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Edited by Rosemary Lyster, Catherine Mackenzie and Constance Medermott

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PART I

Framing the problem: perspectives from law,
science and governance

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1

International legal frameworks for REDD+: ensuring legitimacy

ROSEMARY LYSTER

Prior to the 2007 climate change negotiations at the Thirteenth Conference of the Parties to the *United Nations Framework Convention on Climate Change*¹ (COP13) in Bali, REDD+ was not incorporated in the international legal framework for dealing with climate change. Since Bali there have been three significant negotiations, which are as follows: COP15 in Copenhagen in December 2009; COP16 in Cancun in December 2010; and COP17 in Durban in December 2011. Each of these negotiations has delivered various outcomes which have significant ramifications for the imperative to keep global temperature rise below 2 °C above pre-industrial levels, and indeed for REDD+. This chapter analyses the outcomes of these COPs with a particular focus on REDD+.

1.1 The Bali Action Plan

Under the Bali Action Plan, negotiated at COP13, the Parties decided to begin a process immediately to allow them to adopt a decision at COP15 on a shared vision for long-term cooperative action on climate change. This vision would include a long-term global goal for emission reductions, based on the principle of common but differentiated responsibilities.

Significantly, the Action Plan required ‘enhanced consideration of 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’.² This

¹ *United Nations Framework Convention on Climate Change*, opened for signature 20 June 1992, 31 ILM 848 (1992) (entered into force 21 March 1994).

² Art. 1(b) (iii), available at http://unfccc.int/files/meetings/cop_13/application/pdf/cp_bali_action.pdf (accessed 13 February 2012).

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builds on a decision taken at COP11, in December 2005, to establish a two-year review of relevant scientific and methodological issues, and to consider policy approaches and incentives for reducing emissions from deforestation in developing countries.³

The incorporation of REDD+ in the Bali Action Plan is highly significant, as prior to this there had been no mention of it in international agreements. Under Article 3.3 of the *Kyoto Protocol*,⁴ Annex I Parties⁵ may rely on *domestic* reductions in GHG emissions resulting from forestry activities, limited to afforestation⁶ and reforestation⁷ since 1990, to meet their emissions reduction targets under the Protocol.⁸ Similarly, afforestation and reforestation projects undertaken by Annex I Parties in developing countries may be relied upon, under the Clean Development Mechanism (CDM),⁹ to satisfy their Kyoto commitments.

There are a number of reasons for the previous exclusion of REDD+ from the provisions of the Kyoto Protocol, including from the CDM. These include concerns about the following: the risk of leakage;¹⁰

³ As part of this process, a number of workshops were organised under the auspices of the Subsidiary Body of Scientific and Technical Advice of the UNFCCC, including in Italy in September 2006, in Australia in March 2007, in Bonn in May 2007 and in Bali in December 2007; see, for example, www.rainforestcoalition.org/documents/UNFCCCSBSTA2007110.pdf (accessed 13 February 2012).

⁴ *Kyoto Protocol to the Framework Convention on Climate Change*, opened for signature 16 March 1998, 37 ILM 22 (1998) (entered into force 16 February 2005).

⁵ These are developed countries with emissions reduction targets under the Kyoto Protocol.

⁶ 'Afforestation' is defined as the direct human-induced conversion of land that has not been forested for a period of at least 50 years to forested land through planting, seeding and/or the human-induced promotion of natural seed sources; see FCCC/CP/2001/13/Add.1 available at <http://unfccc.int/resource/docs/cop7/13a01.pdf#page=54> (accessed 12 May 2012).

⁷ 'Reforestation' is defined as the direct human-induced conversion of non-forested land to forested land through planting, seeding and/or the human-induced promotion of natural seed sources, on land that was forested but that has been converted to non-forested land. For the first commitment period, reforestation activities will be limited to reforestation occurring on those lands that did not contain forest on 31 December 1989; see FCCC/CP/2001/13/Add.1, available at <http://unfccc.int/resource/docs/cop7/13a01.pdf#page=54> (accessed 12 May 2012).

