
The Copenhagen Climate Change Conference: A Postmortem

Author(s): Daniel Bodansky

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CURRENT DEVELOPMENTS

THE COPENHAGEN CLIMATE CHANGE CONFERENCE: A POSTMORTEM

*By Daniel Bodansky**

Since the entry into force of the Kyoto Protocol¹ to the United Nations Framework Convention on Climate Change² (UNFCCC or Framework Convention) in 2005, attention has focused on what to do after 2012, when the Protocol's first commitment period ends. Should the Kyoto Protocol be extended through the adoption of a second commitment period, with a new round of emission reduction targets for developed country parties? And, if so, should a new agreement be adopted under the Framework Convention, which addresses the emissions of countries that either are not parties to the Protocol (the United States) or do not have Kyoto emissions targets (developing countries)? Or should a single new agreement be adopted that replaces the Kyoto Protocol and is more comprehensive in coverage, addressing both developed and developing country emissions?

The United Nations climate change conference³ that met in Copenhagen from December 7 to 19, 2009, had been intended as the deadline to resolve these questions about the post-2012 climate regime—a view reflected in the unofficial slogan for the conference, “Seal the deal.” The decision by more than one hundred heads of state or government to attend “Hopenhagen” (as the Danes called it) heightened expectations that the conference would result in a major breakthrough, and more than forty thousand people registered, which made it one of the largest environmental meetings in history (and produced massive logistical problems as a byproduct). But given the lack of progress in the negotiations in the months leading up to the conference, hopes for a full-fledged legal agreement proved unrealistic. Instead, the Copenhagen conference resulted only in a political agreement, the Copenhagen Accord,⁴ which was negotiated by a group of roughly twenty-eight countries, including all of the world's major economies.

* Of the Board of Editors. Thanks to Susan Biniarz, Elliot Diringer, and Cymie Payne for their very helpful comments. Needless to say, I am solely responsible for any remaining errors. A shorter version of this essay appeared in ASIL INSIGHT, Feb. 16, 2010.

¹ Kyoto Protocol to the United Nations Framework Convention on Climate Change, Dec. 11, 1997, 2303 UNTS 162.

² United Nations Framework Convention on Climate Change, May 9, 1992, S. TREATY DOC. NO. 102-38 (1992), 1771 UNTS 107 [hereinafter UNFCCC].

³ Officially, the Copenhagen conference was a joint meeting of the Fifteenth Session of the UNFCCC Conference of the Parties (COP 15) and the Fifth Session of the Kyoto Protocol Meeting of the Parties (CMP 5).

⁴ Copenhagen Accord (Dec. 18, 2009), *in* UNFCCC, Report of the Conference of the Parties on Its Fifteenth Session [hereinafter COP Report and session number], Addendum, at 5, UN Doc. FCCC/CP/2009/11/Add.1 (Mar. 30, 2010) (advance version) [hereinafter Accord]. The Accord is attached to Decision 2/CP.15 of the Conference of the Parties, *infra* note 5. UNFCCC documents cited herein are available at the Convention's Web site, <http://unfccc.int/>.

Key elements of the Copenhagen Accord include the long-term goal of limiting climate change to no more than two degrees Celsius (2°C), systems of “pledge and review” for mitigation commitments or actions by both developed and developing countries, and significant new financial resources. Objections by a small group of countries (led by Bolivia, Sudan, and Venezuela) prevented the Copenhagen conference from “adopting” the Accord. Rather, the conference took “note of” the Copenhagen Accord, which left its future status uncertain.⁵ As of March 30, 2010, 114 countries had associated themselves with the Copenhagen Accord, and the UNFCCC Secretariat had received submissions of national pledges to limit greenhouse gas emissions from seventy-three countries, representing more than 80 percent of global greenhouse gas emissions, including Brazil, China, India, Indonesia, Japan, Russia, South Africa, the member states of the European Union (EU) (acting in common), and the United States.⁶

I. THE EVOLUTION OF THE INTERNATIONAL CLIMATE CHANGE REGIME

Since the international climate change negotiations began in 1991, the climate change regime has developed in three phases. The first phase involved the establishment of the basic framework of governance, set forth in the Framework Convention, which was adopted in 1992 and entered into force two years later. The second phase, running from 1995 to 2001, involved the negotiation and elaboration of the Kyoto Protocol, which sets forth quantitative emission reduction targets for developed (Annex I) countries through 2012, and establishes market-based mechanisms (including emissions trading) for achieving those targets. The current phase—which the Copenhagen conference had been intended to conclude—addresses the post-2012 period, after the conclusion of the first commitment period of the Kyoto Protocol.

