD mechanism. As REDD has been developed, the parties have gradually chipped away at the level of formal international oversight in a number of ways. This Article documents those changes between 2005 and 2012.

The Article is not intended to suggest that a REDD mechanism must consist of top-down hard international law mandates with no flexibility at the national or subnational level. A mechanism that will allow REDD to meet its goals of reducing emissions and limiting deforestation will always depend on implementation within states. Nor does this Article mean to suggest that commentators and negotiators are so naïve as to believe that strong international law is an inevitable outcome of international negotiations or the only thing required for an effective REDD mechanism. Nevertheless, these goals mean that some form of measuring and monitoring activity and some means of ensuring that the hoped-for funding is available will be necessary, even if they are not embodied in a formal, hard international law document. This Article points out, then, that failure to pay attention to the overall effect of what is being negotiated at the international level could leave commentators focusing on aspects of REDD's design that will not be the critical elements for success.

My findings matter precisely because, as commentators argue, the design of REDD will matter for its effectiveness both for climate change mitigation and for achieving the cobenefits of biodiversity and

forest protection. This does not mean that the work on REDD design at the international level is not important. This Article should be considered a supplement to the important work on REDD design at every level. Nevertheless, if the negotiations of the parties about REDD are not leading to a mechanism that resembles a centralized, hard-law mechanism, then design choices will have to account for this reality. Ultimately, this means renewed attention will have to be paid to the role of national and subnational governance bodies.

III. THE TRUE STORY OF REDD'S NEGOTIATION: 2005–2012

A. *The Beginning*

In 2005, Papua New Guinea and Costa Rica shifted the existing debate about involving forests in climate change mitigation with a proposal to the parties of the UNFCCC designed to recognize deforestation as a source of carbon emissions.[85] This was the launch of the program that began as RED—Reducing Emissions from Deforestation—and has developed into REDD+—Reducing Emissions from Deforestation and Degradation, and the Role of Conservation, Sustainable Management of Forests and Enhancement of Forest Carbon Stocks in Developing Countries.

The proposal itself highlighted a number of design questions to be addressed and took a position on some of them. For example, in implicit response to the question of whether a REDD scheme should be linked to carbon credit markets or be funded through some other kind of funding mechanism, Papua New Guinea and Costa Rica indicated a preference for a market-based approach.[86] The proposal also highlighted some technical complexities[87] while acknowledging the technical advances that could allow this proposed scheme to work.[88] The proposal raised the question of whether the mechanism

85. *See Deforestation*, *supra* note 3, at 2, 8 (discussing how Papua New Guinea and Costa Rica are rich in biodiversity and susceptible to natural hazards and climate change and emphasizing carbon emissions—not 'sinks'). The proposal was supported by Bolivia, the Central African Republic, Chile, Congo, Costa Rica, the Democratic Republic of the Congo, the Dominican Republic, and Nicaragua. *Id.* at 11. *See also* Boyd, *supra* note 12, at 893–94 (discussing the effort to bring REDD into the climate regime); van Asselt, *supra* note 29, at 1221 (describing the proposal by Papua New Guinea and their emphasis on forests as a source of emissions).

86. *See Deforestation*, *supra* note 3, at 7 (noting that developing countries are prepared to stand accountable for their contributions provided they have access to the international markets, because that is what is fair and equitable); *id.* at 9 ("Properly harnessed, the carbon emissions market can monetize environmental resources and capitalize sustainable development.").

87. *See id.* at 9 (discussing the technical issues of additionality, leakage, permanence, and monitoring).

88. *See id.* at 4 (describing technologies that allow deforestation to be tracked "at a relatively fine scale of resolution, and in real time"); *see also* Boyd, *supra* note 12,

should be embodied in a separate optional protocol or should be developed throughout the Kyoto Protocol, setting the stage for a consideration of whether a REDD mechanism would take the form of a binding international instrument.[89] The proposal began the discussion about what relation REDD would have to binding emissions limits and the role of developing countries in emissions reduction goals.[90] The proposal also dipped a toe in the water on the question of whether emissions reduction should be calculated on a national or project basis, with the proposal itself preferring a national approach in order to address concerns about leakage.[91] With this proposal, the stage was set for the parties to the UNFCCC to elaborate what a mechanism addressing emissions from deforestation would look like.

In the years since then, the parties have paid a lot of attention to the design of REDD, including the questions they raised in the original proposal. In doing so, they have developed a mechanism that is already being partly implemented through pilot projects and has generated its own website to act as a clearinghouse of information.[92] But it is not clear that even those pilot projects are likely to achieve what REDD purports to promise.

This Part focuses on two particular aspects of these negotiations between 2005 and 2012, first examining the expanding scope of REDD during these years and, second, the way the parties have dealt with questions about the role of international oversight in REDD. Both of these aspects are critical to the ability of REDD to achieve its goals. As the discussion in the next subpart shows, the scope of REDD is inextricably connected to how easy or difficult it will be to implement. The level of international oversight implicates the international community's ability to ensure that REDD is actually achieving its goals of emissions reduction and forest protection without undermining indigenous and local peoples' rights and biodiversity protection.

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at 898 ("[T]he challenge of translating forest carbon into compliance carbon is fundamentally about finding the right legal technologies and accounting rules to ensure equivalence with other emissions reduction efforts over time.").

89. *See Deforestation*, *supra* note 3, at 8 (discussing the options of either relying on a free-standing optional protocol to the UNFCCC or relying on decisions under the Kyoto Protocol to address emissions from deforestation).

90. *See id.* at 3, 7 (noting that there is currently no way for developing countries to engage with the Kyoto Protocol for emissions reduction generated through the reducing of deforestation rates); *id.* at 7 (developing countries are prepared to stand accountable for their contributions provided they have access to the international markets, because that is what is fair and equitable).

91. *See id.* at 9 ("We believe that by addressing deforestation on a national level, leakage will be captured in a manner not possible with project-based accounting.").

92. REDD WEB PLATFORM, http://unfccc.int/methods/redd/redd_web_platform/items/4531.php (last visited Dec. 29, 2013).

B. *From RED to REDD+: Adding Complexity*

1. 2005–2006: Starting with Deforestation

When Costa Rica and Papua New Guinea first presented their proposal, it was based on a relatively simple model of compensation flowing to developing countries for decisions to limit deforestation. The UNFCCC definition of a "source of carbon emissions" cited in the proposal left open the possibility of including more forestry activities in the equation.[93] Nevertheless, the focus of the proposal was on deforestation—rather than degradation of forests or selective logging in forests—and compensation for limiting that kind of deforestation:

> In many developing nations, forests are historically clear cut by outside interests. Rains then wash the thin soils from the hills into the sea, ensuring that the hills will remain unproductive, polluting rivers and damaging the coastal areas and coral reefs. Without question, deforestation carries far-reaching environmental, economic and social impacts.[94]

Even with a focus on deforestation alone, the apparent simplicity of Papua New Guinea and Costa Rica's proposal belied the complexity of the problem of deforestation. As country party submissions in 2006

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93. *See Deforestation*, *supra* note 3, at 7 (noting that the UNFCCC definition of *source* includes tropical deforestation). The UNFCCC defines *source* as "any process or activity which releases a greenhouse gas, an aerosol or a precursor of a greenhouse gas into the atmosphere." United Nations Framework Convention on Climate Change art. 1, ¶ 9, 1 RECIEL 270 (1992) (entered into force Mar. 21, 1994.

94. *Deforestation*, *supra* note 3, at 5; *see also id.* ("Deforestation generates carbon emissions through the degradation, decay and burning of wood, debris, and organic soil matter. When deforestation is the result of commercial logging, approximately one-third of sequestered carbon is released into the atmosphere within five years . . . . Emissions are more rapid when caused by land-use activities that involve clear-cutting, for example agriculture or road-building."); *id.* at 9 (calling for the establishment of national deforestation baseline rates).

noted, the drivers of deforestation are complex,[95] and attempts to stop illegal logging had not always been fruitful.[96]

Yet, with this limited scope, the proposal could also observe that it would be possible to address technical concerns about how to measure deforestation and develop baselines against which decisions not to cut down forests could be evaluated. The proposal observed that satellite-based remote sensing technologies, in conjunction with ground-truthing, allowed scientists to "detect and map tropical deforestation."[97] The proposal also observed that "[i]n recent years these technologies and methodologies have improved to the extent that deforestation can be tracked at a relatively fine scale of resolution, and in real time."[98]

Throughout 2006, in the early stages of support for Papua New Guinea and Costa Rica's proposals, this narrow scope remained. At the same time, parties observed that the methodological and technical complexities of measuring avoided emissions from deforestation were not insurmountable given technological advances.[99] As parties commented on the proposal, a few began to refer to the role of this mechanism in supporting sustainable forest management, although they did not elaborate on how a model designed to compensate for limiting deforestation would support

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95. *See* United Nations Framework Convention on Climate Change, Subsidiary Body for Science & Technological Advice, Bonn, Ger., May 18–26, 2006, *Issues Relating to Reducing Emissions from Deforestation in Developing Countries and Recommendations on any Further Process*, Submissions from Parties, FCCC/SBSTA/2006/MISC.5, at 74 (Apr. 11, 2006) [hereinafter SBSTA, Submissions from Parties, 2006] (submission from the Congo Basin countries); *id.* at 118 (submission from the United States); United Nations Framework Convention on Climate Change, Subsidiary Body for Science & Technological Advice, Bonn, Ger., May 18–26, 2006, *Issues Relating to Reducing Emissions from Deforestation in Developing Countries and Recommendations on Any Further Process*, Submissions from Parties, Addendum, FCCC/SBSTA/2006/MISC.5/Add.1, at 3 (May 10, 2006) [hereinafter SBSTA, Submissions from Parties, Addendum, 2006] (submission from Chile); *id.* at 9 (submission from Switzerland). *See generally* Helmut J. Geist & Eric F. Lambin, *Proximate Causes and Underlying Driving Forces of Tropical Deforestation*, 52 BIOSCIENCE 143 (2002) (outlining the drivers of deforestation).

96. *See, e.g.*, SBSTA, Submissions from Parties, 2006, *supra* note 95, at 36 (submission from Bolivia); *id.* at 54 (submission from Nicaragua).

97. *Deforestation*, *supra* note 3, at 4.

98. *Id.*; *see also id.* at 9 ("With present satellite technology, remote-sensing technologies may be applied with the necessary accuracy and cost effectiveness."); Ben Devries & Martin Herold, *The Science of Measuring, Reporting and Verification (MRV)*, *in* LAW, TROPICAL FORESTS AND CARBON, *supra* note 4, at 151, 162 ("Of the land cover change processes that lead to forest-related carbon emissions, deforestation is the most straightforward process to monitor and quantify.").

99. *See* SBSTA, Submissions from Parties, 2006, *supra* note 95, at 44 (submission from Bolivia) (noting the technical feasibility of measuring avoided emissions); *see also* Boyd, *supra* note 12 (discussing the ways in which advances in technology allowed for the incorporation of deforestation into the climate change regime).

active management practices working toward sustainable forests.[100] Indeed, although Malaysia supported "global efforts to curb deforestation and to provide incentives for reducing deforestation and forest degradation," they also advocated a "conservative and cautious approach . . . to ensure that a clear and fair approach is developed that will address the issues dealing with leakage, permanence and additionality."[101] And while several countries referred to the benefits that this scheme would have for biodiversity and other issues, these were treated as secondary benefits rather than the primary goal.[102]

In 2006, then, the focus of the parties in designing a REDD mechanism was still on deforestation, with secondary benefits for the promotion of sustainable forest management and biodiversity, and limited expression of support for including forest degradation. This relative simplicity was about to change.

2. 2007: Adding Degradation

In May 2006, the UNFCCC's Subsidiary Body for Scientific and Technological Advice (SBSTA) held workshops on REDD and included in the list of topics "enhancing sustainable forest management."[103] By August 2006, the SBSTA had produced a background paper that

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100. *See* SBSTA, Submissions from Parties, 2006, *supra* note 95, at 11 (submission from Bolivia) (arguing that degradation activities should also be included); *id.* at 7 (submission from Austria on behalf of the EC and its Member States); *id.* at 94 (submission from Malaysia); SBSTA, Submissions from Parties, Addendum, 2006, *supra* note 95, at 9 (submission from Switzerland).

101. SBSTA, Submissions from Parties, 2006, *supra* note 95, at 94.

102. A number of countries expressly stated that the goal should be reducing emissions, even as they recognized the benefits REDD could have for other concerns. *See* SBSTA, Submissions from Parties, 2006, *supra* note 95, at 28 (submission from Bolivia, Costa Rica, Nicaragua, Papua New Guinea) (recognizing additional benefits beyond emissions reduction); *id.* at 68 (submission from El Salvador) (recognizing additional benefits beyond emissions reduction); *id.* at 71 (submission from Gabon et al.) (recognizing that deforestation is a result of complex drivers but urging that the parties not delay in establishing a REDD mechanism and urging also that parties not undermine emissions reduction requirements by developed countries); *id.* at 88–89 (submission from Indonesia) (recognizing the benefits of reducing climate change's negative impacts, promoting conservation of natural forest and biological diversity, and urging the parties to keep the mechanism simple and integrate it into the climate change regime); *id.* at 99 (submission from Norway) (stating that a mechanism's primary goal should be combating climate change but noting that there are also other benefits that can be gained); *id.* at 103 (submission from Panama et al.) (noting the synergy of climate change emission reduction goals with biodiversity goals); *id.* at 110 (submission from Peru et al.) (noting the real benefits for the climate that this mechanism could bring and urging the parties not to delay in developing it); *c.f. id.* at 4 (submission from Australia urging the parties to be careful and not to move too fast).