⁸ Although reliance on this is limited in accordance with the Marrakesh Accords negotiated at COP7 in 2001; see Decision 11/CP.7, available at http://unfccc.int/files/meetings/workshops/other_meetings/application/pdf/11cp7.pdf (accessed 14 February 2012).

⁹ The Clean Development Mechanism (CDM) (Art. 12 of the *Kyoto Protocol*) allows developed countries to invest in emission reducing projects in developing countries, and to obtain certified emission reductions (CERs) towards meeting their assigned amounts.

¹⁰ 'Leakage' refers to greenhouse gas emissions which occur outside the project boundary but which are, nevertheless, attributable to its activities.

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non-permanence;¹¹ establishing baselines;¹² additionality;¹³ and difficulties associated with monitoring and measurement. During the two-year review of REDD+, established at COP11, considerable advances were made in addressing these problems, particularly with respect to monitoring and measurement.¹⁴ It should be noted too, that many of the problems relating to REDD also arise with respect to afforestation and reforestation CDM projects. For this reason, the CDM Executive Board has developed unique rules governing these types of projects.¹⁵

1.2 The Copenhagen Accord and the Cancun and Durban Agreements

Although the Copenhagen Accord¹⁶ is not a legally binding international instrument, it acknowledged the crucial role of REDD+. Parties to the Accord agreed also on the need to mobilise immediately financial resources from developed countries for REDD+.¹⁷ Given the failure of the Copenhagen negotiations to deliver a legally binding agreement, the Accord has been subsumed under the Cancun Agreements negotiated at COP16. The Cancun Agreements were further refined at COP17. For this reason, these Agreements will be discussed rather than the Accord, while their provisions for REDD+ will be analysed separately. The most

¹¹ 'Permanence' refers to the possibility that carbon is released into the atmosphere as a result of fire, illegal logging or a change in government.

¹² Credits can only be generated for emissions below the 'baseline', that is, GHG emissions reduction that would not have occurred in the absence of a CDM project.

¹³ It must be demonstrated that the carbon sequestration would not have occurred without the incentives provided by the project.

¹⁴ See, for example, the 2006 IPCC Guidelines for National Greenhouse Gas Inventories – Agriculture, Forestry and Other Land Use, available at www.ipcc-nggip.iges.or.jp/public/2006gl/vol4.htm (accessed 14 February 2012) and GOFG-GOLD REDD Sourcebook, which uses remote sensing to monitor and measure greenhouse gas emissions from forests, available at www.gofc-gold.uni-jena.de/redd/ (accessed 14 February 2012).

¹⁵ See http://cdm.unfccc.int/methodologies/ARmethodologies/approved_ar.html (accessed 14 February 2012); see also C. Streck et al. 'The role of forests in global climate change: whence we come and where we go', *International Affairs* 82(5) (2006) at 868.

¹⁶ Available at <http://unfccc.int/resource/docs/2009/cop15/eng/l07.pdf> (accessed 14 February 2012).

¹⁷ *Ibid.* paragraph 6. It is also important to note the REDD+ Partnership being developed under the Oslo–Paris Accord, which, following its meeting on 27 May 2010, will commit additional REDD+ funds; see REDD+ Partnership document, available at www.oslocfc2010.no/pop.cfm?FuseAction=Doc&pAction=View&pDocumentId=25019 (accessed 31 January 2012).

