

CALIFORNIA'S REDD RUBBERSTAMP: AVOIDING CONSTITUTIONAL CONCERNS, BUT AT WHAT COST?

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INTRODUCTION

In Peru, an unscrupulous Australian businessman has allegedly conned remote indigenous groups into signing over the rights to their forests in exchange for promises of an economic bonanza.¹ The people, accustomed to earning roughly one dollar per day, were promised thirty.² However, they were apparently unaware that they were signing over the rights to their forest for 100 years, and over a year later the people had not received a penny.³

In the village of Quara Quara, Brazil, a man was arrested while attempting to repair his mother's damaged house.⁴ His crime? Chopping down a tree from the lands his people, the Guarani Indians, had lived on for generations.⁵ He spent eleven days in a jail an hour's canoe ride away and was eventually forced to leave his home because he could no longer hunt and gather plants in the forest.⁶

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¹Mariana Sanchez, *'Carbon pirate' acquires Amazon resources*, ALJAZEERA, (Dec. 29, 2012) <http://blogs.aljazeera.com/blog/americas/carbon-pirate-acquires-amazon-resources>.

² *Id.*

³ *Id.*

⁴ Mark Shapiro, *GM's Money Trees*, MOTHER JONES, (Nov. 2009) <http://www.motherjones.com/environment/2009/11/gms-money-trees>.

⁵ *Id.*

⁶ *Id.*

In Papua New Guinea, an indigenous leader named Abalie Wape was threatened by police to surrender the rights to his tribe's forest.⁷ The police came at night, they held Wape at gunpoint, and forced him to sign his tribe's property away.⁸

The link between these three stories is the international carbon trading market. Each of these atrocities against indigenous people in well-forested parts of the world was spurred on by the promise of wealth from rich western nations potentially interested in investing in carbon markets. Each of these stories also comes from a remote portion of the globe, difficult to carefully monitor by the international programs that generally oversee carbon markets; programs like the United Nation's REDD (Reducing Emissions from Deforestation and Degradation) programs.⁹

Over 6,500 miles away from Quara Quara, the state of California has passed legislation, and regulations have been promulgated, to set up a carbon-trading scheme.¹⁰ As part of the regulation, California will allow companies to offset some portion of their pollution by purchasing carbon credits from the developing world – effectively preserving enough forest that will capture enough carbon to offset some portion of their carbon emissions.¹¹

The markets for carbon-credits are complex, and California has created a loose rubric for determining what international programs may qualify for California's system.¹² However, California has given outright acceptance to credits purchased through REDD,¹³ bypassing the rules that any other international program must comply with to have their

⁷ *REDD and violence against indigenous leader in Papua New Guinea*, REDD-MONITOR, (Jan. 15, 2010) <http://www.redd-monitor.org/2010/01/15/redd-and-violence-against-indigenous-leader-in-papua-new-guinea/>.

⁸ *Id.*

⁹ This is not to say REDD programs are specifically responsible for any and all problems within the international carbon market world. Nor is REDD the only carbon-credit certification. For example, the World Wide Fund for Nature created the CDM Gold Standard in 2003 as a carbon-mitigation crediting system (*see*, <http://www.cdmgoldstandard.org/>). However, REDD is both well-known and the only system California has outright accepted for their cap-and-trade scheme and any issues surrounding REDD would likely be applicable to any international monitoring system.

¹⁰ CAL. CODE REGS. TIT. 17, § 95991.

¹¹ *Id.*

¹² CAL. CODE REGS. TIT. 17, § 95992.

¹³ CAL. CODE REGS. TIT. 17, § 95993.

carbon-credits accepted.¹⁴ These “sector-based” credits¹⁵ can be used for up to one-fourth of a company’s compliance obligation under the 2012 regulation.¹⁶

The potential problems with overseas carbon-markets are not a secret – even INTERPOL has released a statement highlighting some of the risks of criminal behavior that come with carbon trading.¹⁷ Unfortunately for California, the state’s hands are somewhat tied when it comes to overseeing the markets they would like to allow their companies to purchase carbon credits from. Only the United States federal government has the Constitutional right to enter treaties with foreign jurisdictions,¹⁸ and surely such an agreement would be necessary to carefully and effectively monitor the generation of carbon credits.

California unilaterally entering the international carbon market through the acceptance of credits from REDD, or any other carbon program, is a mistake. The federal government’s Constitutional right to enter treaties occupies the entire treaty-making field.¹⁹ Thus, California does not have the necessary oversight and bargaining ability to assure international partner jurisdictions selling carbon credits were efficiently and ethically undertaking their responsibilities.

In the end, California is left with two less-than-perfect solutions. The state can limit sector-based carbon credit purchases to domestically produced carbon credits (which are already included in the current regulations) or it can accept carbon credits from markets that the state cannot oversee, leaving ample room for corruption and mismanagement overseas.²⁰

¹⁴ For the most part, this Note will focus on problems with REDD programs. However, the constitutional and other issues that this paper discusses would also likely extend to any, or at least most, other carbon credit creation mechanisms.

¹⁵ CAL. CODE REGS. TIT. 17, § 95991.

¹⁶ CAL. CODE REGS. TIT. 17, § 95994(c) (the amount of total carbon-dioxide emissions that entails for a given industry or corporation is unclear).

¹⁷ *INTERPOL report warns carbon trading at increased risk of criminal exploitation*, INTERPOL, (Aug. 2, 2013) <http://www.interpol.int/News-and-media/News/2013/PR090>.

¹⁸ U.S. CONST. ART. II, § 2, CL. 2.

¹⁹ *Gibbons v. Ogden*, 22 U.S. 1, 228 (1824) (“The States are unknown to foreign nations; their sovereignty exists only with relation to each other and the general government”).

²⁰ A program that allows companies to purchase credits only from domestic sources for offsets would clearly not run into constitutional treaty-making concerns. However, such a system would also limit both the number of credits California companies would have access to and the impact of the carbon-trading scheme.

However, if the federal government were to get involved, California and other states with cap-and-trade schemes may be able to offer domestic companies ethical, well-regulated options for purchasing carbon credits from overseas sources. This solution, while perhaps politically unlikely, is the best way to allow states like California to institute a cap-and-trade system while also assuring international credits are well regulated.²¹

This note is not intended to make a value judgment on whether or not a carbon market is an effective tool for combatting pollution, climate change or any other ill. Rather, this note simply is a look at the issues surrounding California's carbon market, the challenges of effectively regulating such a market that allows domestic companies to purchase carbon credits generated abroad, and the need for federal intervention if carbon trading is to become an effective and ethical reality in the United States.

Part I of this note provides background on REDD as a guide to the carbon-credit creation process as well as discusses the potential strengths and weaknesses of a REDD-style system. Part II covers the history of California's Global Warming Solutions Act of 2006 (AB-32), and takes a closer look at the sections pertinent to the discussion at hand. Part III lays out the problems California has with effectively negotiating with foreign governments, since treaty making powers are reserved for the federal government. Part IV offers a solution to the problem – namely that the federal government is in the best position to negotiate and oversee international production of carbon credits for domestic markets.