103. United Nations Framework Convention on Climate Change, Subsidiary Body for Scientific & Technological Advice, Bonn, Ger., May 18–26, 2006, *Reducing Emissions from Deforestation in Developing Countries*, Draft Conclusions Proposed by the Chair, FCCC/SBSTA/2006/L.8, at 1-2 (May 23, 2006) [hereinafter *Reducing Emissions*, 2006].

discussed the various options for monitoring forest-cover change and carbon-stock change.[104] In discussing these options, the SBSTA was already introducing questions about the role of forest degradation in a REDD scheme. Although forest-cover change would only be connected to deforestation, carbon-stock change could also occur as a result of the degradation of forests. The SBSTA's paper also explored the link between avoiding deforestation and promoting sustainable forest management:[105]

> The approach to reducing deforestation rates has been focused on supporting conservation initiatives and sustainable forest management (SFM). While the first focuses on preserving forest ecosystems and limiting exploitation activities, the second acknowledges the need for communities to directly benefit from goods and services from these ecosystems in a way that it can be sustained into the future. Both approaches recognize the importance of forests for future generations.[106]

At the same time, the SBSTA's background paper observed the implications of looking at degradation for the purposes of monitoring and measuring that degradation.[107] The paper observed the difficulty of getting good information on forest degradation with remote sensing imagery, which is significantly cheaper than on-the-ground measurement tools.[108]

In 2007, the submissions of the parties seemed to call for a broader scope for REDD, connecting forests with ecosystem services.[109] In 2007, Chile raised "forest degradation" as "a concern that requires further attention."[110] As Malaysia captured it:

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104. *See* Secretariat, *Background Paper for the Workshop on Reducing Emissions from Deforestation in Developing Countries, Part I: Scientific, Socio-economic, Technical and Methodological Issues Related to Deforestation in Developing Countries* 18–24 (United Nations Framework Convention on Climate Change, Working Paper No. 1(a), 2006) [hereinafter UNFCCC, Working Paper No. 1(a)] (discussing the methodological issues relating to estimating changes in carbon stocks and in forest and nonforest vegetation cover).

105. Secretariat, *Background Paper for the Workshop on Reducing Emissions from Deforestation in Developing Countries, Part II: Policy Approaches and Positive Incentives* (United Nations Framework Convention on Climate Change, Working Paper No. 1(b), 2006) [hereinafter UNFCCC, Working Paper No. 1(b)].

106. *Id.*

107. UNFCCC, Wokring Paper No. 1(a), *supra* note 104.

108. *Id.* at 22–24; *see also* Devries & Herold, *supra* note 99, at 173 (noting the difficulty of detecting and quantifying forest degradation because it is frequently associated with small changes to forest cover).

109. *See* United Nations Framework Convention on Climate Change, Subsidiary Body for Scientific & Technological Advice, Bonn, Ger., May 7–18, 2007, *Views on the Range of Topics and Other Relevant Information Relating to Reducing Emissions from Deforestation in Developing Countries*, Submissions from Parties, FCCC/SBSTA/2007/MISC.2, at 17 (Mar. 2, 2007) [hereinafter SBSTA, Submissions from Parties, 2007] (submission from Bolivia et al.) ("[F]orest-based ecosystem services need to be recognized and valued by the international community in order to allow developing countries with forests to capitalize these services on a voluntary basis."); *see*

> Both total protection and sustainable forest management practices should be considered as positive practices to avoid deforestation. . . . In formulating appropriate mechanisms on positive incentives for reducing emissions from deforestation in developing countries, Malaysia believes that it should be voluntary, flexible, and offer a range of incentives that would be applicable to the wide variety of forestry environments, management regimes and socio-economic and development conditions of developing countries.[111]

Thailand also expressed the desire to include degradation in the scheme by allowing degradation to be part of any context-based definition of forest.[112] Indonesia's proposed definition of deforestation included degradation and elaborated: "As the consequence of adopting this definition, voluntary actions done by developing countries which include (i) enrichment planting in secondary forests, (ii) targeted emission reduction through combating illegal logging and fires, and (iv) conserving carbon through forest conservation, should be eligible for the compensation."[113]

Indeed, Indonesia's elaboration may explain why there was a push to expand the scope of REDD. Referring to both binding and nonbinding international agreements that support sustainability and forest protection, Indonesia argued that these existing agreements do not "provide adequate economic incentives" to encourage countries to maintain the sustainability of the resource voluntarily.[114] Rather, sustainable forest management acts more like "*non-tariff barriers* for many producer (mostly developing) countries."[115]

Vanuatu also wanted to incorporate degradation credits into their scheme, so that deforestation and degradation credits would account for 20 percent of the market for emissions, because that is what they contributed to emissions in 2007.[116] Despite taking a completely different approach to Vanuatu on the question of market-

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also id. at 62 (submission from Japan) (echoing interest in sustainable forest management).

110. *Id.* at 25.

111. *Id.* at 66.

112. *See id.* at 81 (submission from Thailand) ("Thailand . . . suggests that the methodology for valorizing reduced emissions from deforestation should seriously take into account the estimation of *rates of degradation.*").

113. United Nations Framework Convention on Climate Change, Subsidiary Body for Scientific & Technological Advice, Bonn, Ger., May 7–18, 2007, *Views on the Range of Topics and Other Relevant Information Relating to Reducing Emissions from Deforestation in Developing Countries,* Submissions from Parties, Addendum, FCCC/SBSTA/2007/MISC.2/Add.1, at 7 (Apr. 3, 2007) [hereinafter SBSTA, Submissions from Parties, 2007, Addendum].

114. *Id.* at 11 (submission from Indonesia).

115. *Id.*

116. *See* SBSTA, Submissions from Parties, 2007, *supra* note 109, at 87–88 (submission from Vanuatu) (noting the combined contribution of deforestation and forest degradation on global emissions).

based versus fund-based approaches to REDD, Tuvalu also supported including degradation in the mechanism.[117]

The question of whether to include degradation into REDD is connected to the question of who should set the definitions and the role of the international level of governance—a theme that runs throughout the discussion on the scope of REDD (and is addressed in Part III.C below). Those in favor of national definitions in 2007 argued that "this would enable Parties to include or exclude various elements in their approach for estimating reduced emissions from deforestation, such as degradation and non-CO2 gases, depending, as appropriate, on previous approaches used."[118]

Yet the desire to include degradation in the scope of a REDD mechanism was not universal. In summarizing the second workshop on REDD, the UNFCCC Secretariat reported that while there was common recognition of the importance of forest degradation and some participants highlighted the importance of considering forest degradation in any arrangement, other participants were more cautious about expanding the scope of REDD.[119] In particular, some participants "cautioned that estimating and verifying emissions from forest degradation is complex and presents many challenges, for example, in terms of definitions, methodologies and monitoring, and in estimating historical reference rates."[120]

The result of this impasse was a shift in focus to try to resolve the methodological problems raised by expanding REDD's scope. This is a reasonable approach. If the primary reason not to include forest degradation is purely one of complexity, that reason can be overcome by enhancing technological capacity at the international level and sharing this technology with the countries that will need it. Yet, this neat ducking of the problem is itself illustrative. The addition of complexity that came with adding degradation to the equation is an example of a shift away from the relatively simple accounting that was envisioned in early submissions by the parties in 2006, where methodological problems were not deemed to be insurmountable. As layers were added to REDD's scope, complexity was added, and methodology began to prove harder to address.

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117. *See* SBSTA, Submissions from Parties, 2007, Addendum, *supra* note 113, at 14 n.1 (submission from Tuvalu) (arguing in favor of including forest degradation).

118. United Nations Framework Convention on Climate Change, Subsidiary Body for Scientific & Technological Advice, Bonn, Ger., May 7–18, 2007, *Report on the Second Workshop on Reducing Emissions from Deforestation in Developing Countries*, FCCC/SBSTA/2007/3, at 13 (Apr. 17, 2007) [hereinafter SBSTA, *Report on the Second Workshop*, 2007].

119. *See id.* at 14 (summarizing the views of some participants who highlighted the importance of considering forest degradation in any arrangement, while other participants expressed concern about the complexity of estimating and verifying emissions from forest degradation).

120. *Id.*

Indeed, despite the consensus on the physical relationship between forest degradation and deforestation and the contribution of forest degradation to carbon emissions, both degradation and conservation were still highly contentious additions in May 2007 as the SBSTA convened its Twenty-sixth Session. Going into the meeting, the SBSTA's draft decision contained a number of bracketed statements, signifying how little the parties actually agreed on at this stage.[121] Disagreements included the question of whether to address stabilization and conservation, legal and illegal logging, displacement of emissions at the international level, and problems with definitions, particularly forest degradation.[122] When a compromise was reached, the parties agreed to put a reference to the need to address forest degradation in the preambular section of the decision, [123] but important differences remained on the inclusion of forest stabilization and conservation.[124] And degradation was still not an official part of the title of the REDD mechanism.

Nevertheless, by the time the parties got to the CoP at Bali in December 2007, the SBSTA's draft decision contained a reference to degradation in both the preamble and the main body of the decision, as well as a reference to sustainable forest management. When the parties to the UNFCCC adopted the Bali Action Plan, the parties also adopted the first decision on reducing emissions from deforestation in developing countries—Decision 2/CP.13.[125] As with the SBSTA's draft decision, degradation was still not in the title of Decision 2/CP.13, but

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121. United Nations Framework Convention on Climate Change, Subsidiary Body for Science & Technological Advice, Bonn, Ger., May 7–18, 2007, *Reducing Emissions from Deforestation in Developing Countries*, Draft Conclusions Proposed by the Chair, FCCC/SBSTA/2007/L.10 (May 17, 2007) [hereinafter *Reducing Emissions*, 2007].

122. *SB 26 Highlights: Tuesday, 8 May 2007*, 12 EARTH NEGOTIATIONS BULL. No. 324, May 9, 2007, at 2. Disagreement a week later also concerned the role of maintenance and conservation of forest carbon stocks in the scheme. *See SB 26 Highlights: Wednesday, 16 May 2007*, EARTH NEGOTIATIONS BULL., May 17, 2007, at 2 (discussing the bracketing of certain paragraphs containing references to the maintenance and conservation of forest carbon stocks).

123. *See SB 26 Highlights: Thursday, 17 May 2007*, 12 EARTH NEGOTIATIONS BULL. No. 332, May 18, 2007, at 2 (describing the addition of the need to address forest degradation in the preambular section).

124. *See Twenty-Sixth Sessions of the Subsidiary Bodies of the UNFCCC and Associated Meetings: 7-18 May 2007*, 12 EARTH NEGOTIATIONS BULL. No 333, May 21, 2007, at 10 (noting remaining disagreemeents about the inclusion of forest stabilization and conservation).

125. *Decision 2/CP.13*, *supra* note 3. The Bali Action Plan addressed advanced action on mitigation, adaptation, technology transfer, and provision of financial resources, all somewhat relevant for REDD as well. United Nations Framework Convention on Climate Change, Conference of the Parties, Bali, Indon., Dec. 3–15, 2007, *Report of the Conference of the Parties on its Thirteenth Session, Decision 1/CP.13*, U.N. Doc. FCCC/CP/2007/6/Add.1, at 3–7 (Mar. 14, 2008) [hereinafter Bali Action Plan].

degradation was included in both the preamble and the text.[126] Thus, the preamble, as well as acknowledging "the contribution of the emissions from deforestation to global anthropogenic greenhouse gas emissions," acknowledges that forest degradation leads to emissions and "needs *to be addressed* when reducing emissions from deforestation."[127] The preamble also recognizes the complexity of the problem, different national circumstances, and the multiple drivers of deforestation and forest degradation. The body of Decision 2/CP.13 includes the phrase "and forest degradation" whenever it refers to deforestation without differentiating between the two, except when it refers to methodological questions regarding the calculation of greenhouse gas emissions.[128]

On the topic of sustainable forest management, Decision 2/CP.13 encourages states to "explore a range of actions, identify options and undertake efforts, including demonstration activities, to address the drivers of deforestation relevant to their national circumstances, with a view to reducing emissions from deforestation and forest degradation and thus enhancing forest carbon stocks due to sustainable management of forests." [129] The insertion of this paragraph was itself a response to the dispute between the parties as to whether conservation and enhancement of forest carbon stocks should be included within the scope of REDD.[130] In addition, the annex to Decision 2/CP.13 refers to the need for demonstration activities, which should be consistent with "sustainable forest management," and refers to the UN Forum on Forests, the UN Convention to Combat Desertification, and the Convention on Biological Diversity.[131] This can be seen as both a worthwhile nod to the need for REDD to be consistent with other international concerns

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126. *Decision 2/CP.13*, *supra* note 3, at 8.

127. *Id.* (emphasis added).

128. *See, e.g.*, *id.* at 9 (requesting the SBSTA "to undertake a programme of work on methodological issues related to a range of policy approaches and positive incentives that aim to reduce emissions from deforestation and forest degradation in developing countries noting relevant documents").

129. *Id.* at 8.

130. *See Summary of the Thirteenth Conference of Parties to the UN Framework Convention of Climate Change and Third Meeting of Parties to the Kyoto Protocol: 3-15 December 2007*, 12 EARTH NEGOTIATIONS BULL. No. 354, Dec. 18, 2007, at 7 [hereinafter ENB, *Summary of CoP 13*] (noting that parties agreed to a reference to enhancing forest carbon stocks due to sustainable management of forests in a paragraph encouraging parties to explore a range of actions to address the drivers of deforestation); *see also COP 13 and COP/MOP 3 Highlights: Tuesday, 11 December 2007*, 12 EARTH NEGOTIATIONS BULL. No. 351, Dec. 12, 2007, at 1 (discussing the addition of a paragraph encouraging action to reduce emissions from deforestation and degradation "and thus enhance forest carbon stocks due to sustainable management of forests"). India, Bhutan, and others were in favor; Brazil, the European Union, and others were opposed. ENB, *Summary of CoP 13*, *supra*, at 7.

131. *Decision 2/CP.13*, *supra* note 3, at 11.

and as a signal that sustainable forest management would be an important piece of the REDD puzzle.