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recent negotiations were those of COP17, which were held in Durban in December 2011. Since COP17 built on the Cancun Agreements¹⁸ negotiated at COP16 in December 2010, which confirmed the parameters of the December 2009 Copenhagen Accord,¹⁹ it is necessary to refer to both COPs here. Both COP16 and COP17 proceeded along the two-track process established under the Bali Action Plan adopted at COP13 in 2007. The two-track process comprises the Ad Hoc Working Group on Long-term Cooperative Action under the Convention (AWG-LCA) and the Ad Hoc Working Group on Further Commitments for Annex I Parties under the Kyoto Protocol (AWG-KP). These two working groups were established to delay a decision on whether future legally binding greenhouse gas (GHG) reduction commitments would be made under the Kyoto Protocol. They have met quarterly to conduct further negotiations since Bali. At COP16, the AWG-LCA text, which included the essential elements of the Copenhagen Accord, was adopted by the COP and decisions made in that text are now binding on the COP under the *United Nations Framework Convention on Climate Change* (UNFCCC). For the purposes of this chapter, the decisions on adaptation, technology and capacity building will not be referred to. These are discussed extensively elsewhere by the author.²⁰

1.2.1 Global average temperatures

The COP17 AWG-LCA text²¹ builds on agreements reached at COP16. COP16 and 17 both recognised the need to hold the increase in global

¹⁸ See The Cancun Agreements: 2010 Outcome of the work of the Ad Hoc Working Group on Long-term Cooperative Action under the Convention, Decision 1/CP.16, available at <http://unfccc.int/resource/docs/2010/cop16/eng/07a01.pdf#page=2> (accessed 14 February 2012);

The Cancun Agreements: Outcome of the work of the Ad Hoc Working Group on Further Commitments for Annex I Parties under the Kyoto Protocol at its fifteenth session, Decision 1/CMP.6, available at <http://unfccc.int/resource/docs/2010/cmp6/eng/12a01.pdf#page=3> (accessed 14 February 2012); and

The Cancun Agreements: Land use, land-use change and forestry, Decision 2/CMP.6, available at <http://unfccc.int/resource/docs/2010/cmp6/eng/12a01.pdf#page=5> (accessed 14 February 2012).

¹⁹ FCCC/CP/2009/11/Add.1, 30 March 2010, available at <http://unfccc.int/resource/docs/2009/cop15/eng/11a01.pdf> (accessed 14 February 2012).

²⁰ See R. Lyster 'Energy and climate law', chapter 7 in R. Lyster et al., *Environmental and Planning Law in New South Wales*, 3rd edn (Sydney: Federation Press, 2012).

²¹ See 2011, *Outcome of the work of the Ad Hoc Working Group on Long-term Cooperative Action Under the Convention*, available at http://unfccc.int/files/meetings/durban_nov_2011/decisions/application/pdf/cop17_lcaoutcome.pdf (accessed 13 December 2011).

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average temperatures to *below* 2 °C above pre-industrial levels, as well as the need to consider strengthening the long-term goal in relation to a global average temperature rise of 1.5 °C on the basis of the best available scientific knowledge.²² At both COP16 and COP17, Parties agreed that they should cooperate in achieving the peaking of GHG emissions as soon as possible.²³

1.2.2 *Extending the life of the Kyoto Protocol*

COP17 decided, under the auspices of the AWG-KP,²⁴ that a second commitment period of the Protocol will begin on 1 January 2013 and end either on 31 December 2017 or 31 December 2020, to be decided by the AWG-KP in December 2012.²⁵ Annex I Parties are invited to convert their Kyoto Protocol targets to 'quantified emission limitation or reduction objectives' (QELROs) for the second commitment period and to submit information on their intentions to the AWG-KP by 1 May 2012.²⁶ A seventh greenhouse gas nitrogen trifluoride (NF₃) is added to Annex A of the Protocol.²⁷

1.2.3 *Developing country commitments*

It is well known that developing countries gave no commitments to emissions reductions under the Kyoto Protocol consistently with the principle of common but differentiated responsibility. While the principle of common but differentiated responsibility is still alive and well, there has been a distinct shift with regard to the negotiations for a post-Kyoto world. While COP17 recognises that social and economic development and poverty eradication are the first and overriding priorities of developing

²² Ibid. art. 4. See also Establishment of an Ad Hoc Working Group on the Durban Platform for Enhanced Action FCCC/CP/2011/L.X, available at http://unfccc.int/files/meetings/durban_nov_2011/decisions/application/pdf/cop17_durbanplatform.pdf (accessed 13 December 2011).