California seems to have made the determination that including international credits would be preferable from a policy perspective – otherwise the potential headaches and pratfalls of a more-complex international system could have been avoided entirely.

²¹ The politics of creating a framework for approving international carbon credits is largely outside the scope of this article. However, there will be a relatively-brief look at how past proposals for creating nation-wide carbon markets have fared, and some brief discussion of the benefits of creating only a framework for credit approval for state markets, rather than a national market.

I: A REDD PRIMER

REDD IN BLACK AND WHITE

REDD is a mechanism designed to place an economic value on the atmospheric carbon captured by natural forests and carbon that would be released by a forest through destruction or decay.²² In theory, forest destruction trends would be halted or reversed as local governments and peoples are monetarily incentivized to preserve and grow forests.²³

REDD is designed not just to preserve forests and the carbon-filtering properties of the trees, but also to reduce active greenhouse gas emissions.²⁴ Deforestation accounts for roughly twenty percent of worldwide greenhouse gas emissions.²⁵ The process of cutting down forests, as the trees are either burned or decaying, releases carbon dioxide.²⁶ Each tree felled not only reduces the capacity for future carbon filtration, but also emits carbon dioxide into the atmosphere – a “double loss.”²⁷ This double loss could be all the more troubling as forest ecosystems store “an estimated fifty percent more carbon than the entire amount contained in the earth’s atmosphere.”²⁸

The metrics used to properly assign value to a forest through REDD schemes (including REDD+, the official related United Nations program that includes not just deforestation and degradation but also conservation, sustainable management and enhancement of forest stocks)²⁹ then monetize the carbon stored in a forest and the forest that would sink into a forest over time.³⁰

REDD, and REDD+, have been matters for international climate change debate since at least 2005 when a group of developing countries

²² Lisa Hayden, *So, what is REDD, anyway?* THE NATURE CONSERVANCY, (Dec. 8, 2010) <http://change.nature.org/2010/12/08/so-what-is-redd-anyway/>.

²³ *Id.*

²⁴ *Simply REDD*, CIFOR, available at http://www.cifor.org/publications/pdf_files/media/MediaGuide_REDD.pdf (last visited Mar. 25, 2015).

²⁵ *About REDD+*, REDD, available at <http://www.REDD.org/AboutREDD/tabid/102614/Default.aspx> (last visited Mar. 25, 2015).

²⁶ *Simply REDD*, *supra* note 24.

²⁷ *Id.*

²⁸ Michael L. Brown, *Limiting Corrupt Incentives in A Global REDD Regime*, 37 *ECOLOGY L.Q.* 237, 238 (2010).

²⁹ *About REDD+*, *supra* note 25.

³⁰ *Id.*

proposed the ideas.³¹ Subsequent United Nations Conventions on Climate Change (UNCCC) in Bali in 2007 and Cancun in 2010, mapped a way to incorporate REDD into a nationally-driven approach to forest preservation and climate change mitigation.³² Details of REDD (and REDD+ as a specific UN-approved mechanism) are still under debate under the UNFCCC,³³ but the December 2009 UN Conference in Copenhagen stated that REDD+ was one of the mechanisms that should be “immediately establish[ed]” in a post-Kyoto Protocol world.³⁴

PERCEIVED STRENGTHS OF REDD PROGRAMS

REDD has the potential to create a very large, uniformly-regulated market of carbon credits – possibly up to €45 billion.³⁵ This, coupled with the potential that stopping deforestation and degradation could be a fairly “low-cost option for lowering [greenhouse gas] emissions,” has sparked significant investment by Western countries.³⁶ At the 2010 UNFCCC in Copenhagen, the United States pledged \$1 billion, and five other industrialized nations promised an additional \$2.5 billion.³⁷ Norway supplied an addition \$1 billion to the Amazon Fund in Brazil, and over \$250 million to projects run by the United Nations and the World Bank to preserve forests in Africa and Guyana.³⁸

³¹ *International Negotiations*, REDD-NET, <http://redd-net.org/themes/international-negotiations> (last visited Mar. 25, 2015).

³² *See Bali Climate Change Conference – December 2007*, UNFCCC https://unfccc.int/meetings/bali_dec_2007/meeting/6319.php; see also, *See Cancun Climate Change Conference – November 2010*, UNFCCC http://unfccc.int/meetings/cancun_nov_2010/meeting/6266.php; see also, *International Negotiations*, *supra* note 31.

³³ *Redd+ Negotiations under the UNFCCC: The Story So Far*, THE REDD DESK <http://thereddesk.org/what-is-redd#toc-4>. Further discussion of the detailed mechanics of REDD and/or REDD+ are generally beyond the scope of this paper. Suffice to say, the process for quantifying the value of a forest is still up for some debate, as are potential other issues such as biodiversity and how money filters down to those most impacted by forest-use restrictions.

³⁴ *Copenhagen Accord*, at 2, UNFCCC.INT *available at* <http://unfccc.int/resource/docs/2009/cop15/eng/l07.pdf> (last accessed Mar. 25, 2015).

³⁵ Brown, *supra* note 28 at 239.

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

According to the United Nations, this influx of money into REDD programming, or at least REDD readiness development, will lead to various non-ecological benefits as well – economic benefits to local populations including job creation, enhanced decision-making in land-use for local citizens and improved governance.³⁹ REDD programs may also help protect and promote biodiversity through forest protection.⁴⁰

These potential benefits, along with the avoidance of the double loss that accompanies forest degradation and deforestation, make the REDD program appealing to policy makers.⁴¹ Unfortunately, REDD has also met resistance and is not without the potential for causing harm.⁴²

PERCEIVED SHORTFALLS OF REDD PROGRAMS

The issues surrounding REDD programs stem from three major sources: fraud or mismanagement during the credit-creation process, ethical issues regarding the treatment of indigenous populations in and around forests designated for carbon-credit production, and potential problems in the efficacy of measurement techniques used by the program.

FRAUD OR MISMANAGEMENT

Carbon markets are different from more-traditional economic marketplaces in that the commodity being sold does not physically exist.⁴³ Instead, companies or countries can purchase “credits” that assure a biomass somewhere will soak up a certain amount of carbon-dioxide emissions.⁴⁴ These credits are a “legal fiction” rather than a traditional commodity.⁴⁵

³⁹ *What are the multiple benefits of REDD+?*, REDD PROGRAMME, http://www.REDD.org/Multiple_Benefits/tabid/1016/Default.aspx (last accessed Mar. 25, 2015).

⁴⁰ Brown, *supra* note 28 at 239.

⁴¹ *About REDD+*, *supra* note 25.

⁴² See, Holly Brentnall, *U.N.-REDD program criticized for negative impact on Indigenous communities*, THEINTERNATIONAL.ORG, (Jan. 28, 2014) <http://www.theinternational.org/articles/487-REDD-program-criticized-for-negative>.

⁴³ *INTERPOL*, *supra* note 17.

⁴⁴ *Id.*

⁴⁵ *Guide to Carbon Trading Crime*, INTERPOL, (June 2013) <http://www.interpol.int/Media/Files/Crime-areas/Environmental-crime/Guide-to-Carbon-Trading-Crime-2013>.