In many respects, the climate change issue has come a long way since it first emerged in the mid-1980s. Climate change science has become much more robust, the recent “Climategate” kerfuffles notwithstanding. The business community has become more positively engaged and a significant carbon market has emerged. Above all, most of the world’s major economies have either adopted, or are seriously considering, significant domestic policies to reduce their greenhouse gas (GHG) emissions. The European Union has already established an emissions trading system, and has pledged to reduce its emissions by 20 percent from 1990 levels by 2020 (and by 30 percent as part of a global and comprehensive agreement for the post-2012 period, in which other developed countries undertake comparable efforts). The U.S. House of Representatives has passed a domestic climate bill that would reduce U.S. emissions by roughly 17 percent below 2005 levels by 2020 (although the prospects for the Senate to follow suit are uncertain at best). And China and India have both adopted carbon intensity targets—in the case of China, to reduce its emissions per unit of gross domestic product by 40–45 percent from 2005 levels by 2020, and in the case of India, by 20–25 percent.

In view of these domestic developments, the prospects for Copenhagen might have seemed good. But capturing these national policies in an international agreement has proved extremely difficult. Progress has been obstructed, for one thing, by the continuing uncertainty about whether the United States will undertake serious action to curb its emissions. For another, the

⁵ Decision 2/CP.15 (Dec. 18–19, 2009), *in* COP Report No. 15, *supra* note 4, at 4 (in which the Conference of the Parties “[t]akes note of the Copenhagen Accord of 18 December 2009”).

⁶ UNFCCC, Information Provided by Parties to the Convention Relating to the Copenhagen Accord, *available at* <http://unfccc.int/home/items/5262.php>.

Copenhagen negotiations for the first time have given serious attention to developing country GHG emissions, which already represent more than half of the global total and will account for most of the emissions increases between now and 2050.

The focus on developing country emissions in the Copenhagen process—and, in particular, the emissions of China and the other major developing country economies—represents a significant reorientation of the climate change negotiations. During the first decade of the regime, from the initiation of negotiations in 1991 through the adoption of the Marrakesh Accords in 2001,⁷ the negotiating process focused almost exclusively on emissions reductions by developed countries. Although the United States fitfully pushed the parties to address the issue of “developing country participation,” the 1995 Berlin Mandate, which launched the negotiations of the Kyoto Protocol, effectively took this issue off the table by excluding any new commitments for non-Annex I countries.⁸ Even after the Protocol was adopted in 1997, the same pattern continued for an additional four years, through 2001, when the Marrakesh conference adopted a detailed rule book for implementing the Kyoto targets. Although developing countries participated actively, the primary axis of the negotiations was the split of the developed countries between the European Union and the United States—the EU member states pushing for strong emission reduction targets, implemented primarily through domestic measures, and the United States (together with “Umbrella Group” allies such as Australia and Japan) pushing for the unrestricted use of market-based mechanisms, including emissions trading.

The more recent phase in the climate negotiations, which began after Marrakesh, shifted the primary axis of the negotiations from EU-U.S. to developed-developing (and, in particular, U.S.-China). The new negotiating dynamic was initially obscured by the rejection of the Kyoto Protocol by the Bush administration and its unwillingness to discuss any alternative architecture, which put the negotiations in a holding pattern for several years. But when the negotiating process began to emerge from its deep freeze, the shift in dynamics became apparent, and the developed-developing country divide moved to center stage at the Bali conference in 2007.