²³ Above Decision 1/CP.16, n 18, art. 6. See also 2011, Outcome of the work of the Ad Hoc Working Group on Long-term Cooperative Action under the Convention, above n 21, art. 2.

²⁴ See 2011, Outcome of the work of the Ad Hoc Working Group on Further Commitments for Annex I Parties under the *Kyoto Protocol* at its sixteenth session, available at http://unfccc.int/files/meetings/durban_nov_2011/decisions/application/pdf/awgkp_outcome.pdf (accessed 13 December 2011).

²⁵ Ibid. art. 1. ²⁶ Ibid. art. 5. ²⁷ Ibid. Annex II.

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economies,²⁸ and that the share of global emissions originating in developing countries will grow to meet their social and developmental needs, a low-emissions development strategy is, nevertheless, regarded as central to sustainable development.²⁹ COP17 notes the voluntary commitments made by developing countries to prepare and implement nationally appropriate mitigation actions (NAMAs) under the Cancun Agreements.³⁰ REDD+ programmes are recognised as legitimate NAMA activities. Developing countries which have not yet made commitments are encouraged to do so.³¹ COP17 has also decided to hold workshops in May 2012 to understand further these commitments³² and invites developing countries to submit more information on their NAMAs to the secretariat by 5 March 2012.³³ A web-based registry is to be developed from which developing countries can seek international support for their NAMAs.³⁴

Developed countries are invited to submit to the secretariat information on financial, technical and capacity-building support which they can offer for the preparation and implementation of NAMAs.³⁵ The registry will facilitate the matching of actions seeking international support with support that is available.³⁶

It was decided at COP 16 that internationally supported NAMAs will be subject to domestic measuring, reporting and verification (MRV) procedures, conducted internally by the relevant country, and also be subject to international MRV in accordance with guidelines to be developed under the Convention.³⁷ NAMAs which are only domestically supported will be subject to domestic MRV in accordance with general guidelines to be developed under the Convention.³⁸ COP17 requests the development of guidelines for domestic MRV of domestically supported NAMAs.³⁹

²⁸ 2011, Outcome of the work of the Ad Hoc Working Group on Long-term Cooperative Action under the Convention, above n 21, art. 87.

²⁹ Ibid. Part B. Preamble.

³⁰ Ibid. Part B Preamble. Developing countries' voluntary commitments can be viewed in *Compilation of information on nationally appropriate mitigation actions to be implemented by Parties not included in Annex I to the Convention*; available at <http://unfccc.int/resource/docs/2011/awglca14/eng/inf01.pdf> (accessed 25 January 2012).

³¹ Ibid. art. 32. ³² Ibid. art. 33. ³³ Ibid. art. 35.

³⁴ Ibid. art. 45. ³⁵ Ibid. art. 48. ³⁶ Ibid. art. 51.

³⁷ Decision 1/CP.16, above n 18, art. 61.

³⁸ Ibid. art. 62.

³⁹ 2011, Outcome of the work of the Ad Hoc Working Group on Long-term Cooperative Action under the Convention, above n 21, art. 37.

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1.2.4 *Developing a new legally binding Protocol, instrument or outcome*

It is important to note that at COP17 it was decided to terminate the AWG-LCA established in Bali at the end of 2012. It was decided instead that a new body, the Ad Hoc Working Group on the Durban Platform for Enhanced Action,⁴⁰ be established, noting with ‘grave concern’ that the significant gap between the Parties’ current mitigation pledges by 2020 is unlikely to hold the increase in global average temperatures below 2 °C, or 1.5 °C below.⁴¹ This Working Group will start its work as a matter of urgency in the first half of 2012 and complete its work as early as possible but no later than 2015 to adopt ‘a protocol, or other legal instrument or an agreed outcome with legal force under the UNFCCC’. The Protocol must be adopted at COP21 in 2015 and come into effect from 2020. The process must raise the level of ambition of all Parties, including all developed and developing countries, and must be informed by the IPCC’s Fifth Assessment Report and the outcomes of the progress review to be conducted between 2013 and 2015.⁴² A work plan will be launched to close the ambition gap to ensure the highest possible mitigation efforts by all Parties.