Not only did the scope of REDD begin to expand at the UNFCCC CoP of 2007, but the forum for discussion of REDD design shifted as well. The Bali Action Plan, which put in place a process for long-term cooperative action under the UNFCCC generally, also moved certain aspects of the REDD discussion away from the SBSTA and into the process for long-term cooperative action set up through the plan.[132] The Ad Hoc Working Group for Long-Term Cooperative Action (AWG-LCA) would now consider, among other things, "policy approaches and positive incentives on issues relating to reducing emissions from deforestation and forest degradation in developing countries; and the role of conservation, sustainable management of forests and enhancement of forest carbon stocks in developing countries."[133] The SBSTA would remain the site of discussions about methodology and technological concerns relating to REDD.[134]

The scope of the AWG-LCA's mandate with regard to a REDD mechanism was broader than that of Decision 2/CP.13, which was negotiated under the auspices of the SBSTA. It referred to degradation and to "the role of conservation, sustainable management of forests and enhancement of forest carbon stocks in developing countries"—albeit separated by a semi-colon.[135] But not everyone agreed yet with this expanded scope. Brazil had put forward a proposal during the discussion about long-term cooperative action that had a fairly simple approach: "Its main objective is the development of an arrangement under the UNFCCC process aimed at providing positive incentives for the voluntary reduction of emissions from deforestation in developing countries in relation to a national reference emission rate." [136] Brazil's proposal focused only on deforestation and baselines based on deforestation and contained no reference to forest degradation, conservation, or maintenance of carbon stocks.[137]

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132. *See* Bali Action Plan, *supra* note 125, at 3.

133. ENB, *Summary of CoP 13*, *supra* note 130, at 7. *See generally* Bali Action Plan, *supra* note 125, at 3 (detailing the role developing countries will play under the Bali Action Plan).

134. United Nations Framework Convention on Climate Change, Conference of the Parties, Bali, Indon., Dec. 3–15, 2007, *Report on the Dialogue on Long-term Cooperative Action to Address Climate Change by Enhancing Implementation of the Convention*, Note by the Co-Facilitators, FCCC/CP/2007/4, at 8 (Oct. 19, 2007).

135. Bali Action Plan, *supra* note 125, at 3.

136. United Nations Framework Convention on Climate Change, Conference of the Parties, Bali, Indon., Dec. 3–15, 2007, *Report on the Dialogue on Long-term Cooperative Action to Address Climate Change by Enhancing Implementation of the Convention*, Note by the Co-Facilitators, Addendum, FCCC/CP/2007/4/Add.1, at 8 (Nov. 19, 2007).

137. *See generally Positive Incentives for Voluntary Action in Developing Countries to Address Climate Change: Brazilian Perspective on Reducing Emissions from Deforestation* (U.N. Framework Convention on Climate Change, Dialogue

3. 2008–2009: Sustainable Management of Forests, Enhancement of Carbon Stocks, and Forest Conservation Make It REDD+

In the wake of the parties' first CoP decision on REDD in December 2007 and the Bali Action Plan, the door was now open for discussion about including more than just deforestation in a REDD mechanism. As Colombia and India pointed out in submissions to the SBSTA in 2008, the CoP decision contained three new concepts to add to deforestation and degradation: sustainable management of forests; enhancement of carbon stocks, also expressed as increase in forest cover; and forest conservation.[138]

India stated that it "would seek positive incentives for enhancement of carbon stocks as well as for maintenance of baseline stocks as a consequence of following the policy option of conservation, sustainable management of forest, and increase in forest cover."[139] This move is significant. Under this approach, compensation would be made available for the use of forests as a form of carbon sink, as well as for reducing emissions from certain uses of the forests. As a result, the methodological concerns about calculating emissions and avoided emissions for the purposes of funding or credits became sharper again. Further, not every country was as keen on the inclusion of sustainable forest management. As Slovenia noted in their submission on behalf of the European Community (EC), even if a connection exists between sustainable forest management and the reduction of deforestation and degradation, it would also be important to understand the causes of deforestation.[140] Such a step would not require REDD to have an expanded scope.

Yet at CoP 14 in 2008, several parties pushed to make sustainable forest management and conservation more prominent by removing the semicolon between *deforestation and degradation* and *sustainable forest management and conservation.*[141] The semi-colon

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Working Paper No. 21, 2006) *available at* http://www.unfccc.int/meetings/dialogue/items/3759.php (submission from Brazil).

138. *See* United Nations Framework Convention on Climate Change, Subsidiary Body for Scientific & Technological Advice, Bonn, Ger., June 4–13, 2008, *Views on Outstanding Methodological Issues Related to Policy Approaches and Positive Incentives to Reduce Emissions from Deforestation and Forest Degradation in Developing Countries*, Submissions from Parties, FCCC/SBSTA/2008/Misc.4, at 7 (Apr. 22, 2008) [hereinafter SBSTA, Submissions from Parties, 2008] (submission from Colombia); *id.* at 27 (submission from India).

139. *See id.* at 27 (submission from India); *see also id.* at 31 (submission from Nepal) (arguing in favor of rewards for sustainable forest management); *id.* at 52 (submission from Sri Lanka) (arguing in favor of including sustainable forest management and, more specifically, conservation into the scheme).

140. *See id.* at 48–49 (submission from Slovenia on behalf of the EC).

141. Tomilola Akanle et al., *Summary of the Fourteenth Conference of Parties to the UN Framework Convention on Climate Change and Fourth Meeting of Parties to the Kyoto Protocol: 1-12 December 2008*, 12 EARTH NEGOTIATIONS BULL. No. 395, Dec. 15, 2008, at 6.

was changed to a comma, a victory in the eyes of some.[142] The methodological questions surrounding these shifts continued to burn, and the draft conclusions from the meeting recommended that a future expert meeting include methodological issues relating "[t]o the role and contribution of conservation, sustainable management of forests, changes in forest cover and associated carbon stocks and greenhouse gas emissions and the enhancement of forest carbon stocks to enhance action on mitigation of climate change and to the consideration of reference levels."[143]

Measuring conservation achievements in sustainable forest management is in itself more complex than measuring whether an area has been deforested for whatever reason. Beyond that, measuring the carbon stock maintained or enhanced by conservation and sustainable forest management is even more complex. Brazil's submission explains why:

> The assessment of incremental changes in carbon stock due to sustainable management of forests cannot rely directly on the use of remotely sensed data and require substantial ground measurements and should not be limited to the assessment of incremental changes but should also assess decreases in carbon stock that can also result from the sustainable management of forests.
>
> The most difficult aspect related to sustainable management of forest relates to the separation of the effects of sustainable management in the changes (positive and negative) in the carbon stocks from change induced by natural, indirect, seasonal, and age dynamic effects (factoring out). Some of these effects can be more easily estimated than others (e.g., age dynamics), but still require intensive use of other, complimentary, data.[144]

At the SBSTA's mid-year meeting in 2009, a heavily bracketed text of a draft CoP decision emerged. Earth Negotiations Bulletin reported that discussions on monitoring at the meeting had addressed whether different methodologies would be required for REDD versus REDD+, likely due to the fact that remote sensing alone would not detect degradation.[145] At this point, participants in the broader climate change negotiations already felt that the REDD negotiating

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142. *Id.*

143. United Nations Framework Convention on Climate Change, Subsidiary Body for Scientific & Technological Advice, Poznan, Pol., Dec. 1–10, 2008, *Reducing Emissions from Deforestation in Developing Countries: Approaches to Stimulate Action*, Draft Conclusions Proposed by the Chair, FCCC/SBSTA/2008/L.23, at 2 (Dec. 10, 2008).

144. United Nations Framework Convention on Climate Change, Subsidiary Body for Scientific & Technological Advice, Bonn, Ger., June 1–10, 2009, *Information on Experiences and Views on Needs for Technical and Institutional Capacity-Building and Cooperation*, Submissions from Parties, Addendum, FCCC/SBSTA/2009Misc.2/Add.1, at 6 (Apr. 17, 2009) [hereinafter SBSTA, Submissions on Capacity-Building, Addendum, 2009].

145. Tomilola Akanle et al., *SB30 and AWG Highlights: Thursday 4 June, 2009*, 12 EARTH NEGOTIATIONS BULL. No. 414, June 2009, at 4.

group was speaking a different language from the rest of the climate change negotiators.[146] Nevertheless, by the end of the SBSTA meeting, the parties had agreed to include, in the title of the draft decision, reference to conservation, sustainable management of forests, and enhancement of forest stocks, in keeping with the Bali Action Plan.[147] When this same title remained in the CoP decision agreed to in Copenhagen in December 2009, REDD+ was officially born.[148] AWG-LCA's draft decision was similar in approach. Paragraph 3 "decides that developing countries should contribute to mitigation actions in the forest sector by undertaking the following activities: . . . (a) reducing emissions from deforestation; (b) reducing emissions from forest degradation; (c) conservation of forest carbon stocks; (d) sustainable management of forests; [and] (e) enhancement of forest carbon stocks."[149]

C. *Limiting International Oversight*

1. The Negotiation Context

REDD itself has been developed under the auspices of the UNFCCC, but no formal treaty or binding agreement has been negotiated to implement it. The context for the most formal decisions in the discussion that follows, then, is itself a context of documents and decisions that have a lesser status in international law than treaty provisions. I have argued elsewhere that CoP decisions that are closely connected to the original text of a treaty are in some sense indistinguishable from the original obligations of the parties.[150] These REDD-related CoP decisions have some normative effect and are not without influence. Nevertheless, they do not rise to the level of the

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146. Tomilola Akanle et al., *SB30 and AWG Highlights: Wednesday 3 June, 2009*, 12 EARTH NEGOTIATIONS BULL. No. 413, June 4, 2009, at 4 (reporting the perception of one participant that the "forest club"—those discussing REDD and Land Use, Land-Use Change and Forestry—"sp[oke] their own language" and the words of one African delegate who said that "generally speaking, those negotiators are a different breed").

147. Tomilola Akanle et al., *SB30 and AWG Highlights: Tuesday 9 June, 2009*, 12 EARTH NEGOTIATIONS BULL. No. 418, June 10, 2009, at 2; Tomilola Akanle et al., *Summary of the Bonn Climate Change Talks: 1-12 June 2009*, 12 EARTH NEGOTIATIONS BULL. No. 421, June 15, 2009, at 15 ("At the suggestion of a number of developing countries, the title of the appended draft decision now includes mention of conservation, sustainable management of forests and enhancement of forest carbon stocks.").

148. *See Decision 4/CP.15*, *supra* note 3, at 6.

149. United Nations Framework Convention on Climate Change, *Report of the Ad Hoc Working Group on Long-term Cooperative Action Under the Convention on Its Eighth Session, Held in Copenhagen from 7 to 15 December 2009*, FCCC/AWGLCA/2007/17, at 35 (Feb. 5, 2010).

150. Wiersema, *supra* note 50.

hardest legal obligations in international law—agreements negotiated by the parties that are intended to have legal effect.

This context is interesting. Over the course of the negotiations on REDD, the possibilities for what institutional mechanism would be used to support the mechanism shifted significantly. When discussions about REDD were first put on the table, parties discussed the appropriate forum for its implementation—either through a new protocol negotiated under the auspices of the UNFCCC or through the Kyoto Protocol.[151] Yet, to date, REDD has been developed entirely through CoP decisions. As REDD was developed in the years between 2005 and 2012, discussion about formal inclusion in a successor to the Kyoto Protocol waned, likely at least in part because general negotiations about a successor to the Kyoto Protocol were themselves stalling. Thus, the fact that REDD's negotiation took place within the context of, at their most formal, CoP decisions and, at their least formal, workshops and submissions of the parties, was, in some sense, a victory for REDD. It meant that REDD would not fail to get underway even if the parties could not agree to a successor agreement to the Kyoto Protocol.

Yet, the negotiations reflect something more than a lack of faith in the parties' ability to negotiate a binding agreement for climate change generally. The discussions and negotiations suggest that the appetite for an international role in REDD was limited and became more so as the years progressed. To some extent, the desire for less binding international oversight tracks the timeline in the expansion of REDD's scope. Although my research does not sustain any conclusions on cause and effect, the timing is at least relevant as part of the story of REDD.

The expansion in REDD's scope discussed above tracks with comments by States Party, particularly developing countries, to have REDD be driven by national priorities and activity and not become part of a binding emission reduction scheme. As these strong principles came to be written into the CoP decisions, and as discussions over REDD went into the more policy-oriented forum of the AWG-LCA concurrently with the methodologically-focused SBSTA, the preference for national priority setting became further entrenched. It was embodied in language that limited the role of international institutions—especially international treaties and any

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151. *See Deforestation*, *supra* note 3, at 8 (arguing that one possibility for implementing their proposal would be to have a separate optional protocol or to go through the Kyoto Protocol using Article 12, although that would require a deviation from the Marrakesh rules); United Nations Framework Convention on Climate Change, Nairobi, Kenya, Nov. 6–14, 2006, *Report on a Workshop on Reducing Emissions from Deforestation in Developing Countries*, Note by the Secretariat, FCCC/SBSTA/2006/10, at 12–13 (Oct. 11, 2006) (noting that a representative from Brazil had presented his country's preliminary proposal for an arrangement in the context of the UNFCCC).

body or instrument with apparent binding authority. This section of the Article describes these developments from the beginning of REDD's introduction in 2005 to December 2012.

The move to limit international oversight in REDD is a tricky one for developing countries because oversight by international bodies is usually a prerequisite for releasing funds or incorporating REDD into a market-based scheme. Given the financial incentives for international oversight, it is striking how little support there is for it. Part of the question of international oversight relates to accountability. Papua New Guinea and Costa Rica's first proposal stated that developing countries were prepared to stand accountable for their contributions provided they would have access to international markets.[152] However, as REDD has developed and increasing numbers of countries have favored fund-based approaches over market-based approaches, or a mix of both,[153] this kind of direct commitment has dissipated.