In any REDD program, a significant amount of wealth is transferred, generally to forest-rich developing nations, and corruption on the receiving end of that wealth transfer could significantly affect the long-term development of the program.⁴⁶ Currently, the countries with the highest rates of deforestation (and thus those most likely to benefit from a REDD program), are among the world's most corrupt.⁴⁷

However, it is not just in developing nations with high-levels of corruption that potential illegal activity may take place.⁴⁸ As INTERPOL has warned, there is the potential for significant manipulation in the carbon market – the lack of quantifiable “goods” means the market is perhaps more susceptible to criminal activity.⁴⁹ INTERPOL has outlined a list of five broadly-defined illegal activities that carbon markets are vulnerable to:

- 1) Fraudulent manipulation of measurements used to determine the size of a carbon credit project;
- 2) Sales of carbon credits from sources that do not exist or do not belong to the seller;
- 3) Fraudulent or misleading statements about the environmental or financial impacts of carbon market investments;
- 4) Exploitation of the carbon market to facilitate financial crimes (i.e. money laundering or tax fraud); and
- 5) Computer crimes to steal carbon credits.⁵⁰

While the fourth and fifth issues outlined by INTERPOL are certainly concerning, they lie outside the scope of this note. Instead, this note will focus on the first three potential drawbacks to carbon markets.

1. Manipulation of Measurements

Without extensive oversight, INTERPOL warns that measurements to determine how many credits may come from an area can be

⁴⁶ Brown, *supra* note 28 at 242.

⁴⁷ *Id.* (citing Nalin Kishor & Richard Damania, *Crime and Justice in the Garden of Eden: Improving Governance and Reducing Corruption in the Forestry Sector*, in *The Many Faces of Corruption: Tracking Vulnerabilities at the Sector Level* 89, 90-91 (J. Edgardo Campos & Sanjay Pradhan eds., 2007)).

⁴⁸ John Vidal, *UN's Forest Protection Scheme at Risk from Organized Crime, Experts Warn*, THE GUARDIAN, (Oct. 5, 2009), www.guardian.co.uk/environment/2009/oct/05/un-forest-protection.

⁴⁹ *Id.*

⁵⁰ *Id.*

manipulated in two ways – by intentionally reporting incorrect data or through more-subtle misrepresentation through data collection or “making certain assumptions” when extrapolating data to the entirety of a geographic area.⁵¹

Generally, REDD mechanisms require independent third-party verification before a project can receive carbon credits, but these independent bodies may be susceptible to pressure to manipulate their results.⁵²

Hypothetically, these sorts of practices could result in the following type of scenario: an NGO inspector, tasked with verifying 100 hectares of rainforest would not personally inspect the entire area. Rather, he would verify portions, extrapolate the data based on a pre-approved process and determine how many tons of carbon that area can capture. If the inspector is shown areas that could capture more carbon than others, the data may be distorted and the inspector could validate more credits for the area than it can sustain. Thus, those selling the credits would be able to sell more credits for more carbon than the area could actually hold. And, since the credit itself is intangible and it is impossible to determine which credits are actually being offset, it would be very difficult to spot the error in the process.

In reality, a situation very similar to the above occurred in 2008 – the UN suspended two major verification agencies after finding significant deficiencies in their monitoring process including inconsistencies in verifications for a single project.⁵³ Both organizations were suspended by the UN for a matter of months, adjusted their practices and were reinstated.⁵⁴ While this may appear to be a success-story for the UN’s oversight of the crediting process, INTERPOL says the affair also highlights the difficulties in monitoring the organizations that verify projects.⁵⁵

⁵¹ *Id.*

⁵² *Id.*

⁵³ Mark Schapiro, *Conning the Climate: Inside the Carbon-Trading Shell Game*, HARPER’S MAGAZINE, (Feb. 2010).

⁵⁴ *Id.*

⁵⁵ *Guide to Carbon Trading Crime*, INTERPOL, (June 2013) available at, <http://www.interpol.int/Media/Files/Crime-areas/Environmental-crime/Guide-to-Carbon-Trading-Crime-2013> (last visited March 25, 2015).

2. Sales of Fictional Credits

One of the major difficulties in regulating carbon rights, and thereby carbon credits, is the fact that the rights to the actual land and/or trees can be separated from the rights to the carbon credits generated.⁵⁶ This means an unscrupulous land-owner may be able to sell the same carbon credits through multiple foreign carbon exchanges, each with differing regulatory schemes.⁵⁷

California itself has seen a case in which an individual fraudulently sold credits. In *United States v. Sholtz*, Anne Sholtz of California was charged with defrauding a New York company out of \$3.5 million.⁵⁸ Sholtz was found to have sold \$12.5 million of fictional credits to the New York company, with the promise to resell those credits for \$17.5 million later on.⁵⁹ In the end, she paid the company only \$9 million.⁶⁰

Similarly, INTERPOL has acknowledged a case in which “people purchased forested land with boundaries that either did not exist or were poorly marked.”⁶¹ These lands were in remote areas, with unclear

⁵⁶ The idea of carbon rights, as separate from the rights to the land or forest that contain the carbon-sequestering biomass, is a complex one. The government of Western Australia has explained the concept of carbon rights quite succinctly – carbon rights clarify who is entitled to the benefits or liabilities “that arise from changes to the atmosphere...caused by carbon sequestration or release.” *Carbon Rights in WA – a new interest in the land*, at 2, available at, http://archive.agric.wa.gov.au/objtwr/imported_assets/content/sust/carbon_rights.pdf (last visited Mar. 3, 2014). These carbon rights can be created by contract or legislation and are an intangible property right that has been suggested may be akin to intellectual property rights. *Carbon Rights and Redd+*, REDD-NET ASIA-PACIFIC, available at, http://www.recoftc.org/site/uploads/content/pdf/REDDNet05web_118.pdf (last visited Mar. 3, 2014). A more in-depth look at the intricacies of carbon rights is beyond the scope of this Note, but interested readers may find Norton Rose LLP’s 2010 report on forest carbon rights in Africa illuminating. See *Forest carbon rights in REDD+ countries: a snapshot of Africa*, NORTON ROSE LLP (Nov. 2010) available at <http://www.nortonrosefulbright.com/files/forest-carbon-rights-in-redd-countries-a-snapshot-of-africa-pdf-994-kb-32479.pdf>; see also, *Guide to Carbon Trading Crime*, *supra* note 55.

⁵⁷ *Guide to Carbon Trading Crime*, *supra* note 55.

⁵⁸ *Feds Arrest Californian for Fraudulent Trading of Air Pollution Credits: United States v. Sholtz*, 24 No. 25 ANENVLR 11 (July 16, 2004).

⁵⁹ *Guide to Carbon Trading Crime*, *supra* note 56.