1.2.5 *The financial mechanism*

The financial mechanism adopted at COP16 and COP17 is obviously relevant to REDD+ given the level of financial support needed by tropical rainforest countries to adopt REDD+ programmes. This question is discussed in depth in Chapter 6. Suffice it to say that COP16 took note of the collective commitment by developed countries made at Copenhagen to provide US\$30 billion in fast-start funding for the period 2010–2012.⁴³ In the interests of transparency, developed countries were invited to report in May 2011, 2012 and 2013 to the UNFCCC secretariat on the resources they have provided.⁴⁴ With regard to long-term finance, COP16 decided in accordance with the UNFCCC that scaled-up, new, predictable and

⁴⁰ See Establishment of an Ad Hoc Working Group on the Durban Platform for Enhanced Action, available at http://unfccc.int/files/meetings/durban_nov_2011/decisions/application/pdf/cop17_durbanplatform.pdf (accessed 13 December 2011).

⁴¹ Ibid. Preamble.

⁴² Ibid. art. 6.

⁴³ Decision 1/CP.16, above n 18, art. 95.

⁴⁴ Ibid. art. 96.

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adequate funding must be provided to developing country Parties, taking into account the urgent and immediate needs of developing countries that are particularly vulnerable to the adverse effects of climate change.⁴⁵ Developed countries will commit US\$100 billion per year by 2020 to address these needs,⁴⁶ with the funds coming from public and private, bilateral and multilateral and alternative sources.⁴⁷ The COP also established a Standing Committee. COP17 decided that the Committee will adopt various procedures to assist the COP to improve coherence and coordination in the delivery of climate financing, the mobilisation of financial resources and MRV of support provided to developing countries.⁴⁸ It must also develop a work programme to be presented at COP18,⁴⁹ as well as one on long-term financing, which must include workshops.⁵⁰ The composition and modalities of the Committee are also stipulated.⁵¹

1.3 Reducing Emissions from Deforestation and Degradation (REDD+)

COPs 16 and 17 affirm that developing countries should collectively aim to slow, halt and reverse forest cover and carbon loss according to national circumstances and they encourage developing countries to find effective ways to reduce human pressure on forests that results in GHG emissions, including by addressing drivers of deforestation. COP16 encouraged countries to act as follows: reduce emissions from deforestation and forest degradation; conserve forest carbon stocks; manage forests sustainably; and enhance forest carbon stocks, known collectively now as REDD+.⁵² Extensive provisions on REDD+ can be found in Annexes I and II of the AWG-LCA's Cancun Agreements. These will be discussed before moving to an analysis of the COP17 provisions on REDD+.

1.3.1 Policy approaches for REDD+

At COP16, REDD+ countries were requested to develop the following: a national strategy or action plan; a national forest reference emission

⁴⁵ Ibid. art. 97. ⁴⁶ Ibid. art. 98. ⁴⁷ Ibid. art. 99.

⁴⁸ 2011, Outcome of the work of the Ad Hoc Working Group on Long-term Cooperative Action under the Convention, above n 21, art. 121.

⁴⁹ Ibid. art. 123. ⁵⁰ Ibid. art. 127. ⁵¹ Ibid. art. 47.

⁵² Decision 1/CP.16, above n 18, art. 70. Note that REDD+ extends beyond deforestation and forest degradation, and is concerned with the role of conservation, sustainable management of forests and enhancement of forest carbon stocks.