Although the U.S.-EU negotiations were always difficult—even during the Clinton administration when one might have thought the policy differences would be less significant—the split between the United States and the European Union pales in comparison to the gulf between developed and developing countries. On one side, developed countries insist that the post-2012 regime address the emissions of all of the major economies, developing as well as developed. On the other side, developing countries continue to argue, as they have done since the negotiations began back in 1991, that they are not historically responsible for the climate change problem, have less capacity to respond to it, and should therefore not be expected to undertake specific international commitments to reduce emissions.

The Copenhagen Process and the Question of Legal Form

Over the past several years, the deliberations on the post-2012 climate regime have proceeded on two tracks, one to negotiate amendments to the Kyoto Protocol, including a second

⁷ The Marrakesh Declaration and the Marrakesh Accords, *in* COP Report No. 7, Addendum, UN Doc. FCCC/CP/2001/13/Add.1 (Jan. 21, 2002).

⁸ The Berlin Mandate: Review of the Adequacy of Article 4, paragraph 2(a) and (b), of the Convention, Decision 1/CP.1, *in* COP Report No. 1, Addendum, at 4, UN Doc. FCCC/CP/1995/7/Add.1 (June 6, 1995).

round of emissions targets for developed country parties; the other to develop an “agreed outcome” under the Framework Convention. The Kyoto track, conducted in the Ad Hoc Working Group on Further Commitments for Annex I Parties under the Kyoto Protocol (AWG-KP or Protocol Working Group), was initiated in 2005, and does not include the United States. The Convention track was launched two years later by the Bali Action Plan,⁹ which established the Ad Hoc Working Group on Long-Term Cooperative Action under the Convention (AWG-LCA or Long-Term Action Working Group), with the mandate to develop a comprehensive outcome, including a shared long-term vision; mitigation commitments or actions by developed countries; nationally appropriate mitigation actions (NAMAs) by developing countries; financial arrangements; measures to address adaptation and technology transfer; and a system for measurement, reporting, and verification (MRV).

The two-track structure of the negotiating process has raised two related questions. First, should the negotiations result in two outcomes, one under the Kyoto Protocol and the other under the Framework Convention, or a single outcome that brings the two tracks together? Second, should the outcome or outcomes be legal in nature? The countries with Kyoto emissions targets (including the EU member states, Australia, Canada, and Japan) are generally unwilling to accept a new round of emissions targets under the Protocol for the post-2012 period unless the other major emitters (including China and the United States) accept legal commitments as well, and their expressed preference is for a single new comprehensive legal agreement that would replace the Protocol. The United States takes a similar position: it has proposed the negotiation of a single binding agreement that would address both developed and developing country emissions, although it has specifically said that such an agreement could live alongside a post-2012 Kyoto agreement. On the other side, developing countries are united in opposing a one-track approach, and repeatedly insisted at the Copenhagen conference that the Kyoto track and the Convention track receive equal attention and make equal progress. Having succeeded during the Kyoto process in establishing what amounts to a “fire wall” between Annex I and non-Annex I parties, they are unwilling to give that up now, by replacing the Protocol with a new legal instrument. But developing countries differ in their views about the outcome of the Convention track. China and India have insisted that developed country parties agree to a second commitment period under the Kyoto Protocol, but have opposed the adoption of a new legal agreement addressing their own emissions. In contrast, other developing countries (including the small island states) support, as a complement to the Protocol, the negotiation of a new legal agreement that would be more comprehensive in coverage by including the United States and major developing countries such as Brazil, China, and India.

The Copenhagen Conference

Under the terms of the Bali Action Plan and a Kyoto Protocol decision, the two working groups were to complete their work on the post-2012 climate change regime at the Copenhagen Conference of the Parties/Meeting of the Parties (COP/CMP).¹⁰ This deadline created

⁹ Bali Action Plan, Decision 1/CP.13 (Dec. 14–15, 2007), *in* COP Report No. 13, Addendum, at 3, UN Doc. FCCC/CP/2007/6/Add.1 (reissued Mar. 14, 2008).