⁶⁰ *Id.*

⁶¹ *Id.*

ownership records, and INTERPOL claims the fraud was estimated to be worth \$80 million.⁶²

3. *Misleading Claims about Environmental or Financial Impacts*⁶³

The relative newness of carbon markets means that investors and companies purchasing carbon credits may be at greater risk of being taken advantage of.⁶⁴ In 2008, the Australian Competition and Consumer Commission released guide lines to educate companies and consumers.⁶⁵ These materials were intended to ensure companies' claims of carbon credits and carbon neutrality were understandable for consumers and not misleading.⁶⁶

Regardless of the type of crime or fraud being committed, it is clear that carbon credit markets do have the potential to be exploited. As such, they need significant oversight and regulation. California, working alone, does not seem to be in the place to handle nor bargain for this sort of extensive oversight.

UNETHICAL TREATMENT OF INDIGENOUS POPULATIONS

The three stories at the beginning of this note highlight instances in which native populations, often without significant resources, have been taken advantage of in carbon credit markets. There is significant concern over further abuses, both in regard to international markets as well as the California scheme under AB-32.⁶⁷

One of the main tenets of REDD is the notion of free, prior and informed consent for indigenous populations.⁶⁸ The UN-drafted

⁶² *Id.*

⁶³ It should be noted that there is no real evidence a federal framework would help regulators to combat these sorts of claims. The risk of such crime, however, still warrants some brief discussion.

⁶⁴ *Guide to Carbon Trading Crime*, *supra* note 56.

⁶⁵ See *Australian Competition and Consumer Commission, ACCC Addresses Carbon Claims*, AUSTRALIAN COMPETITION & CONSUMER COMMISSION (June 27, 2008) <http://www.accc.gov.au/content/index.phtml/itemId/833354>.

⁶⁶ *Id.*

⁶⁷ See generally, RED-MONITOR.ORG, *available at* <http://www.redd-monitor.org/> (last viewed Mar. 25, 2015).

⁶⁸ *Guidelines on Free, Prior and Informed Consent*, UN-REDD PROGRAMME, (Jan. 2013), *available at* http://www.unredd.net/index.php?option=com_docman&task=doc_download&gid=8717&Itemid=53.

guidelines acknowledge that indigenous peoples may be affected by REDD programs and that they should be consulted throughout the process.⁶⁹ However, there are claims that these very guidelines have been violated in “at least ten” of the sixteen countries that currently have REDD national programs.⁷⁰

Carbon Trade Watch, an association based in Barcelona that critiques carbon trading, has collected sources from those ten countries that assert violations of the guidelines.⁷¹ The sources range from letters to the UN or other administering agency (including letters from indigenous peoples in Brazil and Mexico to the California Air Resources Board regarding AB-32)⁷² to articles highlighting sustained problems in developing effective regulations in places such as Guyana,⁷³ Panama,⁷⁴ and Peru.⁷⁵

While a few isolated anecdotes, such as those at the beginning of this Note, may (perhaps rightfully) be generally discounted when

⁶⁹ See *Launch of REDD Programme Guidelines on Free, Prior and Informed Consent (FPIC)*, UN-REDD PROGRAMME, available at http://www.un-redd.org/Launch_of_FPIC_Guidlines/tabid/105976/Default.aspx

⁷⁰ “Violation of Free, Prior and Informed Consent by REDD and REDD,” CARBON TRADE WATCH, (May 2013), available at <http://www.carbontradewatch.org/articles/violation-of-free-prior-and-informed-consent-by-REDD-and-redd.html>.

⁷¹ *Id.*

⁷² See “Open letter to the government of California” (Apr. 2013) available at <http://www.redd-monitor.org/2013/04/29/letter-from-brazil-opposing-redd-in-californias-global-warming-solutions-act-ab32/#more-13816> and “Open Letter of Chiapas on the agreement Acre/Chiapas/Brasil- Open letter from Chiapas about the Agreement Between the States of Chiapas (Mexico), Acre (Brazil) and California (USA)”, (Apr. 2013) available at <http://reddeldia.blogspot.mx/2013/04/carta-abierta-de-chiapas-sobre-el.html> (translated by Google).

⁷³ “‘Concerns Grow Over Weak Safeguard Implementation,’ Forest Peoples Programme on REDD and Safeguards” REDD-MONITOR.ORG, (May 2013) available at <http://www.redd-monitor.org/2013/05/01/concerns-grow-over-weak-safeguard-implementation-forest-peoples-programme-on-redd-and-safeguards/#more-13827>.

⁷⁴ COONAPIP, *Panama’s Indigenous Peoples Coordinating Body, Withdraws from REDD*, REDD-MONITOR.ORG, (Mar. 2013) available at <http://www.redd-monitor.org/2013/03/06/coonapip-panamas-indigenous-peoples-coordinating-body-withdraws-from-REDD/>.

⁷⁵ *Indigenous Peoples of the Peruvian Amazon Denounce Failure of the World Bank’s Forest Investment Programme in Peru to Respect Their Rights to Lands and Territories*, FORESPEOPLES.ORG, (Feb. 2013) available at <http://www.forestpeoples.org/id/topics/forest-investment-programme-fip/news/2013/02/indigenous-peoples-peruvian-amazon-denounce-fail>.

looking at such a large international policy or program, the extensive problems highlighted by Carbon Trade Watch and organizations such as redd-monitor are less-easily ignored.⁷⁶ Because California is not in a position, constitutionally, to bargain for better oversight or compliance with nations involved in trading carbon credits, the state's hands are somewhat tied. Instead, the federal government is in a better position to ensure that any carbon credits coming to any of the United States from overseas are generated through ethical means.

II. A LOOK AT CALIFORNIA'S AB-32

In 2006, then-California Governor Arnold Schwarzenegger signed into law Assembly Bill 32, titled the Global Warming Solutions Act of 2006 ("AB-32").⁷⁷ AB-32 set greenhouse gas ("GHG") emissions reduction targets for 2020 at 1990 levels – 427 million metric tons of carbon dioxide equivalent (MMTCO₂e).⁷⁸ The state has estimated that, on the current trajectory 2020 GHG emissions in the state would be 507 MMTCO₂e.⁷⁹ A reduction of roughly 80 MMTCO₂e, effectively the reduction of one-sixth of the currently estimated 2020 GHG emissions, will be necessary to reach the AB-32-mandated goals.⁸⁰

AB-32 amended the California Health and Safety Code, and set seven specific tasks for the California Air Resource Board (ARB):⁸¹

1) Prepare a scoping plan for cost-effective technological reductions in GHG emissions from sources in California,⁸²

2) Determine the state's GHG emission level from 1990, to serve as the limit for 2020.⁸³

3) Adopt regulations that require "reporting and verification" of GHG emissions,⁸⁴

⁷⁶ See generally, redd-monitor.org.

⁷⁷ *Assembly Bill 32 Overview*, CALIFORNIA ENVIRONMENTAL PROTECTION AGENCY AIR RESOURCE BOARD, available at <http://www.arb.ca.gov/cc/ab32/ab32.htm> (Aug. 5, 2014).

⁷⁸ *Id.*

⁷⁹ *Status of Scoping Plan Recommended Measures*, ARB, available at http://www.arb.ca.gov/cc/scopingplan/status_of_scoping_plan_measures.pdf (last viewed 3/25/15).

⁸⁰ *Id.*

⁸¹ *Assembly Bill 32*, *supra*, note 77.

⁸² CAL. HEALTH & SAFETY CODE § 38561.