2. 2006–2007: Situating REDD as a Voluntary Scheme with International Oversight

Early on, developing countries made clear that REDD should not be used to reduce the international legal obligations of developed countries—Annex I countries under the UNFCCC—and that any REDD scheme should be entirely voluntary on the part of developing countries.[154] Thus, from the beginning, it was clear that REDD would not be part of an obligatory emissions-reduction scheme. Costa Rica, one of the original proponents of REDD, was clear in its 2006 submission to the SBSTA that developed countries should not be able to participate in the scheme, and it was not alone in that view.[155] By contrast, Switzerland stressed the need to tackle the issue of deforestation at the local, regional, and global levels.[156]

Given the history of climate change negotiations at the international level, it is not surprising that developing countries would want a voluntary scheme unavailable to developed countries. It is also not surprising that some developed countries would seek greater commitments from developing countries.

Nevertheless, in the early days, this voluntary REDD scheme was still situated within an international legal framework. In these early years, developing countries' submissions consistently referred to

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152. *Deforestation*, *supra* note 3, at 7.

153. *See* THE LITTLE REDD+ BOOK, *supra* note 4, at 13 (identifying which countries favor fund-based approaches, market-based approaches, or a mix of both).

154. SBSTA, Submissions from Parties, 2006, *supra* note 95, at 60–61 (submission from Brazil).

155. *Id.* at 62 (submission from Costa Rica).

156. SBSTA, Submissions from Parties, Addendum, 2006, *supra* note 95, at 9 (submission from Switzerland).

the need for REDD to be consistent with international law principles that included permanent sovereignty over natural resources, benefit sharing, capacity building and technology transfer, fairness and equity, and common but differentiated responsibilities.[157] Some also referred to consistency with other international agreements and activities, particularly in the realm of international action to address deforestation.[158]

Early submissions show that even developing countries that emphasized the need for the mechanism to be voluntary and country driven were willing to tolerate international oversight.[159] Indeed, some of the impetus for supporting the scheme was precisely to bring efforts to combat deforestation within an international framework that would provide funding for activities that countries might be doing anyway.[160] As Indonesia noted in its 2006 submission to the SBSTA, actions taken by developing countries to reduce emissions from deforestation were not currently included in an international mechanism, while equivalent actions taken by developed countries were included in UNFCCC-mandated reports detailing how these developed countries were meeting their emissions targets.[161] Morocco stated that it wanted a framework that was strong, albeit flexible.[162] Switzerland, coming from a developed-country perspective, spent far more time discussing its desire for synergy with other international processes and advocated for a strategic role for the Climate Change Convention, which could "provide knowledge on climate issues and coordinate developing country action."[163]

A recurring question in discussions is whether to address technical issues regarding REDD before tackling policy questions like sources of financing, to address them concurrently with policy questions, or to address them after resolving policy questions. Addressing technical questions first would be consistent with a strong role for international oversight, which is frequently coupled with a

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157. *See* SBSTA Submissions from Parties 2006, *supra* note 95, at 88 (submission from Indonesia); *id.* at 103–04 (submission from Panama et al.) (arguing in favor of applying the principles of sustainable development and poverty eradication); *id.* at 110 (submission from Peru et al.) (arguing that a mechanism should promote real benefits for the climate, common but differentiated responsibilities, sustainable development, sovereignty, and fairness and equity).

158. *See id.* at 91 (submission from Japan) (noting that ongoing discussions should focus on "harmonization and consistency with discussions on sustainable forest management").

159. *See id.* at 117 (submission from the United States) (calling for any crediting mechanisms to "occur under the auspices of the Kyoto Protocol").

160. *See generally* Boyd, *supra* note 12.

161. SBSTA, Submissions from Parties, 2006, *supra* note 95, at 88 (submission from Indonesia).

162. *Id.* at 96 (submission from Morocco).

163. SBSTA, Submissions from Parties, Addendum, 2006, *supra* note 95, at 9 (submission from Switzerland). Switzerland also talked about consistency with national plans.

desire to move toward a market-based scheme rather than a fund-based scheme. By contrast, those parties who wish to promote technology transfer, capacity transfer, and funds in a system with high deference to the nation-state frequently prefer to resolve policy questions first, or at least concurrently, leaving the technical questions to be resolved by an international body facilitating implementation.

It is somewhat significant, then, that in the first two years, discussions and negotiations about REDD took place within the setting of the UNFCCC's technically oriented committee, the SBSTA, with a heavy focus on methodological and technical concerns. In the initial negotiation period about REDD, the parties focused on methodological and technical issues, such as how to deal with measuring emissions from forestry activities and how to set baselines against which changes in emissions could be measured. Policy questions certainly crept into these discussions, for example, when countries argued about whether countries with a good record of forest protection could use historical baselines so that they would not be penalized for their recent good behavior. Nevertheless, when policy crept in like this, the policy discussions were still tightly connected to methodological and technical questions.

In its background paper for the SBSTA's 2006 workshop, the United States noted that standard protocols would be needed for methodological questions like use of "the remote sensing data, tools, and analytical methods that suit the variety of national conditions but yet meet acceptable levels of accuracy."[164] At this early stage of discussion, deference to national conditions did not yet mean deference to national methodologies. At this point, the SBSTA also began to highlight the Intergovernmental Panel on Climate Change's (IPCC) guidelines for National Greenhouse Gas Inventories and the IPCC's *Good Practice Guidance for Land Use, Land-Use Change and Forestry* as good sources of methods for estimation of emissions from areas with measurable deforestation and degradation.[165] Indeed, the SBSTA's own background paper relied heavily on information from the Food and Agriculture Organization (FAO), demonstrating the significance of international sources of information at least for the SBSTA at this stage of the negotiations.[166]

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164. UNFCCC, Working Paper No. 1(a), *supra* note 104, at 3.

165. *Id.* at 4 (noting IPCC reports for reference). The background paper for the workshop also referred to a tool developed by the Intergovernmental Panel on Forests in 1996 that could determine causes of deforestation in a particular country. "This framework would allow each country to undertake its own analysis and develop its own national forest policy for sustainable development. To date, this formal framework has not yet been developed or applied." UNFCCC, Working Paper No. 1(a), *supra* note 104, at 11.

166. *See generally* UNFCCC, Working paper No. 1(b) *supra* note 105; UNFCCC, Working Paper No. 1(a), *supra* note 104.

3. 2007: Beginning the Slide Away from International Oversight

In 2007, this willingness to accept international oversight and technical assistance began to wane, albeit slowly at first. In submissions in 2007, while some role for international consistency was still on the table, the balance of support began to tip in favor of flexibility and deference to national definitions and agenda setting.[167] This deference to national definitions and agenda setting should not be confused with the degree of support for international assistance with capacity building. Nearly all parties indicated that multilateral and bilateral cooperation would be needed to reduce emissions, and developing countries emphasized the need for capacity building and technology transfer flowing from developed countries to developing countries in order to address deforestation.[168] Thus, there was broad agreement that international cooperation was relevant for achieving the goals of REDD. This is not the same, however, as support for international oversight.

Bolivia's submission in 2007 on behalf of several other developing countries highlighted the need for positive incentives along with a nationally based REDD mechanism.[169] Their submission advocated both market-based and nonmarket approaches and a desire for forest-based ecosystem services to be recognized and valued by the international community. At the same time, their submission still strongly emphasized principles focusing on state sovereignty and national circumstances: "[N]ot only should the Parties' participation in efforts to reduce emissions from deforestation be voluntary, Parties alone shall decide how to implement specific measures."[170] Mexico advocated that international mechanisms should be "voluntary, ensure environmental integrity of the climate change regime, equitable, and efficient."[171]

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167. *See, e.g.*, SBSTA, Submissions from Parties, 2007, *supra* note 109, at 13 (submission from Bolivia) ("To be effective, developing countries themselves will determine which policy approaches are relevant and where to be applied.").

168. United Nations Framework Convention on Climate Change, Subsidiary Body for Scientific and Technological Advice, *Background Paper for the Workshop on Reducing Emissions from Deforestation in Developing Countries, Working Paper No. 1 (d), 2006*, Addendum 2: Part I: Synthesis of Submissions by Parties on Issues Relating to Reducing Emissions from Deforestation in Developing Countries, at 28 (Aug. 23, 2006).

169. *See generally* SBSTA, Submissions from Parties, 2007, *supra* note 109, at 11 (submission from Bolivia et al.).

170. *Id.* at 17; *see also id.* at 20 (suggesting an approach that would create a body of knowledge and experience "that would facilitate the development of a global program of incentives").

171. *Id.* at 70 (submission from Mexico). Mexico avoided concerns about the need for oversight with a market-based approach by urging that market-based options use the Clean Development Mechanism with its existing international framework for oversight. *Id.* at 72.

Similarly, Thailand stressed the difficulty of having a standard definition of the term *forests*.[172] Vanuatu, even as it focused on market instruments, urged that "[r]ather than attempt to identify a set of international policies," the parties should "focus on positive incentives that can be linked to nationally developed policies."[173]

Yet, not all parties were willing to give up on some role for international oversight, particularly those countries that would be providing resources and payments for REDD. In 2007, the fault lines on this issue between developed and developing countries became more evident. Australia, for example, advocated a respect for the complexity of the problem and differences in national situation while still arguing that the international community could develop a workable framework.[174] Australia advocated principles that would require a lot of work by the international community to set priorities but also advocated an outcome-driven rather than a rule-bound approach.[175] Germany's submission in 2007, on behalf of the European Union, placed even greater emphasis on a strong role for an international framework, with an emphasis on concrete policies and actions.[176]

Although developing countries were more firmly in the camp of emphasizing the role of national governments over international institutions, some countries were, at this stage, trying to feel their way to a middle ground. South Africa noted both the need to clarify definitional issues upfront and the difficulty of having a standard definition of *forests*.[177] As we have seen, Australia attempted to allocate roles for the national and roles for the international.[178] New Zealand provided a particularly good example of this in its submission to the SBSTA in 2007.[179] It stressed the need for the involvement of both developed and developing countries, multilateral action, and respect for sovereignty.[180] As their submission put it when discussing the appropriate role for the SBSTA: "The SBSTA

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172. *Id.* at 79, 81 (submissions from South Africa and Thailand, respectively).

173. *Id.* at 83 (submission from Vanuatu).

174. *Id.* at 8 (submission from Australia).

175. *See generally id.* at 9–10. Australia's submission is interesting in that it highlights a number of things Australia wants to be done in a centralized manner, while still wanting some deference to countries. *See, e.g., id.* at 10 (discussing definitions, which Australia says could be country specific but tied to the Marrakesh Accords and possibly other international agreements).

176. *Id.* at 52–55 (submission from Germany).

177. *See id.* at 78–79 (submission from South Africa) (arguing that a standard definition of forests is complicated by continental and regional differences in species composition and local conditions, including historical factors).

178. *See supra* note 175 and accompanying text.

179. SBSTA, Submissions from Parties, 2007, *supra* note 109, at 76–77 (submission from New Zealand) (noting that multiple levels, from the multilateral down to the local level, will be needed for an effective global response to climate change).

180. *Id.*

should not be prescriptive. Instead, it should create an enabling environment for voluntary participation by Parties." [181] The submission urged that international process complement national policies.[182] In a similar vein, Indonesia urged a single definition of *forests* while still contending that a single definition would allow the scheme to fit different national circumstances.[183] Consistent with this nested, tiered approach, during the SBSTA's workshop in 2007, the European Union urged a preparatory scheme that could "explore approaches that combine national action and international support."[184]

At the workshop, the participants discussed whether common or countrywide definitions would be needed. Participants recognized that the use of common definitions would improve consistency and comparability among countries.[185] Yet proposals were also made to use national definitions for *forests* and *deforestation* consistent with current and earlier practices for the preparation of national inventories, as reported to the UNFCCC bodies, the FAO, or both. This would enable parties to include or exclude various elements in their approach to estimating reduced emissions from deforestation. Thus, the parties were already clear on the issues at stake in this debate, framed at this point as a concern about balancing consistency with flexibility.[186]

The draft CoP decision that came out of the workshop in 2007 and the final decision from the CoP in Bali in December 2007 suggested that there was at least some agreement for consistency in reporting and for reliance on international standards for reporting of greenhouse gas emissions from deforestation. [187] Although many issues were bracketed, Paragraph 5 was not bracketed, indicating agreement. Paragraph 5 encouraged "the use of the most recent reporting guidelines [from CoP Decision 17/CP.8] as a basis for reporting greenhouse gas emissions from deforestation, noting also that Parties not included in Annex I to the Convention are encouraged to apply the Intergovernmental Panel on Climate Change good practice guidance." [188] With just the reference to the IPCC removed, this was adopted as part of the first CoP decision in Bali in December 2007.[189]

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181. *Id.*

182. *Id.* (urging that the SBSTA not be prescriptive, but rather that it should support voluntary participation by parties).

183. SBSTA, Submissions from Parties, Addendum, 2007, *supra* note 113, at 3 (submission by Indonesia).

184. SBSTA, *Report on the Second Workshop*, 2007, *supra* note 118, at 8.

185. *Id.* at 13.

186. *Id.*

187. *Reducing Emissions*, 2007, *supra* note 121, at 3.

188. *Id.*

189. *Decision 2/CP.13*, *supra* note 3.

However, in the run-up to the Bali CoP, as the parties debated expanding the scope of REDD, some concern about the level of international oversight began to show. In a group submission by several developing countries, the submitting parties expressed concern about not being able to address the drivers of deforestation because of "insufficient domestic resources and overly cumbersome requirements from international agencies" and complained that the standards for sustainable forest management were very high, which would mean developing countries would need additional support.[190] Developing countries were, in essence, beginning to be more explicit about the connection between international oversight and financial and technical support. However, unlike in Papua New Guinea and Costa Rica's 2005 proposal, the relationship between funding and oversight was now flipped. Rather than international oversight and verification being conditions for the availability of resources, as many parties, particularly developed countries, had framed them before,[191] actual achievement of emissions reduction and acceptance of international oversight were now being made conditional on the receipt of funding and technology transfer.[192]

This split explains the disagreement about whether to pursue policy questions as well as methodological questions or just methodological questions. The phrase "policy issues and positive incentives" connotes discussion of financial and technical support. Thus, when developed countries advocated focusing on methodological questions early on, it is because they considered that the resources should flow once the methodological questions were resolved. As Slovenia stated on behalf of the EC in its submission in 2008: "A submission on methodological issues is not, in the EU's view, the place to discuss issues such as sources of support for positive incentives to reduce emissions but the EU notes that a sound methodological approach, such as that outlined here, would be a prerequisite for success in mobilizing sufficient funding for this."[193] Similarly, during the SBSTA's Twenty-eighth Session in June 2008, a few developing countries argued that methodological issues could not be separated from discussions on financial mechanisms. In contrast, the EC supported discussing outstanding methodological issues item by item and argued that the SBSTA's work, which had been focused

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190. United Nations Framework Convention on Climate Change, Subsidiary Body for Scientific and Technological Advice, *Views on Issues Related to Further Steps Under the Convention Related to Reducing Emissions from Deforestation in Developing Countries: Approaches to Stimulate Action*, FCCC/SBSTA/2007/MISC.14, at 5, 9 (Sept. 10, 2007).