¹⁰ Advancing the Work of the Ad Hoc Working Group on Further Commitments for Annex I Parties Under the Kyoto Protocol, Decision 3/CMP.4, para. 4, *in* CMP Report No. 4, UN Doc. FCCC/KP/CMP/2008/11/Add.1 (Mar. 19, 2009).

enormously high expectations for the Copenhagen conference—much higher than for any previous COP except perhaps the Kyoto meeting. Reflecting its anticipated importance, the meeting was held at a much higher level than usual. Typically, the ministerial segment of a COP comprises only the last day or two, but in Copenhagen, the ministerial segment occupied the entire second week and the last two days of the conference were held at the head-of-state/government level.

In preparation for Copenhagen, the two ad hoc working groups met five times in 2009, three times in Bonn and once each in Bangkok and Barcelona. But despite the call by the COP at its 2008 meeting in Poznan for the Long-Term Action Working Group to shift into “full negotiating mode,”¹¹ states simply restated their positions at meeting after meeting. As a result, states made little progress in narrowing their differences and the more than one hundred and fifty pages of text prepared for the proceedings at Copenhagen were heavily bracketed, which made agreement at the conference almost impossible. At the final preparatory meeting in November, both the UNFCCC executive secretary and the chair of the Long-Term Action Working Group acknowledged what many had been saying throughout the year, namely, that the conference would be able to produce, at best, a political agreement rather than a full-fledged legal instrument.

During the first week and a half of the Copenhagen conference, negotiations continued in the two ad hoc working groups with little progress. Attempts by the Danish president of the conference to craft a compromise were systematically undermined, initially by the leak of the so-called Danish text just prior to the meeting; and the Danes’ efforts throughout the conference to organize a smaller group to address the core issues were strongly resisted by developing countries, which claimed that meetings of a smaller group would be undemocratic and illegitimate. Instead, they insisted that negotiations continue on the basis of the heavily bracketed texts that had emerged in the working groups over the past two years, in “contact groups” open to all parties.

As a result of these procedural roadblocks, serious negotiations did not begin until nearly the last day of the meeting, when heads of state arrived and began negotiating in a much smaller group. Reportedly, twenty-eight parties were involved, including Algeria, Australia, Bangladesh, Brazil, China, Colombia, Denmark, Ethiopia (on behalf of the African Union), the European Union (represented by Sweden as president and the European Commission), France, Gabon, Germany, Grenada (on behalf of the Alliance of Small Island States), India, Indonesia, Japan, the Republic of Korea, Lesotho (for the least developed countries), the Maldives, Mexico, Norway, Russia, Saudi Arabia (for the Organization of Petroleum Exporting Countries members), South Africa, Spain, Sudan (for the Group of 77 developing countries), the United Kingdom, and the United States. The breakthrough finally came on Friday afternoon in an even smaller meeting between President Barack Obama of the United States and the leaders of the four BASIC group countries: Premier Wen Jiabao of China, President Luiz Inácio Lula da Silva of Brazil, Prime Minister Manmohan Singh of India, and President Jacob Zuma of South Africa. President Obama publicly announced the broad outlines of the Copenhagen Accord at a press conference before departing on Friday evening.

¹¹ Advancing the Bali Action Plan, Decision 1/CP.14, para. 5, *in* COP Report No. 14, Addendum, at 2, UN Doc. FCCC/CP/2008/7/Add.1 (Dec. 12, 2008).

II. THE COPENHAGEN ACCORD

The Copenhagen Accord is a political rather than a legal document. It is very brief—only about two-and-a-half pages long—and leaves many details to be filled in later.

Elements of the Accord

Shared vision. The Framework Convention defines the climate regime's objective as the prevention of "dangerous anthropogenic interference with the climate system"¹² but does not further identify what level of emissions or concentrations such interference entails. Thus, a major element of the Bali Action Plan was to establish "[a] shared vision for long-term cooperative action, including a long-term global goal for emission reductions."¹³ Proposals for a long-term objective include:

- an upper bound on global temperature increase of 1.5° or 2°C;
- an upper bound on atmospheric concentrations of greenhouse gases of 350 or 450 parts per million (ppm) (by way of comparison, the current concentration of carbon dioxide is about 390 ppm);
- a long-term goal to reduce global emissions by 50 percent by 2050 (the so-called 50-by-50 target, which the Group of Eight industrialized countries has endorsed); and
- a target date for the peaking of global emissions (and possibly dates for the peaking of developed and developing country emissions as well).