⁸³ CAL. HEALTH & SAFETY CODE § 38550.

⁸⁴ CAL. HEALTH & SAFETY CODE § 38530.

4) Identify by June 30, 2007 early action GHG emission reduction measures and adopt by January 1, 2010 regulations to implement those measures,⁸⁵

5) Convene an environmental justice advisory committee to advise in any matter pertinent to AB-32,⁸⁶

6) Convene an Economic and Technology Advancement Advisory Committee to advise the ARB on matters regarding implementation of technological GHG emission reductions,⁸⁷ and

7) Adopt regulation that creates a “system of market-based declining annual aggregate emissions limits” for sources of GHG emissions.⁸⁸

The ARB accomplished the first six tasks listed above on time, and in 2011 adopted cap-and-trade regulations.⁸⁹ Those cap-and-trade regulations, which include language allowing California companies to use carbon credits generated by REDD plans, are the only portion of AB-32 germane to this note and are thus due a further exploration.⁹⁰

CALIFORNIA'S CAP-AND-TRADE

California's cap-and-trade program works on a basis of allowances and purchased credits – effectively each can be surrendered to the state by a covered entity⁹¹ in exchange for having emitted one metric ton of CO₂ equivalent (CO₂e) GHG gasses.⁹² If a covered entity wishes to

⁸⁵ CAL. HEALTH & SAFETY CODE § 38560.5.

⁸⁶ CAL. HEALTH & SAFETY CODE § 38591.

⁸⁷ CAL. HEALTH & SAFETY CODE § 38591(d).

⁸⁸ CAL. HEALTH & SAFETY CODE § 38562(c).

⁸⁹ *Assembly Bill 32*, *supra*, note 77.

⁹⁰ CAL. CODE REGS. TIT. 17, § 95993; The ARB has proposed amendments to the regulation, but as of the writing of this note none of the changes proposed seem to affect the international component of the cap-and-trade scheme. A reader-friendly version of the proposed 2013 amendments is available from the ARB website at <http://www.arb.ca.gov/cc/capandtrade/c-t-reg-reader-2013.pdf> (last viewed Mar. 25, 2015).

⁹¹ Covered entities are defined in CAL. CODE REGS. TIT. 17 § 95811. In general, covered entities include things like cement, glass, and iron and steel producers, along with petroleum refiners, fuel suppliers and electricity generating facilities. Most covered entities have an inclusion threshold of 25,000 metric tons of CO₂e per year under § 95812.

⁹² CAL. CODE REGS. TIT. 17, § 959856.

emit more CO₂e GHG gasses than its allowance⁹³ permits, the entity can purchase credits at auction⁹⁴ or by trade between covered entities.⁹⁵ A covered entity may also acquire and surrender sector-based credits from other programs recognized by the ARB, including credits from REDD programs and any other approved international program.⁹⁶

In layman's terms, a covered entity that wishes to emit one metric ton of GHG must either have a state-granted allowance to emit that ton, trade for another entity's allowance or have a one-ton credit from an approved accreditation program.

As the thrust of this Note is focused on the mechanisms for REDD credits, and those created through other international carbon credit programs, the remainder of this section on AB-32 will focus on sector-based offset credits and their limitations.⁹⁷

SECTOR-BASED OFFSET CREDITS

The ARB has promulgated regulations for allowing international sector-based offset credits in the California cap-and-trade scheme.⁹⁸ These credits, generated either by the reduction or avoidance of GHG emissions or through carbon sequestration by a specific economic sector, must be generated in developing countries or subnational jurisdictions within those countries.⁹⁹

⁹³ The difference between "allowances" and "credits" is subtle, but important. Allowances are the amount of GHG a covered entity can legally emit. Credits are legal fictions that let a covered entity to emit pollution beyond their allowance. For example, if a fictional company had an allowance that let them emit ten tons of GHG, they could purchase a one-ton credit and legally emit eleven tons of GHG.

⁹⁴ CAL. CODE REGS. TIT. 17, § 95910.

⁹⁵ CAL. CODE REGS. TIT. 17, § 95921.

⁹⁶ CAL. CODE REGS. TIT. 17, §§ 95990-95995.

⁹⁷ The exact amount each covered entity is granted in allowance, the costs and mechanisms for trading allowances, and the methods for verifying emissions are incredibly complex. They are also not particularly germane to the thrust of this Note and will be ignored for the sake of simplicity and readability. For more information on those, and many other, details, see CAL. CODE REGS. TIT. 17, §§ 95800-96022.

⁹⁸ CAL. CODE REGS. TIT. 17, § 95991.

⁹⁹ *Id.* The generation of credits through GHG emission avoidance— and the bargaining/monitoring that would be necessary to effectively oversee those credits — may also raise questions regarding California's constitutional ability to bargain with foreign jurisdictions. However, the focus of this note is on carbon sequestration and the credits raised by sequestration — reduction or avoidance of GHG emissions is thus beyond the scope of this paper but could be a fruitful avenue of future research.

The ARB has created procedures for approving such sector-based credits,¹⁰⁰ but included a pre-approved rubberstamp for sector-based credits from REDD plans.¹⁰¹ This means that REDD credits generated in developing nations can enter the California cap-and-trade system, as described above, without any further oversight from the ARB.

Non-REDD credits may be approved based upon the requirements set-up by the ARB.¹⁰² The requirements for credit-producing programs are more exacting than that for the host jurisdiction. Under the ARB's current regulations, an approved program must have a "transparent" system for monitoring, reporting, verifying and maintaining accounting for the entire sectors emission reductions.¹⁰³ The program must also set quantifiable offset criteria,¹⁰⁴ a system for determining baselines and performance in relation to those baselines,¹⁰⁵ and a "means for public participation and consultation" when designing a program.¹⁰⁶

These requirements may seem thorough, but as seen in the experiences of the UN, having standards for verification and transparency does not necessarily mean that those standards are particularly effective.¹⁰⁷

The ARB regulations require host jurisdictions to have a clear plan for emission reductions.¹⁰⁸ This emission reduction plan is the only requirement for "host jurisdictions" under California regulations, every other provision therein outlines the requirements of sector-based crediting programs.¹⁰⁹ Presumably, this requirement for host jurisdictions is separate and distinct from the requirements for programs (which are discussed below) and focused on making sure the government body responsible for the sector from which the credits are generated is on-board and actively engaged in GHG emission

¹⁰⁰ CAL. CODE REGS. TIT. 17, § 95992.

¹⁰¹ CAL. CODE REGS. TIT. 17, § 95993.

¹⁰² CAL. CODE REGS. TIT. 17, § 95994.

¹⁰³ CAL. CODE REGS. TIT. 17, § 95994(a)(2).

¹⁰⁴ CAL. CODE REGS. TIT. 17, § 95994(a)(3).

¹⁰⁵ CAL. CODE REGS. TIT. 17, § 95994(a)(4).

¹⁰⁶ CAL. CODE REGS. TIT. 17, § 95994(a)(5).

¹⁰⁷ See Vidal, *supra* note 48.

¹⁰⁸ CAL. CODE REGS. TIT. 17, § 95994(a)(1).