191. SBSTA, Submissions from Parties, 2008, *supra* note 138 (submission from Slovenia on behalf of the EC).

192. The question of which should come first, the financing or the action, has also dogged negotiations surrounding climate financing generally.

193. *Id.* at 51.

on methodological questions, should inform the work of the more policy-oriented AWG-LCA.[194]

This approach was consistent with what was going on more broadly in the climate change negotiations. In general, in negotiations about future climate change mitigation efforts at the CoP, the parties were hotly debating whether developing countries would take on mitigation obligations that would be embodied in an international agreement or commit only to "enhanced and incentivized mitigation [that is] measurable, reportable, and verifiable."[195] Developing countries sought to discuss financial issues before discussing mitigation options that might link technology transfer to achievement of mitigation objectives by both developed and developing countries, and the parties concluded an informal agreement on technology transfer before they agreed on mitigation obligations and objectives.[196]

Yet, there is also a fine line between technical assistance—with methodologies and definitions that could help a country in determining its reference baselines—and standardization imposed by developed countries. As Australia put it when arguing in favor of a market-based approach, good safeguards on questions of permanence, additionality, and leakage would be needed for a market, but developing countries would also need incentives to be able to satisfy these safeguards.[197] Developing countries' desire and need to achieve a balance between these two—both technical assistance and national control—is nicely demonstrated by a submission by a group of developing countries in 2008. It desired that reductions of emissions under the REDD scheme be voluntary and that the parties "alone w[ould] determine how best to implement specific measure[s] toward these objectives."[198] Yet, it also argued in favor of standardization on methodological regulations applicable for developing country

194. *SB 28 and AWG Highlights: Friday 6, June* 2008, 12 EARTH NEGOTIATIONS BULL. No. 369, June 7, 2008, at 2; *SB 28 and AWG Highlights: Wednesday, 4 June 2008*, 12 EARTH NEGOTIATIONS BULL. No. 367, June 5, 2008, at 2.

195. *COP 13 and COP/MOP 3 Highlights: Thursday, 13 December 2007*, 12 EARTH NEGOTIATIONS BULL. No. 353, Dec. 14, 2007, at 2.

196. *Id.*

197. United Nations Framework Convention on Climate Change, Subsidiary Body for Scientific and Technological Advice, *Views on Outstanding Methodological Issues Related to Policy Approaches and Positive Incentives to Reduce Emissions from Deforestation and Forest Degradation in Developing Countries,* Submissions from Parties, Addendum 2, FCCC/SBSTA/2008/MISC.4/Add.2, at 3 (June 2, 2008) (submission from Australia).

198. United Nations Framework Convention on Climate Change, Subsidiary Body for Scientific and Technological Advice, *Views on Outstanding Methodological Issues Related to Policy Approaches and Positive Incentives to Reduce Emissions from Deforestation and Forest Degradation in Developing Countries,* Submissions from Parties, Addendum 1, FCCC/SBSTA/2008/MISC.4/Add.1, at 3 (May 21, 2008) (submission from Belize et al.) [hereinafter SBSTA, Submissions from Parties, Addendum 1, 2008].

participation within all domestic, regional, and international emissions markets.[199] This particular submission favored market-based approaches and might have favored more emphasis on standardization for that reason. But even with that desire, it was also firmly in favor of country control over implementation and wanted only the minimum international coordination needed to achieve a functioning market.[200]

When the SBSTA convened in 2008 for their Twenty-eighth Session, the countries still debated this problem but finally resolved it with a compromise. The developed countries' desire for language that would encourage cooperation and the developing countries' desire for language that would encourage technical support both found a home in language in the SBSTA's draft conclusions, which stated that the SBSTA would identify capacity-building needs "in order to facilitate technical support and cooperation where appropriate."[201] This was a vague compromise, to be sure, but a compromise nonetheless.

4. 2008–2009: National Control over Baselines and Reference Levels

In 2008, the struggle over levels of international oversight found a new home. As discussions continued on expanding REDD's scope, questions about the baselines states should be using to determine reductions of emissions that would warrant compensation became more difficult. Early in the negotiations about REDD, when only deforestation was part of the scope of the mechanism, some parties had highlighted concerns about equity in how baselines, known then as *reference emission levels*, should be set.[202] These baselines are critical, because they are the point against which future efforts to limit deforestation and protect forests will be measured and, in turn, compensated. Countries with a relatively good track record on forest conservation expressed concern about fixing reference emission levels at the present because they would get less money for continuing on a good course of limiting deforestation.[203] They would be punished,

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199. *Id.* at 4.

200. *Id.* at 6 (arguing that there was no need for more definitions of forest degradation beyond what the IPCC already had).

201. United Nations Framework Convention on Climate Change, Subsidiary Body for Scientific and Technological Advice, *Reducing Emissions from Deforestation in Developing Countries: Approaches to Stimulate Action*, Draft Conclusions Proposed by the Chair, FCCC/SBSTA/2008/L.12, at 3–4 (June 12, 2008).

202. SBSTA, Submissions from Parties, 2007, *supra* note 109.

203. *See SB 28 and AWG Highlights: Tuesday, 10 June 2008*, 12 EARTH NEGOTIATIONS BULL. No. 372, June 11, 2008, at 2 (stating that "[m]any parties stressed the importance of flexibility in selecting the starting date or period for reference emissions"); *see also SB 28 and AWG Highlights: Wednesday, 4 June 2008*, 12 EARTH NEGOTIATIONS BULL. No. 367, June 5, 2008, at 2 (reporting that the Democratic

essentially, for having been a leader in limiting deforestation within their borders.

Although these points had surfaced in early submissions, until 2008 the parties had not spent very much energy on the question of whether baselines would be set according to emissions or according to some other less quantitative criteria. Now that the scope of REDD was beginning to expand, questions about the degree to which decisions about setting baselines should be country driven or more centrally decided bubbled to the surface. In 2008, during discussions about methodological issues—before the scope of REDD had been expanded fully—some parties suggested referring to *changes* instead of *reductions* in emissions.[204] A day later, a group of developed countries stressed the role of historical emissions from deforestation in developing countries in establishing reference levels. At the same time, many parties stressed the importance of flexibility in selecting the starting date or period for reference emissions.[205] As Suriname explained in its submission in 2009 on technical and institutional capacity-building needs, it wanted to be able to include projected future emissions from intended development.[206] Suriname's explanation is worth quoting at more length:

> Simple historical base-lines are not adequate, because they characterize a different economic and social dynamic that led to low rates of deforestation; Suriname is now embarking on a more dynamic development trajectory and a deliberate strategy to increase the exploitation of its natural resources including expansion of agriculture. Therefore, Suriname's reference scenario must be based on a modeled future economy and the projected emissions that would occur under a business as usual assumption that would normally accompany changes in land-use allocations, infrastructure investments, demographic and socio-economic trends, policy and enforcement, and any other causal or correlative factors that can be used to infer forest cover change with known levels of certainty.[207]

In 2009, this issue really began to heat up. At first, it took the form of a split between those favoring centralized approaches and those favoring more national approaches. At a 2009 experts meeting, some experts suggested that global reference levels would be

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Republic of Congo, for the Congo Basin countries, stated that "reference data based on historical trends would penalize past good behavior").

204. *SB 28 and AWG Highlights: Monday, 9 June 2008*, 12 EARTH NEGOTIATIONS BULL. No. 371, June 10, 2008, at 2 (June 10, 2008).

205. *Id.*

206. United Nations Framework Convention on Climate Change, Subsidiary Body for Scientific and Technological Advice, *Information on Experiences and Views on Needs for Technical and Institutional Capacity-Building and Cooperation*, Submissions from Parties, FCCC/SBSTA/2009/MISC.2, at 44 (Mar. 10, 2009) (submission from Suriname) [hereinafter SBSTA, Submissions from Parties, 2009]. Disagreements and difficulties surrounding the baselines have also pervaded general climate change discussions from the beginning.

207. *Id.*

necessary, while others argued in favor of national (or regional) reference levels.[208] Questions came up at this meeting that implicated the issue of centralized versus decentralized action, including whether countries would all set reference emission levels at once (assuming they would be set at the national level) and whether the level would depend on national circumstances.[209] Indeed, some experts also raised the next step of whether reference emission levels proposed by participating developing countries would undergo expert review and subsequently be formalized in a CoP decision.[210]

A similar debate occurred with regard to data. While some experts argued in favor of global consistency, others expressed caution about a global database with guidelines becoming "the rule."[211] Rather, the role of guidance should be to "allow developing countries to improve and move forward in their efforts to reduce emissions from deforestation and forest degradation."[212] Yet the push for standardization was not going to go away even if information would be generated by national sources; the Secretariat produced a technical paper advocating some consistency in estimation and reporting of carbon emissions and removals and highlighting the need for a centralized database and a centralized spatial data infrastructure.[213]

A third site for the debate about international oversight versus national control and flexibility involved questions related directly to REDD's expanding scope. Many countries, including the United States, had earlier proposed using IPCC guidance as a starting point for definitions. They also expressed concern about the lack of consistent land-use definitions.[214] However, some of these countries also argued that there would be no need for additional definitions of *forest degradation* to be developed by the parties beyond what the IPCC already offered.[215] In other words, there was limited support for

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208. United Nations Framework Convention on Climate Change, Subsidiary Body for Scientific and Technological Advice, *Report on the Expert Meeting on Methodological Issues Relating to Reference Emission Levels and Reference Levels*, FCCC/SBSTA/2009/2, at 6–7 (May 14, 2009) [hereinafter SBSTA, *Report on the Expert Meeting on Methodological Issues Relating to Reference Emission Levels and Reference Levels*]

209. *Id.*

210. *Id.*

211. *Id.*

212. *Id.*

213. United Nations Framework Convention on Climate Change, *Cost of Implementing Methodologies and Monitoring Systems Relating to Estimates of Emissions from Deforestation and Forest Degradation, the Assessment of Carbon Stocks and Greenhouse Gas Emissions from Changes in Forest Cover, and the Enhancement of Forest Carbon Stocks*, Technical Paper, FCCC/TP/2009/1, at 36 (May 31, 2009).

214. *See* SBSTA, Submissions from Parties, 2008, *supra* note 138, at 55 (submission from the United States). *See generally id.*

215. *See, e.g.*, SBSTA, Submissions from Parties, Addendum 1, 2008, *supra* note 198, at 4, 6.

definitions to be negotiated as part of any binding provision or CoP decision. At the mid-year SBSTA meeting in June 2009, these disagreements bubbled to the surface as the parties negotiated over the text of a draft CoP decision on methodological guidance to take to CoP 15 in Copenhagen in December 2009.[216]

A number of parties wanted to replace the term *reference emission levels* with *reference removal levels*, a subtle but important shift in the way the parties might approach thinking about deforestation and conservation issues—and one consistent with the broad shift in REDD's scope.[217] Even as the parties agreed to include references to conservation, sustainable management of forests, and enhancement of carbon stocks in the title of the draft CoP decision, debates over whether to refer to *reference levels*, *reference emission levels*, or both continued deep into the meeting's negotiations.[218] Some parties indicated that reference emission levels were associated only with deforestation and forest degradation and wanted to include both phrases "in order not to prejudge the outcome in Copenhagen."[219] Debates about language referring to the use of IPCC guidance, reference to independent review of national forest monitoring systems, and what countries should account for when establishing reference levels also continued deep into the meeting.[220] With regard to independent review of forest monitoring systems, some debate centered on whether results or the system itself should be open to independent review.[221]

These debates were not resolved by the end of the meeting, resulting in a heavily bracketed draft CoP decision intended for Copenhagen's CoP 15. Interestingly, going into the meeting, many parties had been happy with the draft, and some "expressed frustration about the 'explosion of brackets at the eleventh hour.'"[222] Whether this explosion was a result of the expanding scope of REDD is hard to say without further inquiry and might never be known with absolute certainty. Nevertheless, it was clear by the end of the

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216. In general negotiations, not just those related to REDD, developing countries and developed countries were particularly divided at this historical moment.

217. *Id.*; *see also SB 30 and AWG Highlights Saturday, 6 June 2009*, 12 EARTH NEGOTIATIONS BULL. No. 416, June 7, 2009, at 4 (describing continuing discussions the next day on whether to refer to "reference levels," "reference emission levels," or "levels" and on how much future guidance the SBSTA might want to recommend in the context of a possible outcome from CoP 15).

218. *SB 30 and AWG Highlights: Monday, 8 June 2009*, 12 EARTH NEGOTIATIONS BULL. No. 417, June 9, 2009, at 4.

219. *Summary of the Bonn Climate Change Talks: 1-12 June 2009*, 12 EARTH NEGOTIATIONS BULL. No. 421, June 15, 2009, at 15.

220. *SB 30 and AWG Highlights: Tuesday, 9 June 2009*, 12 EARTH NEGOTIATIONS BULL. No. 418, June 10, 2009, at 2.

221. *Summary of the Bonn Climate Change Talks*, *supra* note 220, at 15.

222. *SB 30 and AWG Highlights: Tuesday, 9 June 2009*, 12 EARTH NEGOTIATIONS BULL. No. 418, June 10, 2009, at 2.