In Copenhagen, developing countries strongly objected to setting a date for the peaking of their emissions, and also resisted adopting a global emissions goal or a greenhouse gas concentration target because of the implications these would have for their own emissions. (Although developed countries have pledged to reduce their emissions by 80 percent by 2050, the 50-by-50 goal would still require developing country emissions to peak and begin to decline prior to 2050.) In the end, states could agree only that "deep cuts" in emissions are necessary, with a view to keeping the increase in global temperature below 2°C.¹⁴ In deference to the Maldives and other small island states, which had pushed for a 1.5° limit on global temperature change, the Copenhagen Accord provides for consideration of a stronger long-term goal as part of the assessment of the Accord's implementation that will be completed by 2015.¹⁵

Developed country mitigation. Over the past year, a general consensus has emerged that developed countries should undertake economy-wide emissions targets for the post-2012 period, although countries have differed about

- the stringency of these emissions limitation targets;
- the base year from which emissions targets should be measured—1990, as the Kyoto Protocol provides, or some other year such as 2005 (as proposed U.S. climate legislation provides), or 2000 (as Australia's emissions target uses); and

¹² UNFCCC, *supra* note 2, Art. 2.

¹³ Bali Action Plan, *supra* note 9, para. 1(a).

¹⁴ Accord, *supra* note 4, para. 2.

¹⁵ *Id.*, para. 12.

- whether the targets should be defined by using international accounting rules (as in the Kyoto Protocol) or national legislation (as the United States has proposed).

The Copenhagen Accord establishes a bottom-up process that allows each Annex I party to define its own target level, base year, and accounting rules, and to submit its target in a defined format, for compilation by the UNFCCC Secretariat. Under the terms of the Accord, Annex I countries “commit to implement” their targets, individually or jointly, subject to international MRV.¹⁶

Developing country mitigation. There has been widespread agreement that developing country NAMAs that receive international support should be subject to some type of international review, and that a “matching mechanism” should be established to link developing countries’ proposals with financing by developed countries. This consensus is reflected in the Copenhagen Accord, which establishes a registry for listing NAMAs for which support is sought, and provides that supported NAMAs “will be subject to international measurement, reporting and verification in accordance with guidelines adopted by the Conference of the Parties.”¹⁷

The principal issues relating to developing country mitigation have concerned “autonomous” mitigation actions—that is, emission reduction measures that do not receive any financial support from developed countries. Should these be purely a matter of national discretion, subject only to national reporting and verification? Or should they be internationalized in some fashion—for example, through inclusion in a schedule that is subject to international review? And, more generally, should developing country mitigation actions (both supported and autonomous) be expected to add up to a particular quantitative reduction below business as usual?

In Copenhagen, these issues became the principal bone of contention between the United States and China, as the United States and many other developed countries insisted on measurement, reporting, and some form of international review, while China rejected any international review. The Copenhagen Accord represents a tortuous compromise in its paragraph 5:

- As with developed country emissions targets, it establishes a bottom-up process by which developing countries will submit their mitigation actions in a defined format, for compilation by the UNFCCC Secretariat (including both autonomous and supported mitigation actions).
- It provides that non-Annex I parties “will implement” these actions.¹⁸
- It provides that developing country mitigation actions will be subject to domestic MRV and that developing countries will report on the results of this MRV in biennial national communications, “with provisions for international consultations and analysis under clearly defined guidelines that will ensure that national sovereignty is respected.”¹⁹

¹⁶ *Id.*, para. 4.

¹⁷ *Id.*, para. 5.

¹⁸ In the case of least-developed countries and small island developing states, actions may be taken “voluntarily and on the basis of support.” *Id.*

¹⁹ *Id.*

Financial assistance. Although states generally agree on the need for substantial new funding to help developing countries mitigate and adapt to climate change, they conceptualize this funding differently. The United States and other developed countries see financial assistance, in essence, as part of an implicit quid pro quo linked to developing country mitigation commitments. Developing countries, in contrast, see it as payment of the “carbon debt” that they believe developed countries owe for their historical emissions.