¹⁰⁹ CAL. CODE REGS. TIT. 17, § 95993.

reductions. As discussed in Part III of this note, this could lead to constitutional problems under the dormant-treaty power.¹¹⁰

SECTOR-BASED OFFSET LIMITS

The ARB has set limits on the number of offset credits an entity can use to meet compliance obligations.¹¹¹ Currently, covered entities can use offset credits to cover up to two percent of their obligation, with that number rising to four percent in budget year 2018.¹¹² While two percent of an entity's obligation may not, on its face, seem like a significant portion it is important to keep the scale in mind. Assuming the 80 MMTCO₂e number referred to above is the annual amount the state needs to reduce emissions by 2020, covered entities would be allowed to offset 1.6 million metric tons of CO₂ equivalent through the use of REDD credits each year. According to the Environmental Protection Agency (EPA), it would take over 41 million tree seedlings grown for ten years to sequester that much carbon.¹¹³ Put another way – it would take over 1.3 million acres of US forests to sequester that much carbon.¹¹⁴

III. CALIFORNIA'S TREATY-MAKING PROBLEM

The Constitution, through Article 2, Section 2, Clause 2, has reserved the power to enter into treaties for the federal government—namely through the President with the advice and consent of the Senate.¹¹⁵ The Constitution specifically prohibits states from entering

¹¹⁰ See *infra*, Matthew Schaefer, *Constraints on State-Level Foreign Policy: (Re) Justifying, Refining and Distinguishing the Dorman Foreign Affairs Doctrine*, 41 SETON HALL L. REV. 201, 204 (2011).

¹¹¹ CAL. CODE REGS. TIT. 17, § 95854(c).

¹¹² CAL. CODE REGS. TIT. 17, § 95854(b) (referring to compliance periods laid out in CAL. CODE REGS. TIT. 17, § 95841). The math required to interpret §95854 can be daunting –effectively the regulation allows a covered entity to use compliance instruments (including sector-based offset credits) for 8% of the total compliance obligation. § 95854(c) then limits sector-based offset credits to one quarter of that 8% for the first and second compliance periods (running through budget year 2017) and one half of the 8% for the third compliance period starting in budget year 2018.

¹¹³ *Calculated using the EPA's Greenhouse Gas Equivalencies Calculator*, U.S. Environmental Protection Agency <http://www.epa.gov/cleanenergy/energy-resources/calculator.html> (last visited Mar. 25, 2015).

¹¹⁴ *Id.*

¹¹⁵ U.S. CONST. ART. II, § 2, CL. 2.

into treaties, alliances or confederations.¹¹⁶ However, as Professor Edward T. Swaine points out, state and local jurisdictions regularly engage with foreign polities in ways that seem suspiciously like diplomacy – including entering into “symbolic political ties...trade and investment missions [and] bilateral and multilateral agreements.”¹¹⁷

So, where then, is the problem for California? And why can the state not work with foreign governments to ensure that any carbon credits generated are done so to the satisfaction of state regulations?

The answer lies in the dormant treaty power invested in the federal government— namely that the dormant treaty power effectively precludes any state from bargaining with foreign powers on any matter of national concern.¹¹⁸ This interpretation of the Constitutional powers of the federal government has not always been clearly elucidated, or followed, but was first laid out by the Supreme Court in *Zschernig v. Miller*.¹¹⁹ Recent cases, including three that arose from controversies in California, have more-clearly defined the dormant treaty power.¹²⁰

This analysis will discuss those more-recent cases in the context of the dormant treaty power. However, first it seems prudent to discuss, from a theoretical perspective, why California would need to enter into a negotiation or bargain with a foreign government in order to sufficiently monitor the creation of carbon credits.

CALIFORNIA’S NEED TO BARGAIN

California, if they were to assure the credits used in their cap-and-trade scheme are legitimate and created without abuses of native populations, would certainly have to interact with foreign governments or multi-national organizations (such as the U.N.). Oversight of programs, in an attempt to verify that the credits are generated in an

¹¹⁶ U.S. CONST. ART I, § 10, CL. 1.

¹¹⁷ Edward T. Swaine, *Negotiating Federalism: State Bargaining and the Dormant Treaty Power*, 49 DUKE L. J. 1127, 1130 (2000).

¹¹⁸ Matthew Schaefer, *Constraints on State-Level Foreign Policy: (Re) Justifying, Refining and Distinguishing the Dorman Foreign Affairs Doctrine*, 41 SETON HALL L. REV. 201, 204 (2011).

¹¹⁹ *Zschernig v. Miller*, 389 U.S. 429 (1968).

¹²⁰ See generally, *Movsesian v. Victoria Versicherung AG*, 670 F.3d 1067 (9th Cir. 2012) *cert. denied*, 133 S. Ct. 2795 (2013); *Von Saher v. Norton Simon Museum of Art at Pasadena*, 592 F. 3d 954 (9th Cir. 2010); *Am. Ins. Ass’n v. Garamendi*, 539 U.S. 396 (2003).

efficient manner is required at some level.¹²¹ If California were to require direct oversight of the programs, this would clearly be a form of bargaining. For example, California directly inserting itself into the practices of how Brazil manages its forests in exchange for allowing Brazilian carbon credits entrance into California's carbon market would be a clear form of negotiation or bargaining.

But what if California, unilaterally, creates a set of very specific requirements for carbon credit programs that countries are free to follow? Is this a form of bargaining? According to Professor Swaine this would constitute a form of "indirect bargaining," which is also constitutionally problematic.¹²² It appears that the ARB's requirement that any jurisdiction hosting a sector-based offset crediting program already have a "plan for reducing emissions" could be considered a form of indirect bargaining.¹²³

Indeed the form any bargaining takes is likely irrelevant – states are not allowed, under the dormant treaty clause, to negotiate with a foreign government either directly or indirectly.¹²⁴ Direct negotiation is fairly self-explanatory, but indirect negotiation is perhaps a bit more nuanced. Effectively, the prohibition on indirect negotiation would mean California would be precluded from creating a unilateral standard with the purpose of changing the behavior of a foreign body, enticing them to fall in line in order for their carbon credits to be acceptable in California.¹²⁵

So, either by direct oversight or through standards that would entice foreign bodies to comply in order to receive approval, California has a need to interact with foreign governments in a way that would be considered bargaining if they wanted to ensure the quality of the carbon credits entering their market.¹²⁶

¹²¹ Or, perhaps more pertinently, that the credits are actually generated at all, and not a creation of double-counting or dubious claims about the amount of carbon captured.

¹²² Swaine, *supra* note 117 at 1138.

¹²³ CAL. CODE REGS. TIT. 17, § 95994(a)(1).

¹²⁴ Schaefer, *supra* note 118 at 224.

¹²⁵ *Id.*

¹²⁶ The discussion of indirect negotiation, and its standing in relationship to the dormant treaty clause, is more nuanced than outlined above. The next section will tackle some of the cases dealing with indirect negotiation and the power of the states. For now, it is stipulated that California needs some form of leverage or bargaining power in order to get foreign governments to conform to any unilateral standards they set and the discussion on why those regulations, were California to enact them, are unconstitutional is in the next section.