SBSTA's thirtieth meeting in June 2009 that several issues could not garner agreement.

Going into CoP 15 in Copenhagen in December 2009, the SBSTA'S heavily bracketed draft decision reflected all the fault lines already discussed.[223] The draft requested developing country parties to take the most recently adopted IPCC guidance and guidelines into account as a basis for estimating anthropogenic, forest-related greenhouse gas emissions by sources and removals by sinks, forest carbon stocks, and forest-area changes but modified the request with the phrase *as appropriate* twice.[224] The decision also requested the parties to establish "robust and transparent . . . monitoring systems," with reference to the methodologies that should be included.[225] This too was modified by the phrase "according to national circumstances and capabilities."[226] Strikingly, a subparagraph in this section of the draft decision that requested developing country parties to "[e]nsure that these monitoring systems and their results are open to independent review as agreed by the Conference of the Parties" was in square brackets, indicating that this matter was still subject to disagreement among the parties.[227] Some developed countries had sought the provision, and one developing country had requested the text be bracketed.[228] Similarly, a subsequent paragraph recognizing that more work might be needed by the IPCC to provide supplemental guidance was also in square brackets.[229]

The fault line about baselines and reference levels also remained live in the draft decision going into CoP 15.[230] The entire paragraph addressing baselines and what developing countries should take into account in setting them was bracketed. [231] Further, particular elements within that paragraph were also bracketed, indicating that parties had not agreed on those elements. For example, at the request of two different developing countries, phrasing that would allow reference levels to be adjusted for expected *future* emission trends and phrasing that would allow domestic legislation, policies, and measures *that are still under development* to be taken into account in setting reference levels were both added close to the end of the meeting. This phrasing was then bracketed because there was

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223. *See* United Nations Framework Convention on Climate Change, Subsidiary Body for Scientific and Technological Advice, *Report of the SBSTA on Its Thirtieth Session, Held in Bonn from 1 to 10 June 2009*, Draft Decision, FCCC/SBSTA/2009/3, at 23 (Aug. 5, 2009) [hereinafter SBSTA, Draft Decision [-/CP.15]]. The decision is intended solely to provide methodological guidance.

224. *Id.*

225. SBSTA, Draft Decision [-/CP.15], *supra* note 223, at 24.

226. *Id.*

227. *Id.*

228. *Summary of the Bonn Climate Change Talks*, *supra* note 219, at 15.

229. SBSTA, Draft decision [-/CP.15], *supra* note 223, at 24.

230. *Id.*

231. *Id.*

insufficient time to discuss it.[232] The draft decision contains a reference to both reference emission levels and reference levels.[233] With regard to those reference levels, however, the draft decision left the modifier *national* bracketed, indicating that parties still could not agree on whether baselines should be subnational, national, regional, or global.[234]

When the final decision emerged from CoP 15 at Copenhagen in 2009, after negotiation in multiple sessions, it took into account a lot of the concerns of developing countries. On the debate over reference emission levels and reference levels, the parties agreed to include both phrases, which is not surprising given the expanded scope of REDD at this stage of REDD's development. On the question of centralization versus flexibility for developing countries, the balance of this decision tipped heavily in favor of the latter with more flexibility for developing countries and more deference to their national circumstances and capabilities.[235] For estimating anthropogenic forest-related greenhouse gas emissions by sources and removals by sinks, forest carbon stocks, and forest-area changes, the question of reference to IPCC guidance was resolved by adding the phrase *as appropriate* and referring to the need only to take the guidance "into account."[236] Similarly, the request for developing countries to establish "robust and transparent national forest monitoring systems" is modified by the phrase "according to national circumstances and capabilities."[237] All of the subsequent subsections discussing how those monitoring systems should operate and what they should provide have some kind of modifier that retains a lot of flexibility for the developing countries, although one of these leaves open the possibility of more or less oversight by the CoP, depending on what the parties agree on in subsequent decisions.[238]

Yet it would be a mistake to read the Copenhagen decision as a complete abandonment of a role for international oversight or support. Several provisions contain the phrase "in accordance with

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232. *Id.* Although this bracketing seems to have occurred because these possibilities were raised close to the end of the meeting and there was insufficient time to discuss them. *Summary of the Bonn Climate Change Talks*, *supra* note 219, at 16.

233. SBSTA, Draft decision [-/CP.15], *supra* note 223.

234. *Id.*

235. *Id.*

236. *Decision 4/CP.15*, *supra* note 3, at 11. The text here is a little confusing, since the chapeau for paragraph 1 says that developing country parties are requested to take the following guidance "into account," while subparagraph 1(c) referring to IPCC guidance for estimating emissions says "use." Nevertheless, the modifier "as appropriate" suggests that the language is intended to give the developing country parties to whom it is addressed a lot of flexibility.

237. *Id.* at 12.

238. *Id.* at 12. *See id.* (using "as appropriate" as a modifier); *id.* (using "taking into account national capabilities and capacities" as a modifier); *id.* (requiring information to be transparent and suitable for review "as agreed by the Conference of the Parties").

relevant decisions of the Conference of the Parties," which serves a dual function of deferring decision about the level of oversight that the CoP should exercise and leaving open the possibility that the CoP might exercise some oversight or add additional guidance.[239] The decision also urges a role for the Secretariat to enhance coordination of capacity-building activities, invites parties to share lessons learned and experiences gained through a web platform on the UNFCCC website, and recognizes that further work may be needed by the IPCC.[240]

CoP 15 was also important for the emergence of a new forum for discussion of REDD policy issues, the AWG-LCA. Although the AWG-LCA had been charged with addressing REDD since the Bali Action Plan in 2007, negotiations had remained largely within the SBSTA and had focused on methodological issues. Indeed, during discussions in the SBSTA, many parties highlighted that many of the most contentious issues, including monitoring, reporting and verification, and national and subnational reference levels, were political in nature and should be addressed through the AWG-LCA.[241] Although no final CoP decision on REDD came out of the AWG-LCA's activity in 2009, the draft CoP decision that emerged after the conference showed that the same fault lines were about to appear in this different setting.[242] The draft decision was presented to the CoP for adoption but did not change much during the CoP and was not adopted until a year later.[243] Yet its text is interesting as a marker of the starting point for negotiation of REDD issues that would now be taken up by the AWG-LCA.

The draft decision highlighted substantial deference to national priorities and the need for national circumstances to be taken into account, highlighting the need for action to be voluntary, country driven, in accordance with national circumstances and capabilities, respectful of sovereignty, and consistent with national sustainable

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239. *E.g.*, *id.* ¶¶ 1(d)(iii), 2, 7.

240. *Id.* ¶¶ 2, 6, 8.

241. *Summary of the Copenhagen Climate Change Conference: 7-19 December 2009*, 12 EARTH NEGOTIATIONS BULL. No. 459, Dec. 22, 2009, at 22 (discussing REDD negotiations in the SBSTA during CoP 15).

242. *See generally* United Nations Framework Convention on Climate Change, Ad Hoc Working Group on Long-Term Cooperative Action Under the Convention, *Outcome of the Work of the Ad Hoc Working Group on Long-Term Cooperative Action Under the Convention*, Draft Conclusions Proposed by the Chair, *Draft Decision -/CP.15 Policy Approaches and Positive Incentives on Issues Relating to Reducing Emissions from Deforestation and Forest Degradation in Developing Countries; and the Role of Conservation, Sustainable Management of Forest and Enhancement of Forest Carbon Stocks in Developing Countries*, FCCC/AWGLCA/2009/L.7/Add.6, at 3 (Dec. 15, 2009) (demonstrating disagreement on many of the issues that had been contentious before)) [hereinafter AWG-LCA Draft Decision [-/CP.15]].

243. United Nations Framework Convention on Climate Change, *Report of the Ad Hoc Working Group on Long-Term Cooperative Action Under the Convention on Its Eighth Session*, FCCC/AWGLCA/2009/17, at 5 (Feb. 5, 2010).

development needs and goals.[244] Yet again, it also demonstrated some role for international oversight with the emergence of a set of draft "safeguards" to guard against the most problematic potential consequences of implementing REDD for both climate change mitigation and other important interests, such as indigenous peoples and biodiversity.[245] At this stage in the decision's progress, in 2009, these safeguards were contained in the main body of the draft decision text, in Paragraph 2. How these safeguards would be developed and implemented would become a critical factor in determining where the line between international and national was going to be drawn and is discussed in a separate Part below.[246]

A year later, in 2010, the AWG-LCA proposed a draft decision to the CoP in Cancun, which was adopted. With the expanded scope for REDD now embodied in a 2009 CoP decision, parties spent more time talking about the cobenefits—benefits beyond emissions reduction and climate change mitigation. At the same time, they also spent more time talking about the safeguards that should help ensure both proper emissions reduction and prevention of harmful collateral consequences.[247] The decision is consistent with the negotiations up to 2010. It refers to REDD's expanded scope and modifies requests for national strategies and action plans with phrases giving deference to

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244. AWG-LCA Draft Decision [-/CP.15], *supra* note 242, at 2, 6, 9.

245. *See id.* at 3 (recognizing the importance of indigenous peoples); *see also Summary of the Copenhagen Climate Change Conference: 7-19 December 2009*, 12 EARTH NEGOTIATIONS BULL. No. 459, Dec. 22, 2009, at 17.

246. The broader context of Copenhagen sheds some further light on this ongoing struggle to navigate the boundary between national needs and international oversight. Going into CoP 15 in Copenhagen, the question of developing a successor agreement to the Kyoto Protocol was high on everyone's mind. Yet discussions during the CoP demonstrated that the parties did not even agree on what form that successor should take. *See Copenhagen Highlights: Thursday 10 December 2009*, 12 EARTH NEGOTIATIONS BULL. No. 452, Dec. 11, 2009, at 4 (discussing disagreements about whether an agreement should be a strengthened Kyoto Protocol, a new comprehensive legal framework engaging the United States and developing countries in mitigation efforts (unlike the Kyoto Protocol), and even whether an agreement should be legally binding, on which developing countries were split); *see also Copenhagen Highlights: Wednesday, 9 December 2009*, 12 EARTH NEGOTIATIONS BULL. No. 451, Dec. 10, 2009, at 1, 4 (discussing disagreements about whether a new legally binding agreement should be adopted). Yet Copenhagen ended with the Copenhagen Accord, agreed on outside the regular processes of the CoP, with a contentious legal status and a weak commitment to reduce emissions. Certainly, no new protocol came out of Copenhagen. *See also id.* at 1, 4 (discussing that some of the parties were opposed to a new legally binding agreement).

247. United Nations Framework Convention on Climate Change, *Report of the Conference of the Parties on Its Sixteenth Session, held in Cancun from 29 November to 10 December 2010, Addendum, Part Two: Action Taken by the Conference of the Parties at Its Sixteenth Session, Decisions Adopted by the Conference of the Parties, Decision 1/CP.16, The Cancun Agreements: Outcome of the Work of the Ad Hoc Working Group on Long-Term Cooperative Action Under the Convention*, FCCC/CP/2010/7/Add.1, at 12, 26 (Mar. 15, 2011) [hereinafter *Decision 1/CP.16*].

national capabilities and circumstances.[248] It allows parties to develop either forest reference emission levels, forest reference levels, or both, or to develop interim measures. It also contains a provision allowing for subnational forest reference emission levels or forest reference levels as an interim measure.[249] The decision recognizes a phased approach.[250] In a separate paragraph, the decision makes clear that any request under the decision is subject to national needs and to whether there is international support for what the party is trying to achieve. This paragraph states: "[Recognizing] that the implementation of the activities referred to . . . above, including the choice of a starting phase . . . depends on the specific national circumstances, capacities and capabilities of each developing country Party and the level of support received."[251]

5. 2010–2012: Limiting International Oversight over Safeguards Implementation

The safeguards are, in many ways, the most interesting element of the decision coming out of CoP 16, particularly with regard to the role of international oversight.[252] Debates about the safeguards and their implementation continue to echo many of the debates already discussed. For parties, the critical questions during CoP 16 revolved around how implementation of these safeguards would be managed and what role international institutions would play in supervising or reviewing compliance.[253]

A few changes had occurred to the AWG-LCA's draft decision in the time period between Copenhagen and Cancun. The safeguards, which had been part of the draft CoP decision, were moved to an appendix.[254] The appendix itself begins with a set of principles to guide REDD activities.[255] Under these principles, activities undertaken under the REDD mechanism must contribute to the achievement of the objectives of UNFCCC Article 2, which focuses on mitigation, and Article 4(3), which describes the need for developed countries to commit to providing new and additional financial resources to developing countries.[256] The activities must be country driven and—in a change from the word *voluntary*—"be considered options available to Parties."[257] Activities under REDD must also be

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248. *Id.* at 12, 13, ¶¶ 70–74.
249. *Id.* ¶ 71.
250. *Id.* ¶ 73.
251. *Id.* ¶ 74.
252. *Id.* at app. I.
253. *Id.* at app. I, ¶¶ 1(e)–(f).
254. *Id.* at app. I.
255. *Id.* at app. I, ¶ 1.
256. *Id.* at app. I, ¶¶ 1(a)–(b).
257. *Id.* at app. I, ¶ 1(c).

"consistent with the objective of environmental integrity" and "take into account the multiple functions of forests and other ecosystems."[258] This latter phrase was added at Cancun.[259] A number of subparagraphs stress that REDD activities should be consistent with national priorities, sustainable development, and the adaptation needs of the implementing country.[260] They must also be supported by "adequate and predictable financial and technology support, including support for capacity-building."[261] They must be results based and promote sustainable management of forests.[262]

Article 2 of the appendix contains the safeguards. The safeguards are to be "promoted and supported," a different level of exhortation from the principles contained in Article 1 of the CoP Decision Appendix, which states that activities "should" contribute to and be consistent with the principles set out in the subparagraphs.[263] The safeguards refer to consistency with both national forest programs and relevant international conventions and agreements.[264] They do not, however, specify which international conventions and agreements should be deemed relevant.[265] The safeguards also provide for "[r]espect for the knowledge and rights of indigenous peoples and members of local communities, by taking into account relevant international obligations, national circumstances and laws."[266] In a shift, and likely compromise, this provision also "not[es] that the United Nations General Assembly has adopted the United Nations Declaration on the Rights of Indigenous Peoples."[267] While earlier drafts had either referred explicitly to the UN Declaration as a source of rights for indigenous peoples or had dropped the reference into a footnote, this apparent compromise simply notes the General Assembly's approval of the declaration, without establishing it as a source of any rights.