In Copenhagen, the discussions about financial support revolved around the typical issues: how much money, from what sources, and with what governance arrangements? The Copenhagen Accord addresses only the first of these issues, leaving the other two for future resolution. It creates a “collective commitment” for developed countries to provide “new and additional resources . . . approaching USD 30 billion” in so-called fast start money for the 2010–2012 period, balanced between adaptation and mitigation, and sets a longer-term collective “goal” of mobilizing \$100 billion per year by 2020 from all sources (public and private, bilateral and multilateral), but links this money to “meaningful mitigation actions and transparency on implementation.”²⁰ It calls for governance of adaptation funding through equal representation by developing and developed country parties, but does not establish a governance arrangement for finance more generally. Finally, it calls for the establishment of a Copenhagen Green Climate Fund²¹ as an operating entity of the Convention’s financial mechanism, as well as a high-level panel to consider potential sources of revenue to meet the \$100 billion per year goal,²² and provides that a “significant portion” of international funding should flow through the Green Climate Fund.²³

Forestry. In the run-up to the Copenhagen conference, the potential to reduce emissions from deforestation and forest degradation (known as “REDD-plus”) received considerable attention. The principal question has been whether to finance REDD-plus from public funds or by providing carbon credits. The Copenhagen Accord calls for the “immediate establishment” of a mechanism to help mobilize resources for REDD-plus from developed countries and acknowledges the “need to provide positive incentives,”²⁴ but does not resolve the issue of public versus private support.

Adaptation. The Copenhagen Accord recognizes the “urgent” need for “enhanced action and international cooperation on adaptation,” and agrees that “developed countries shall provide adequate, predictable and sustainable financial resources, technology and capacity-building” to help implement adaptation actions in developing countries.²⁵

Monitoring, reporting, and verification. As with the mitigation issue, the discussions on MRV have concerned its level, as well as the parallelism/differentiation between developed and developing country MRV. The Copenhagen Accord calls for “rigorous, robust and transparent” MRV of Annex I emissions reductions and financing, “in accordance with existing and any further guidelines adopted by the Conference of the Parties.”²⁶ As noted above, supported NAMAs by developing countries will be subject to international MRV under guidelines

²⁰ *Id.*, para. 8.

²¹ *Id.*, para. 10.

²² *Id.*, para. 9.

²³ *Id.*, para. 8.

²⁴ *Id.*, para. 6.

²⁵ *Id.*, para. 3.

²⁶ *Id.*, para. 4.

adopted by the COP, while autonomous mitigation actions will be verified nationally and reported in national communications every two years, and will be subject to “international consultations and analysis” under international guidelines that ensure that national sovereignty is respected.²⁷

Legal form. The Copenhagen Accord sidesteps the issues about the legal form of the post-2012 climate regime. Although the penultimate draft of the COP decision accompanying the Copenhagen Accord called for the completion of negotiations on a new “legally binding instrument” at next year’s conference in Cancún, Mexico, this reference was deleted from the final version. As a result, the questions of one versus two outcomes and legal versus nonlegal form remain unresolved.

The Future of the Copenhagen Accord

Following agreement on the Copenhagen Accord by heads of state and government, the remaining question on the final night was how the Accord would be reflected in the official decisions of the conference. The Danes proposed that the Copenhagen Accord be adopted as a COP decision, which requires consensus (usually defined as the absence of formal objection). But a small group of countries that had played a spoiler role throughout the conference (led by Bolivia, Sudan, and Venezuela) objected, arguing that the negotiation of the Accord represented a “coup d’état” against the United Nations because it bypassed the formal meetings. After an all-night session, the impasse was ultimately broken by a decision to “take note of” the Copenhagen Accord,²⁸ which gives it some status in the UNFCCC process but not as much as endorsement by the COP. Those countries that wish to “associate” themselves with the Copenhagen Accord are to notify the UNFCCC Secretariat, for inclusion in the list of countries in the chapeau.