INDIRECT NEGOTIATION AND AB-32

It is clear that California does not have the Constitutional power to directly negotiate and enter a treaty or alliance with a foreign body over how they manage their forests in exchange for entrance into California's carbon credit market.¹²⁷ Article I of the Constitution says "No State shall enter into any Treaty, Alliance, or Confederation."¹²⁸ A directly negotiated deal, such as getting a foreign body to regulate their carbon credit creation in a specific way in exchange for letting those credits enter California's market, would clearly then be a violation.

The Supreme Court has not heard a case relating to carbon credits and the effects of the dormant treaty clause, but *Zschernig* does provide an excellent example of a state's attempt at indirect negotiation being struck down.¹²⁹ In *Zschernig*, Oregon has passed a law that limited the inheritance rights of non-US citizens – namely, a citizen of a country could only inherit property from an Oregon resident if US citizens could inherit from that country.¹³⁰ Inheritance laws are traditionally an area of state regulation,¹³¹ however the Court ruled the law unconstitutional, and held that it illustrated "the dangers which are involved if each State...is permitted to establish its own foreign policy."¹³²

¹²⁷ As is common when dealing with complicated Constitutional questions, word choice is important (though often cumbersome). For example, California could, with approval of the Senate, enter into an "Agreement or Compact" with a foreign nation (U.S. CONST. ART I, § 10, cl. 3). California has not received (nor, as far as this author can discern, sought) Senate approval for any international agreements in regards to AB-32. Whether any arrangement would fall under the definition of "treaty" or "agreement" is therefore not relevant at this point.

¹²⁸ U.S. CONST. ART I, § 10, CL. 1.

¹²⁹ See generally, *Zschernig*, 389 U.S. 429 (1968).

¹³⁰ *Id.* It is possible, as Professor Swaine noted that some have argued, that *Zschernig* is a very narrow decision, confined to the facts of the case which lead Oregon probate courts to make decisions based upon the prevailing political positions of the day and the policies of foreign governments. However, the more-recent cases, especially those coming from the 9th Circuit and discussed in the following section, point to a broader field preemption by the federal government of foreign affairs. Cases involving laws that required disclosure of insurance policies (*Garamendi*), the return of art looted by Nazis (*Von Saher*), and insurance actions by victims of the Armenian Genocide (*Versicherung*) all invoked the dormant foreign affairs powers of the federal government and were deemed invalid.

¹³¹ Douglas A. Kysar & Bernadette A. Meyler, *Like a Nation State*, 55 UCLA L. REV. 1621, 1653 (2008).

¹³² *Id.* at 441.

The Court, in 2003, laid out the principles of *Zschernig* once again in *American Ins. Ass'n v. Garamendi*.¹³³ Though, in the end, the outcome of the case was determined under a different standard,¹³⁴ the Court did say that state actions, which would have more than “incidental effect on foreign affairs”, are preempted if they do not concern “traditional state interests.”¹³⁵

Following *Garamendi*, the 9th Circuit, in 2010, used a field preemption analysis to invalidate a California law regarding the statute of limitations for Holocaust victims, or their decedents, making claims on stolen or looted art.¹³⁶ The 9th Circuit then analyzed whether the statute in controversy concerned a traditional state responsibility.¹³⁷ The 9th Circuit held that while regulating property, as was purportedly the purpose of the law in question, is generally a state responsibility, the true purpose of the law, since it addressed only claims of Holocaust victims, actually impacted foreign affairs.¹³⁸

This, it would seem, is analogous to California’s situation if they were to create a more-stringent regulatory process.¹³⁹ California’s

¹³³ *American Ins. Ass'n v. Garamendi*, 539 U.S. 396 (2003).

¹³⁴ The issue in *Garamendi* was found to be a direct conflict between standing federal foreign policy and the California statute. This allowed the Court to bypass an in-depth examination of the field preemption, or dormant treaty, power of the federal government. As there is currently no federal regulation of international carbon credits, there is no direct conflict in regards to AB-32.

¹³⁵ *Garamendi*, at 398. The Court here is unclear whether *Zschernig*’s result means state laws are invalid any time they have more than an “incidental effect” on foreign affairs, or if they are only invalid when they have an effect and do not concern “traditional state interests.” Future decisions by the 9th Circuit interpreted *Garamendi* to holding that if a state statute does concern traditional state interests, it may not be invalid even if it does effect foreign affairs in an area that does not have direct conflict with current foreign policy. The author’s reading of *Garamendi* did not produce such a clear understanding, but this Note will continue under the understanding that the 9th Circuit is correct in its analysis.

¹³⁶ *Von Saher v. Norton Simon Museum of Art at Pasadena*, 592 F.3d 954, 963 (9th Cir. 2010).

¹³⁷ *Id.*

¹³⁸ *Id.*, (citing similar decisions in *Garamendi*; *Zschernig*; *Crosby v. National Foreign Trade Council*, 530 U.S. 363 (2000), and *Deutsch v. Turner Corp.*, 324 F.3d 692 (9th Cir. 2003)).

¹³⁹ It should be noted (though, this is just a draft and should be worked out better in the final paper, hopefully) that the current regulations do not seem to violate the dormant treaty clause. They just are ineffective, instead. If they were to be re-crafted to be effective (something that will be discussed in the as-yet unfinished section on AB-32) they would then be problematic.

regulations create a carbon market in the state, which is undoubtedly an area of state responsibility. However, if California's regulations were to effectively control the manner in which foreign governing bodies managed their carbon-sinks and the way in which carbon credits were produced, this would seem to be a clear case of indirect bargaining in an area that is generally not within the realm of state responsibility.

The 9th Circuit re-affirmed their position the dormant treaty clause (or, "dormant foreign affairs preemption") in *Movsesian v. Victoria Versicherung AG*.¹⁴⁰ Here, the court mirrored its decision in *Von Saher* – first noting that the facial concern of the law in question was a matter of state concern before holding that the law was also distinctly related to foreign affairs.¹⁴¹

In *Movsesian*, the 9th Circuit also stressed that the original dormant treaty case, *Zschernig*, was decided in part because law required "value-laden judgments" of foreign nations by members of a state court.¹⁴² This, perhaps, adds another element that would further-invalidate any more-robust version of AB-32 regulations. Under a hypothetical AB-32 system that required more-effective controls on carbon-credit production, a decision-maker at a regulatory agency would be tasked with not only assessing the technical specifications of carbon-credits (which would not be particularly value-laden, though it may violate other aspects of the dormant foreign affairs clause discussed above), but would also be responsible for assessing the impact on various indigenous populations that might be effected. This second half of the process would likely have non-objective, and thus value-laden, components that would violate the standard set by *Zschernig* and elucidated in *Movsesian* above.

IV. THE SOLUTION

As any attempt to amend AB-32 to require either direct oversight and/or negotiation with foreign governments or indirect negotiation

¹⁴⁰ *Movsesian v. Victoria Versicherung AG*, 670 F. 3d 1067, at 1072 (9th Cir. 2012) (holding that "even in the absence of any express federal policy, a state law still may be preempted under the foreign affairs doctrine if it intrudes on the field of foreign affairs without addressing a traditional state responsibility.")