For biodiversity and forests, the safeguards' most significant provision is contained in Paragraph 2(e), which states that the safeguard should be promoted and supported so that "actions are consistent with the conservation of natural forests and biological diversity" and so that actions referred to in the decision "are not used for the conversion of natural forests, but are instead used to incentivize the protection and conservation of natural forests and their ecosystem services, and to enhance other social and

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258. *Id.* at app. I, ¶ 1(d).
259. *Id.*
260. *Id.* at app. I, ¶¶ 1(e)–(h).
261. *Id.* at app. I, ¶ 1(i).
262. *Id.* at app. I, ¶¶ 1(j)–(k).
263. *Id.* at app. I, ¶ 1.
264. *Id.* at app. I, ¶ 2(a).
265. *Id.*; *see* Savaresi, *supra* note 20, at 40.
266. *Decision 1/CP.16*, *supra* note 247, at app. I, ¶ 2(c).
267. *Id.*

environmental benefits." The use of the word *ensuring* in this provision suggests that it is to have some substantive force.[268] In their efforts to undertake REDD activities, developing country parties are requested to develop, *inter alia*, "[a] system for providing information on how the safeguards . . . are being addressed and respected throughout the implementation . . . , while respecting sovereignty."[269] This is very deferential to state sovereignty and is reliant on procedures and reporting without any provision for oversight.

The CoP 16 Decision charged the SBSTA with developing "guidance" relating to this request for presentation to the parties at CoP 17.[270] In 2011, the parties' comments about that guidance varied in telling ways.[271] There were points of general agreement. Parties generally described the importance of national-scale implementation of the safeguards' information systems and paid deference to national circumstances. Similarly, most parties recognized a role for general guidelines or principles that should guide everyone.[272]

Parties were split, however, on whether the system for providing information on how the safeguards are being addressed and respected should be fully integrated into other regular reporting obligations under the UNFCCC or should be more ad hoc, leaving it to the discretion of the parties on when and what to report. The parties were also split about the role of international oversight over the content of these reports.[273]

The split was largely, but not entirely, a split between developing countries and developed countries. Costa Rica, for example, a country that is supportive of a market-based approach to REDD, seemed more willing to tolerate international oversight.[274] Costa Rica's submission urged that the system for providing information on safeguards is "an integrated part of REDD+ strategies" and that this information system "should be part of the overall information on the both [sic] REDD+ strategy in general."[275]

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268. *Id.* at app. I, ¶¶ 2(e)–(g). The last two safeguards refer to aspects of permanence and leakage, favoring "[a]ctions to address the risks of reversals" and "[a]ctions to reduce displacement of emissions." *Id.*

269. *Id.* ¶ 71(d).

270. *Id.* at app. II, ¶ (b).

271. *See generally* United Nations Framework Convention on Climate Change, Subsidiary Body for Scientific and Technological Advice, *Views on Methodological Guidance for Activities Relating to Reducing Emissions from Deforestation and Forest Degradation and the Role of Conservation, Sustainable Management of Forests and Enhancement of Forest Carbon Stocks in Developing Countries*, Submissions from Parties, 19, U.N. Doc. FCCC/SBSTA/2011/MISC.7 (Oct. 19, 2011) [hereinafter SBSTA, Guidance Submissions from Parties, 2011] (submission from Brazil).

272. *See, e.g., id.* at 18 (submission from Brazil).

273. *See id.* at 24 (submission from Costa Rica).

274. *Id.*

275. *Id.* at 25 (submission from Costa Rica).

Costa Rica urged that this system also be consistent with the system for monitoring, reporting, and verification of REDD+.[276] Safeguard information should be presented "as an integral part of progress reports on the implementation of the overall REDD+ strategy" and "the periodicity of the provision of information on safeguards should be consistent with the reporting intervals of the REDD+ strategy in general."[277]

Norway was the most explicit about the way in which it viewed the safeguards.[278] For Norway, the purpose of the safeguards information system is "to inform and strengthen the policy work and implementation of REDD+ policies" and "to satisfy the needs of financial contributors on the use of finance and implications of policies and activities."[279] In its submission, Norway stressed the principles of "transparency, involvement of stakeholders, reliability of information, and complete coverage" of the seven safeguards.[280] Norway also argued that the term *addressed* in the Cancun Agreement implies action that "is intended, is taking place or has taken place" and that the term *respected* implies "the achievement of a certain result."[281] Norway also urged that a CoP decision on this issue would be necessary.[282] Norway "is of the opinion that the Cancun decision *mandates* the provision of information at regular intervals."[283]

These positions, which seem to advocate a more centralized approach to reporting about the safeguards, can be contrasted with the positions of several developing country parties. A submission by the Coalition of Rainforest Nations and a number of like-minded developing countries urged that guidance on the system for providing information on how safeguards are being implemented should be flexible; nationally led and developed; respectful of national sovereignty, legislation, diversity, and socioeconomic conditions; and consistent with national development priorities.[284] In addition to these, they added, "[T]ransparency, regularity, consistency, reliability and broad participation should be guiding principles of the system."[285] They went on to stress that guidance developed by the

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276. *Id.*

277. *Id.* at 26; *see id.* at 60 (submission from Poland and the European Commission on behalf of the European Union and its Member States) (demonstrating that the European Union believes that a CoP decision should direct parties to submit safeguards information as part of its national communications and biannual update reports).

278. *See id.* at 86 (submission from Norway).

279. *Id.* at 86–87.

280. *Id.* at 87.

281. *Id.*

282. *Id.*

283. *Id.* at 89 (emphasis added)

284. *See id.* at 15 (submission from Belize et al.).

285. *Id.*

SBSTA should not be "a prejudice to official national information systems."[286] With regard to the timing of reporting, these parties acknowledged the need for regular reporting but also argued that this information should only be provided for supported actions under REDD+ and that they should be reported "through existing systems such as national communications *consistent with country capability and the level of technical and financial support received as part of the whole REDD+ strategy*."[287]

Brazil stressed that the system for providing information on safeguards should be country driven, even as it accepted the need for clear general principles and workable guidance.[288] Thus, Brazil argued that "[r]ather than having a single system to be implemented by all Parties, each country will develop its own information system, oriented by general guidance to be provided by SBSTA and the CoP."[289] It went on to say that it should be a national decision as to the type of data and information to be included in the systems of information. That data and information "should flow as deemed appropriate by each developing country."[290] "Equally important," Brazil's submission says, "is to maintain the system for information on safeguards separate from the monitoring, reporting, and verification system."[291]

At CoP 18 in Doha in December 2012, these disputes about the level of oversight of implementation of the safeguards continued.[292] While some parties proposed a new REDD+ committee to mainstream the implementation of REDD activities, a number of other countries opposed this.[293] Similarly, some parties discussed the possibility of establishing a governing body under the authority of the CoP to promote and coordinate REDD activities, while others expressed their opposition to creating new institutions.[294] Parties also could not agree on whether to link finance to take account of the achievement of noncarbon benefits.[295] The result of these disagreements was the creation of a new process under the auspices of the SBSTA and the Subsidiary Body on Implementation (SBI).[296] Thus, as of December

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286. *Id.*

287. *Id.* (emphasis added).

288. *See id.* at 18 (submission from Brazil).

289. *Id.*

290. *Id.*; *see id.* at 19 (stating that the timing for presentation of data and information should be defined domestically and respect national circumstances and challenges).

291. *Id.* at 18.

292. *See Summary of the Doha Climate Change Conference: 26 November – 8 December 2012*, 12 EARTH NEGOTIATIONS BULL. No. 567, Dec. 11, 2012, at 10.

293. *Id.*

294. *Id.*

295. *Id.*

296. *Id.* at 10–11.

2012, the implementation of the safeguards remains without clear international oversight and standardization.[297]

D. *Conclusion*

Analysis of the submissions of the parties and the decisions of the CoPs between 2005 and 2012 gives us two narrative strands in the story of REDD. First, the scope of REDD expanded significantly, beginning with a focus only on deforestation and ending with a scope that included conservation and sustainable forest management. Second, over those same years, the parties limited the role of international institutional oversight, thereby limiting the role of international law in REDD.

Part IV of the Article discusses the consequences of REDD's shifts for REDD's likely effectiveness and two problems that arise from failing to see the true story of REDD.

IV. IMPLICATIONS OF THE TRUE STORY OF REDD

A. *The Consequences of REDD's Shifts*

The result of the story in Part III is that REDD has become more complicated and nationally oriented. REDD's expanded scope has led to more difficult methodological problems of accounting for emissions reduction. At the same time, the narrowing of a role for international legal oversight means this complex system will now be managed with less supervision and oversight from international institutions.

The consequences of these developments are significant. In order to be effective and achieve the goals set out for it, a REDD mechanism must do several things. It must be able to measure emissions reduction from covered activities and ensure those reductions are actually achieved. A mechanism must provide a way to determine which of those emissions reductions are additional to reductions that would have occurred anyway. It must also ensure against leakage—the possibility that emissions reduction in one place could lead to increased emissions somewhere else in the same country or outside its borders. And it must ensure that REDD activities do not violate indigenous and local peoples' rights or destroy biodiversity.

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297. Some progress was made at CoP 19 in Warsaw in standardizing MRV modalities and aligning the frequency of information on the implementation of safeguards with submissions of national communications. *See Summary of the Warsaw Climate Change Conference: 11-23 November 2013,* 12 EARTH NEGOTIATIONS BULL. No. 594, Nov. 16, 2013, at 23 (describing the decisions of CoP 19 on REDD). If this represents a shift in the parties' tolerance for international oversight, it is a welcome shift. Nevertheless, implementation of the safeguards remains in the hands of countries, and the main concerns raised by this Article remain live.

The technical expertise and international oversight necessary to ensure all of this has been made significantly more difficult by the way REDD has been negotiated.

As REDD's scope began to expand, negotiating countries recognized this would have an impact on the complexity of implementing REDD. By the end of 2009, REDD was clearly REDD+. Just as the scope of REDD had expanded, so had the needs of developing countries to implement REDD. The SBSTA began to seek comments on technical and institutional capacity-building needs. In response, even countries with extensive monitoring experience, like Brazil, Indonesia, and Costa Rica, noted the need for increased capacity building as a result of the increasing complexity of the task.[298] Indeed, the addition of degradation alone to the equation was enough to add complexity for some countries.[299]

Certainly, the difficulty of monitoring and developing baselines was increased by expanding REDD's focus beyond deforestation. "While ongoing research and technology development has contributed to reducing the uncertainty of monitoring and estimation of forest degradation to some extent, uncertainty is still relatively high compared to the one with estimation of deforestation."[300]

Interestingly, the need for increased capacity building was in part a response to the need for the kind of methodological certainty that would allow resources to flow to developing countries. Thus, a shift had already taken place by 2009. As the scope of REDD expanded, so too did the potential for resources to help with important conservation goals. However, at the same time, developing countries would now need more resources to provide the kind of accounting certainty that would allow developed countries to release

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298. *See* SBSTA, Submissions from Parties, 2009, *supra* note 206, at 35 (submission from Indonesia); *id.* at 12–13 (submission from Costa Rica).

299. *See* United Nations Framework Convention on Climate Change, Subsidiary Body for Scientific and Technological Advice, *Information on Experiences and Views on Needs for Technical and Institutional Capacity-building and Cooperation*, Submissions from Parties, Addendum 1, at 9, U.N. Doc. FCCC/SBSTA/2009/Misc.2/Add.1 (Apr. 17, 2009) (submission from Nepal).

300. United Nations Framework Convention on Climate Change, Subsidiary Body for Scientific and Technological Advice, *Information on Experiences and Views on Needs for Technical and Institutional Capacity-building and Cooperation*, Submissions from Parties, Addendum 2, at 4, U.N. Doc. FCCC/SBSTA/2009/Misc.2/Add.2 (May 26, 2009) (submission from Japan); *see also id.* at 6 (noting that technologies for estimating emissions from these additional activities in developing countries "[are] more complicated"); *id.* at 10 (submission from Switzerland) (sharing its experiences in Madagascar, Switzerland commented that the need for capacity building was particularly true "where remote sensing is still too limited in estimating carbon stock changes where only degradation, but no clearly detectable deforestation has yet taken place . . . . Moreover, in cases where an over-arching [sustainable forest management] approach is to be furthered, e.g., in the case of restoration of once degraded forests, such considerations become even more relevant to the success of all REDD activities in the very long run.").

funding for conservation. The parties had put REDD into a circular position. Perhaps in response to this, at an experts meeting on methodological issues held in 2009, experts suggested that there should be a period during which "financial support is provided for policy implementation before any actual payments for emission reductions are given or received."[301] Indeed, the experts meeting also raised significant questions about the desire to provide incentives for sustainable forest management and conservation where those activities may not lead directly to emissions reduction.[302]

The expansion of the scope of REDD coincided with more discussion of protection of indigenous peoples and biodiversity conservation. In 2009, for example, Switzerland wanted to draw an explicit link between indigenous peoples' rights and sustainable forest management.[303] In this sense, the expansion of REDD's scope was an improvement over the narrow and acontextual constructs of an approach that focused solely on deforestation and on trees as carbon-emission units.[304]

This shift was a double-edged sword. Concerns about biodiversity and about the rights of indigenous peoples would be implicated by a REDD mechanism that focused only on deforestation, relatively narrowly defined. Yet they would be far more implicated by an expansion of that scope into managed forests and forests subject to conservation activities. With this heightened impact in mind, representatives of the negotiating parties may have begun to pay more attention to the concerns of indigenous groups and worries about biodiversity. Thus, with an expanded scope came increased attention. This increased attention came with increased risk. As the Secretariat noted in comments at CoP 15 in Copenhagen in 2009, "REDD methodologies based only on net deforestation rate could fail to reflect actual change in carbon stocks and to deliver biodiversity co-benefits."[305] Once the scope was expanded, methodologies had to change. At the same time, those methodologies had become increasingly difficult to develop.