As of March 30, 2010, the UNFCCC Secretariat had received submissions from more than one hundred countries regarding their plans to reduce their GHG emissions and/or their wish to be associated with the Copenhagen Accord. In many cases, countries providing information on their mitigation actions have explicitly “associated” themselves with the Copenhagen Accord (including Brazil, China, the European Union and its member states, India, Japan, South Africa, and the United States), but, as of this writing, a few countries—most notably Russia—have not done so expressly.²⁹

The Copenhagen Accord asserts that it will be “operational immediately,”³⁰ but fully operationalizing its terms will require further acts—for example, the elaboration of the guidelines for “international consultations and analysis” of developing country communications, and the establishment of the various bodies envisioned in the Accord (the high-level panel to study potential sources of revenue, the Copenhagen Green Climate Fund, and a new technology mechanism). The terms of the Accord presume that this work will be carried out by the COP.

²⁷ *Id.*, para. 5.

²⁸ See *supra* note 5.

²⁹ For an up-to-date summary of national submissions related to the Copenhagen Accord, see US Climate Action Network, Who’s on Board with the Copenhagen Accord? at <http://www.usclimatenetwork.org/policy/copenhagen-accord-commitments>. For the submissions, see also Information Provided by Parties to the Convention Relating to the Copenhagen Accord, *supra* note 6.

³⁰ Accord, *supra* note 4, pmb1.

But given the COP's inability to adopt the Copenhagen Accord, this presumption appears tenuous at best.³¹ Thus, the future of the Accord may ultimately depend on the willingness of the "associators" group to elaborate it on their own as an independent agreement.

Meanwhile, the COP decided to extend the mandate of the Long-Term Action Working Group, which will continue to meet this year in parallel with the Protocol Working Group, "with a view to presenting the outcome of its work . . . for adoption" at the Cancún COP in late November–early December.³² It is hard to see what is likely to change, however, between now and then that would allow the ad hoc groups to adopt a stronger result there than leaders were able to achieve at the Copenhagen conference, unless the "associators" credibly threaten to go their own way, which appears highly doubtful.³³ The two ad hoc working groups will continue to work on the basis of the heavily bracketed draft decisions that were left unfinished in Copenhagen. And a proposal by the United States and others that the intended outcome be a legally binding agreement was opposed by India and Saudi Arabia, among others, and was not included in the COP decision extending the mandate of the Long-Term Action Working Group, so that the legal form of the intended outcome in Cancún remains open.

III. CONCLUDING OBSERVATIONS

Although the Copenhagen Accord has been criticized by some as inadequate or worse,³⁴ it represents a potentially significant breakthrough. True, the emission reduction pledges announced thus far do not put the world on a pathway to limiting climate change to 2°C, the ostensible long-term goal of the Accord.³⁵ But the participating states did agree to a bottom-up process in which they will list their national actions internationally and subject their actions

³¹ Indeed, Cuba has already challenged the authority of the UNFCCC Secretariat to compile submissions from states regarding their willingness to associate themselves with the Copenhagen Accord and/or their national mitigation targets or actions.

³² Outcome of the Work of the Ad Hoc Working Group on Long-Term Cooperative Action Under the Convention, Decision 1/CP.15, para. 1 (Dec. 18–19, 2009), in COP Report No. 15, *supra* note 4, at 3.

³³ After Copenhagen, the four BASIC countries (Brazil, China, India, and South Africa) issued a joint statement in which they "underscored the centrality of the UNFCCC process and the decision of the parties to carry forward the negotiations on the two tracks" of the two ad hoc working groups. Joint Statement Issued at the Conclusion of the Second Meeting of Ministers of BASIC Group, New Delhi (Jan. 24, 2010), *available at* <http://www.chinafaqs.org/files/chinainfo/BASIC%20Joint%20Statement%2024%20January%202010.pdf>.