¹⁴¹ *Id.* (holding that a law subjecting foreign insurance companies to lawsuit in California on the basis of their holding policies for victims of the Armenian Genocide effected foreign affairs).

¹⁴² *Id.*

through more-stringent regulations that came to the same effect would be invalid under the dormant treaty clause, what is the solution for solving the defects in California's cap-and-trade regulation?

Broadly, the solution¹⁴³ is for Congress to enact legislation creating a framework for approval and oversight of any foreign carbon-credits entering into state-level markets.¹⁴⁴ Before delving into a solution, however, it may prove fruitful to look at past attempts to pass legislation related to carbon-markets.

PAST, BUT NOT PASSED, ATTEMPTS AT LEGISLATION

Two different bills came before Congress in 2009 related to carbon markets. The more successful of the two was the American Clean Energy and Security Act of 2009 (ACESA) that was started in the House of Representatives.¹⁴⁵ The less successful bill started in the Senate and was called the Clean Energy Jobs and American Power Act of 2009 (CEJAPA).¹⁴⁶

The ACESA managed to get passed in House on June 26, 2009, but died in the Senate shortly thereafter.¹⁴⁷ The CEJAPA, meanwhile, was introduced in the Senate in November of 2009, but never made it to the House.¹⁴⁸ The language used in the two bills is largely identical, including the sections dealing with international offset credits.¹⁴⁹

The bills both ultimately failed, and media surrounding the bills blamed the usual candidates – a broken political system,¹⁵⁰ a struggling

¹⁴³ At least the solution proposed by the author in this Note.

¹⁴⁴ It could be that the framework would also apply to any carbon credits created domestically. However, one would assume that any domestically-created credits are less likely to run into the issues of corruption, mismanagement, and abuse of indigenous people than those created overseas. We do not have the large tracts of remote land here that might found in, say, the Amazon basin in South America. So, for the purposes of this Note, the focus will be on international credits.

¹⁴⁵ See *H.R. 2454 (111th): American Clean Energy and Security Act of 2009*, GOVTRACKS.US, available at <https://www.govtrack.us/congress/bills/111/hr2454> (last viewed Mar. 25, 2015).

¹⁴⁶ See *S. 1733 (111th): Clean Energy Jobs and American Power Act*, GOVTRACKS.US, available at <https://www.govtrack.us/congress/bills/111/s1733> (last viewed Mar. 25, 2015).

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ Compare, HR 2454 §743, with S 1733 §744.

¹⁵⁰ David Roberts, "Why Did the Climate Bill Fail?", GRIST.ORG, (July 2010) available at <http://grist.org/article/2010-07-26-why-did-the-climate-bill-fail/>.

economy,¹⁵¹ poor messaging and communication,¹⁵² and poorly written policy.¹⁵³ Although both of the bills failed as a whole, there did not appear to be an international offset portion of the bills that drew specific ire. Perhaps, then, that section deserves more scrutiny and can provide a blueprint for future legislative solutions.

The bills would have required the Administrator of the Environmental Protection Agency (EPA)¹⁵⁴ to work with the Secretary of State and the Administrator of the United States Agency for International Development (USAID) to promulgate the regulations for international credits.¹⁵⁵ The regulations would have restricted credits to developing countries that were part of a bilateral or multilateral agreement with the United States that applied to the credits.¹⁵⁶ This provision would have allowed the United States to guarantee that effective safeguards were in place to promote an efficient and ethical carbon-crediting program.¹⁵⁷

Equally importantly, the proposed legislation did not rubber-stamp REDD or any other international accreditation programs. Rather, the bill required that the Administrator of the EPA verify that any international programs met or exceeded the standards of US credits.¹⁵⁸ These rules also would have applied to international offset credits.¹⁵⁹ The bill also required the Administrator of the EPA to ensure “by whatever means appropriate” that no credits were double counted in other carbon credit schemes.¹⁶⁰

In regards to the treatment of indigenous peoples, the proposed legislation required “consultation with, and full participation of,” local indigenous populations as “partners and primary stakeholders.”¹⁶¹

¹⁵¹ *Id.*

¹⁵² Dante Atkins, “*Not-so-slick Messaging*” DAILY KOS, (July 25 2010) <http://www.dailykos.com/story/2010/07/25/885743/-Not-so-slick-messaging>.

¹⁵³ Lee Wasserman, “*Four Ways to Kill a Climate Bill*” New York Times (July 25, 2010) http://www.nytimes.com/2010/07/26/opinion/26wasserman.html?_r=0.

¹⁵⁴ See 2009 CONG US HR 2454 § 2(1) (defining “Administrator” as the Administrator of the EPA).

¹⁵⁵ *Id.* at § 743(a).

¹⁵⁶ *Id.* at § 743(b)(2).

¹⁵⁷ There were further steps taken ensure the country issuing the credits was truly a “developing country” (and that the correct types of biomass were present (§743 (C))).

¹⁵⁸ *Supra* note 149 at § 743(d)(1).

¹⁵⁹ *Id.* at § 743(e).

¹⁶⁰ *Id.* at § 743(g).

¹⁶¹ *Id.* at §743 (e)(1)(E)(iii).

Profits and dividends were also to be shared equitably among local communities and indigenous populations.¹⁶²

GOING FORWARD

It appears the bones of the solution have already had two chances before the US Senate. The language in the ACESA and CEJAPA concerning international carbon credits significantly addresses the concerns raised by this Note in regards to UN REDD being rubberstamped in California.

Perhaps the one addition that would be necessary would be language either a) ensuring that verification of international credits would take place by trained, knowledgeable personnel and/or b) enabling the EPA to singlehandedly suspend any program or disbar any verification agency that was caught attempting to circumvent US regulations.

Not only does the language of the ACESA and CEJAPA seem effective, but it also may be more-politically viable as a standalone measure than as part of an omnibus climate change bill. If the general stereotype is that political right is going to be pro-state rights and pro-industry while the political left is pro-environmental protection, a bill that does its best to protect the environment and indigenous peoples while also allowing states to create carbon markets tailored to their own industries could be popular.

V. CONCLUSION

California's desire to reduce greenhouse gas emissions, curb deforestation in developing nations and promote potential solutions for curtailing global warming are laudable. Unfortunately, the state acting alone cannot efficiently and effectively institute a cap-and-trade program that includes carbon-credit offsets from international sources. The state does not have the constitutional power, under the dormant treaty power theory, to provide effective oversight of the international carbon-creation process. By giving blanket acceptance to carbon credits created under the REDD program California's cap-and-trade regime, as outlined by regulations proposed by the state's Air Resource Board, exposes the state's market to carbon credits created fraudulently or via unethical treatment of indigenous populations.

¹⁶² *Id. at*, §743 (e)(1)(E)(iv).

Instead of letting California go it alone, the federal government should intervene. By creating an effective monitoring process and allowing only approved carbon credits to be traded in state-level offset programs, the federal government can assure to Californians, and residents of other states that create similar programs in the future, that the carbon credits traded are both legitimate and created without the unethical treatment of indigenous populations overseas.