By 2009, the role of international oversight was also changing in the new REDD mechanism. By 2012, even the safeguards that were intended to ensure that REDD would achieve the goal of emissions

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301. SBSTA, *Report on the Expert Meeting on Methodological Issues Relating to Reference Emission Levels and Reference Levels*, *supra* note 208, at 7.

302. *Id.*

303. United Nations Framework Convention on Climate Change, Subsidiary Body for Scientific and Technological Advice, *Issues Relating to Indigenous People and Local Communities for the Development and Application of Methodologies*, Addendum 2, at 2, U.N. Doc. FCCC/SBSTA/2009/MISC.1/Add.2 (May 27, 2009) (submission from Switzerland).

304. Boyd, *supra* note 12, at 872–77.

305. *Copenhagen Highlights: Tuesday 8, December 2009*, 12 EARTH NEGOTIATIONS BULL. No. 450, Dec. 9, 2009, at 2.

reduction without undermining biodiversity protection and protection for the rights of indigenous groups were subject to minimal international oversight. The international community had negotiated an instrument that was country driven and voluntary with limited international guidance or oversight. Not only is participation in REDD voluntary, but the manner of implementation is also increasingly flexible and ad hoc.

In short, at the international level, the parties have negotiated a soft-law mechanism with severe implementation difficulties. In that sense, it has far more in common with the international legal regime that currently governs forests and biodiversity than it does with the hard-law international legal regime that governs climate change.

The mechanism that formed between 2005 and 2012 is very different from the one proposed in Papua New Guinea and Costa Rica's initial proposal and from the one that many commentators implicitly assume it to be. In 2009, a group of experts proposed a REDD mechanism with international standards and oversight and a limited scope.[306] Their words are worth quoting because what they advocate is so different from what has actually transpired.

Claire Stockwell, William Hare, and Kirsten Macey advocated a mechanism that focused solely on deforestation and not degradation, although their broad definition of *deforestation* would "address most of the impacts of degradation."[307] As these writers say, expanding the scope of REDD would change the mechanism: "Specific and targeted action will be required to reduce deforestation rates and associated GHG emissions. This action will be significantly different from measures designed to support conservation, afforestation, reforestation or other land use changes."[308] Further, "[t]he goals of the mechanism should be articulated in advance, since a mechanism the sole purpose of which is to reduce emissions could be structured quite differently from a mechanism the purpose of which is also to protect biodiversity and the rights of indigenous peoples."[309]

Further, these same commentators argued that "[i]nternational standards would need to be developed to ensure the protection of biodiversity and the rights of indigenous communities in the implementation of REDD activities," drawing on principles already agreed to in other fora, such as the CBD and the UN Declaration on the Rights of Indigenous Peoples.[310] These commentators argue that "[w]ithout international standards a REDD mechanism is likely to repeat a CDM-like experience in which only the emission reduction objective is met. There can be no justification moreover for mandating

306. Stockwell, *supra* note 4, at 153–59.
307. *Id.* at 163.
308. *Id.* at 155.
309. *Id.*
310. *Id.* at 165.

international standards for measuring [greenhouse gas] reductions but not for the mechanism's other goals."[311]

As it stands today, the mechanism that was negotiated and supported over the years does not follow these suggestions.

We could speculate as to why the scope of REDD changed over time. One possible explanation is that the international community wanted to enhance the cobenefits of biodiversity and forest protection through more contextual and ecosystem-based approaches. Another possible explanation is developing countries' desire to expand the range of activities for which they could be compensated. In turn, developed countries may have recognized that expanding that range could allow them to meet their emissions reduction targets more easily because more emissions reduction credits might be available to them. However, these possible explanations, although hinted at in parties' submissions, are speculative, and this Article does not provide the evidence for any causal analysis. Suffice it to say that the international community was unwilling to put the issue of forest protection into a mechanism that focused only on deforestation.

The move to more limited international oversight is relatively easy to understand. It has come with an overall shift in the focus of international environmental law toward national control and is consistent with trends in the negotiations about climate change mitigation more broadly.

What is clear is that the two narrative strands tell a story about REDD that is at odds with any image of REDD as the great savior of forests in international law. While the expanded scope of REDD initially seems welcome in that it is consistent with ecosystem principles and recognition of the broader role of forests in biodiversity, it also means that REDD is now far harder to implement and monitor. Indeed, despite the recognition of different forest protection activities in REDD, it is not clear that forests are actually given a greater role than as emission reduction units. The expansion of the scope of REDD reflects the complexity of dealing with biodiversity and forests on a global scale.[312]

Further, the increasing limits on international oversight suggest that contrary to the hope that the climate change regime would provide some hard international law structure to the international regime governing forests, the reverse has happened. As forests have entered into the climate change regime, they have brought with them their tradition of soft instruments, voluntary action, and a minimal role for international oversight.

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311. *Id.*

312. *See* Long, *supra* note 20, at 135–42 (arguing that the same things that have undermined the forest regime could still undermine REDD).

B. *Misdirected Focus and Misdirected Accountability*

Two problems result from a failure to understand the true story of REDD. I term the first misdirected focus, and the second misdirected accountability. Both have the potential effect of letting REDD be implemented while the international community focuses its attention elsewhere, in turn potentially allowing REDD to serve as a cover for limited emissions reduction, weak forest protection, infringement of indigenous and local peoples' rights, and harm to biodiversity.

The first problem that results from misunderstanding the true story of REDD is misdirected focus. If commentators assume that the REDD mechanism being created within the UNFCCC will include strong international oversight and hard-law principles, they will likely spend energy advocating specific reforms at the international level while possibilities for improvement at the domestic level may go unnoticed. This is not to suggest that commentators should take their eye off the ball of the international level completely. However, they cannot ignore the import of the national and even subnational levels of activity.

Commentators already recognize that the REDD mechanism, as with many international environmental law mechanisms, will involve a complex interaction among governance levels and a less hierarchical system than the international legal community is used to in some other contexts. William Boyd describes REDD, for example, as part of a post-Copenhagen legal assemblage, a form of polycentric governance.[313]

The story in this Article both confirms Boyd's view and expands on it. It highlights not only that REDD is part of a complicated set of relationships among various governance levels but also that it is a country-driven mechanism with an ever-increasing likelihood that it will lack any significant international standard setting or guidance beyond the articulation of broad principles such as sovereignty over natural resources and equity.

The fact that this occurred within a mechanism that was expanding its scope into areas that have been historically kept within the sphere of national, or even local, governance is significant. It suggests that certain environmental problems are sufficiently complicated that the international role will be harder to articulate and will have to show substantial deference to national spheres of governance.

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313. Boyd, *supra* note 7, at 512–13. On climate change and international law, see Osofsky, *supra* note 8. *See also* Long, *supra* note 7, at 400–01; Hari M. Osofsky, *Diagonal Federalism and Climate Change: Implications for the Obama Administration*, 62 ALA. L. REV. 237 (2011) (exploring ways the Obama Administration can overcome challenges associated with climate change).

This is not entirely inconsistent with what is needed for biodiversity protection more generally, since so much of what has to happen for conservation has to be tailored to local context.[314] Nevertheless, it says something important about where commentators should focus their attention.

First, if commentators focus their attention on the details of REDD design at the international level, they will be misdirecting that focus because so much of the actual activity of implementing REDD and its safeguards will occur at the national and local levels of governance.[315] Thus, believing that REDD is firmly situated within a hard-law international instrument will result in misdirected focus.

This does not mean, however, that commentators should focus all their attention on the national and local levels of governance. A failure to focus sufficiently careful attention on the institutional design of a mechanism like REDD could result in losing sight of what role international law could and should play.[316]

Ecologists have long urged a focus on multiple scales of governance. Policy makers must not ignore the international level because it can provide benefits in the form of information sharing and standard setting. Seeing the true story of REDD reminds us that our work at that level may not be done. If commentators and policy makers accept that the international level has something to offer, they should pay attention to the form of that role and not just to specifics of design that deal with the substance of REDD, such as whether it will be a market-based or fund-based system.

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314. *See* Epple et al., *supra* note 35, at 10 ("Significant challenges to the development of biodiversity safeguards result from the high spatial variability and the complex ecological requirements and relationships that need to be taken into account in its conservation. These result in a need to define biodiversity goals at various scales and make it difficult to provide universally applicable safeguards that are both stringent and appropriate to the context in which they are implemented.").

315. *See* Valerio Avitabile, *Measuring Tropical Forest Carbon Stocks*, *in* LAW, TROPICAL FORESTS AND CARBON, *supra* note 4, at 48–49 (stating that the establishment of "robust monitoring . . . at national scales . . . is one of the key steps for developing REDD+ activities"); Catherine MacKenzie, *Designing, Implementing and Enforcing REDD+ Schemes*, *in* LAW, TROPICAL FORESTS AND CARBON, *supra* note 4, at 129 (providing a variety of paths forward to address the complexity of dealing with deforestation); *id.* at 134 (observing the importance of good governance and the rule of law at the national level for REDD+ implementation); Simon Butt et al., *Brazil and Indonesia: REaDD+y or Not?*, *in* LAW, TROPICAL FORESTS AND CARBON, *supra* note 4, at 251, 256, 267, 273 (discussing the requirements for implementation of REDD+ in Brazil and Indonesia).

316. *See* Avitabile, *supra* note 315, at 67 (arguing that "robust methods applicable in different ecological contexts" will be necessary "in order to overcome the limitations of one-time, one-place methodologies and to provide estimates that are consistent through time and space"); MacKenzie, *supra* note 315, at 141 (arguing that "[w]ell-drafted treaties with widespread support can further good governance by establishing stable regimes within which REDD+ may develop"); Devries & Herold, *supra* note 99, at 152 (recognizing the need for strong monitoring).

The second problem that results from reliance on a false view of REDD as an international legal mechanism is misdirected accountability. Misdirected accountability arises even if the false view of REDD includes a recognition of the role of national-level implementation.

If commentators believe REDD is fundamentally an international law mechanism with hard-law obligations, they may find international institutions and actors accountable for failures. Yet the reality is more likely that that those responsible for failures are those responsible for implementation and monitoring. These are national and subnational actors, private actors, third-country governments, and, in some instances, international institutions and actors.

Accountability also plays out in a deeper sense with regard to the goals of REDD. As discussed in Part III.C, the relationship between ensuring that the goals of REDD are met and the availability of funding for forest protection is complex. For some countries, primarily developing countries, resources should flow first to enable countries to protect and to monitor protection. For others, primarily developed countries, resources should flow once countries demonstrate that they will be able to protect forests in a way that reduces carbon emissions, avoids leakage, and addresses concerns about permanence of emissions reduction. This complex relationship is, at its core, a question about accountability—namely, who should be accountable for compliance with REDD's goals and what are the consequences of a failure to demonstrate achievement of the goals?

If it is assumed that the REDD mechanism is being negotiated as a hard-law mechanism with strong international oversight, it might also be assumed that the biggest task for accountability to REDD's goals is to focus on the design elements at the international level. If these are addressed, the argument would go, accountability will come with good implementation and compliance. Yet, the reality of the way in which REDD is being negotiated indicates that accountability for achievement of REDD's goals will be subject to the far messier and more complex implementation of an ad hoc and country-driven mechanism, with private actors as participants.[317]

What would it mean to redirect accountability? It could change the way in which resources are directed. It could also change the kind of reporting and monitoring required before projects can go forward. These involve paying attention to the details of the real institutional framework within which REDD sits, meaning the complex of

317. *See* McDermott, *supra* note 40, at 97 (describing the important role private-funding initiatives are playing in REDD+ implementation); MacKenzie, *supra* note 315, at 139 (noting that REDD+ has developed largely outside the international legal process); Butt et al., *supra* note 315, at 266 (discussing the number of publicly and privately funded pilot-REDD+ programs that have begun in Indonesia).

international standards, national legislation, private actor standards, and local practices—to name just a few.

V. CONCLUSION

While commentators and policymakers have been worrying about the design of a REDD mechanism at the international level, REDD may be heading for failure. REDD projects might be underway, but the lack of international standardization and support, coupled with the methodological difficulties inherent in REDD's expanded scope, means that it will be difficult to ensure these projects meet the goal of climate change mitigation and comply with the safeguards. Even with the best intentions in the world, implementing countries will struggle with the complexity of the problem. With limited international oversight, and even limited provisions about reporting to international institutions, it will be harder to know what is happening on the ground. The standard narrative of REDD in its early days suggested that it offered the promise of an international hard law instrument that could address both climate change mitigation and biodiversity and forest protection. This Article reveals that the true story of REDD's negotiation between 2005 and 2012 shows that REDD is something remarkably different. REDD has been negotiated to be a mechanism with an unwieldy scope and a country-driven, ad hoc approach to standards and implementation. In that sense, it has far more in common with the international legal regime that currently governs forests and biodiversity than it does with the hard law international legal regime that governs climate change.

Failure to address the overall effect of the REDD negotiations leads to two problems: misdirected focus and misdirected accountability. Both problems result from a belief that the success or failure of REDD turns on what happens at the international level. The reality is that it will primarily turn on the interaction among multiple actors: national actors, private actors, subnational actors, and some international actors. Only if commentators and policymakers recognize this, can they start to pay attention to what will be needed to ensure that REDD can achieve its goals of climate change mitigation and biodiversity and forest protection.

If commentators and policymakers do not pay attention to the real story of REDD, while we are not looking, REDD is likely to become nothing more than a cover for limited emissions reduction, weak forest protection, infringement of indigenous and local peoples' rights, and harm to biodiversity. At best, it will be irrelevant. At worst, it will be a disaster.