³⁴ Lavanya Rajamani, for example, says that the Accord "can plausibly be characterized as 'rotten' not just because it is weak and will not contain climate change in its current form, but also because even in this weak form it faces considerable legal and procedural challenges to its operationalization." Lavanya Rajamani, Copenhagen Accord: Neither Fish nor Fowl 26, 26 (Feb. 2010) (Centre for Policy Research Seminar 606, paper), *available at* <http://www.cprindia.org/>. Similarly, Navroz Dubash refers to the Accord as a "paper-thin cover-up of what was a near complete failure," and suggests that the results in Copenhagen may "represent[] the worst possible outcome—the overlay of a thin veneer of success over what is a deeply flawed outcome, perpetuating a process that is unable to overcome entrenched differences." Navroz K. Dubash, *Copenhagen: Climate of Mistrust*, ECON. & POL. WKLY., Dec. 26, 2009, at 8, 9, 10, *available at id*.

³⁵ Kelly Levin & Rob Bradley, Comparability of Annex I Emission Reduction Pledges (Feb. 2010) (World Resources Inst. working paper), *at* <http://www.wri.org/publication/comparability-of-annexi-emission-reduction-pledges>; Press Release, Ecofys, Climate Action Tracker, Ambition of Only Two Developed Countries Sufficiently Stringent for 2°C (Feb. 2, 2010), *available at* <http://www.climateactiontracker.org/>. But according to Andrew Light of the Center for American Progress, the pledges put on the table thus far could achieve as much as two-thirds of the emissions reductions needed to achieve the 2°C target. Andrew Light, Progress from the Copenhagen Accord (Feb. 9, 2010) (Center for American Progress), *at* http://www.americanprogress.org/issues/2010/02/copenhagen_progress.html.

to some form of international scrutiny. In addition, the Accord articulates a quantified long-term goal for the first time (holding global warming below 2°C) and puts significant new funds on the table, for both the short and medium terms.³⁶

As a political necessity, the Copenhagen Accord continues to reflect the principle of common but differentiated responsibilities and respective capabilities, but does so very differently from the Kyoto Protocol, which emphasizes the differentiated rather than the common aspects of responsibility. The Copenhagen Accord continues to have a differentiated structure, envisioning two appendices, one for developed countries' economy-wide emission "targets," which will be subject to international MRV, and the other for developing countries' "actions," which will be subject to international MRV only if a mitigation action receives international support, and otherwise to national MRV. Nevertheless, the Copenhagen Accord reflects an apparent shift by the BASIC group countries (Brazil, China, India, and South Africa), which begins to break the so-called fire wall between developed and developing countries. For the first time, the major developing countries agreed to reflect their national emissions reduction pledges in an international instrument, to report on their GHG inventories and their mitigation actions in biennial national communications, and to subject their actions either to MRV (for internationally supported actions) or to "international consultations and analysis under clearly defined guidelines that will ensure that national sovereignty is respected" (for domestically supported actions). This may seem like a rather modest achievement; but it represents the first time that these countries have accepted any type of "internationalization" of their national climate change policies.

The Copenhagen conference is also notable, from a process standpoint, for several shifts in the negotiating dynamic. China was much more assertive than previously, reflecting its emergence as a global power, at one point thumbing its nose at the United States by sending a midlevel official to negotiate with President Obama; conversely, the European Union played a less central role. The fractures within the developing country negotiating bloc (the Group of 77) were more evident than ever; indeed, during the final session, a negotiator for one small island state publicly blamed the big developing countries for the failure to make more progress. Finally, the willingness and ability of a small group of countries that had previously played little role in the negotiations to block the adoption of the Copenhagen Accord showed the absurdity of the consensus decision-making rule.

Although many negotiators left Copenhagen with a sense that the UNFCCC process is broken, there is no viable alternative at the moment, which means that the ad hoc working groups will continue to meet and the negotiations will continue to revolve around the COPs. But if world leaders were unable to make further progress through direct negotiations, under an intense international spotlight, there is little reason to expect midlevel negotiators to be able to achieve a stronger outcome anytime soon. As a result, the Copenhagen Accord may well represent the high-water mark of the climate change regime for some time to come.

³⁶ For a similar view, see David Doniger, *The Copenhagen Accord: A Big Step Forward*, Posting to Nat. Resources Defense Council blog, <http://switchboard.nrdc.org/> (Dec. 21, 2009).