



THE FORUM

Was the Copenhagen summit a failure? What will the international climate change regime look like in the next three to five years?

A year ago, the hope was that the U.S. Congress would pass climate change legislation in 2009, followed by the triumphal rollout of a new, enforceable, mandatory program of national greenhouse gas emission reductions at the 15th meeting of the parties to the U.N. Framework Convention on Climate Change in December. Unfortunately, the negotiators and heads of state at the Copenhagen summit failed to pass a real successor to the convention's Kyoto Protocol, which governs emission during the period from 2008 to 2012 and contains enforceable limits for the world's industrial powerhouses.

Several nations, including both developed and developing countries, did come together on an agreement called the Copenhagen Accord, which establishes for the first time a call to restrict emissions of GHGs that applies to all countries alike, although developing countries will only be asked to reduce emissions intensity, not overall levels. In addition, the agreement establishes a top limit to global average temperature of 2 degrees Celsius.

But is that enough? What more is needed in terms of national commitments to make the next conference of the parties in Mexico later this year a success in bringing together all the world's economies in an enforceable emissions reduction regime?



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Head, Climate Change Practice
VAN NESS FELDMAN



“The alternative is years of dysfunctional international negotiations under the climate convention”

Bill Fang

Deputy General Counsel
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“The next step toward clarifying the regulatory environment for business is passage of bipartisan legislation.”

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“A fair assessment of the summit’s implications will turn on actions taken, or not taken, by the major players in 2010 and beyond”

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New and Improved Course for a Climate Regime

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To be sure, the Copenhagen talks did not produce a fully realized successor to the Kyoto Protocol. The three-page agreement salvaged from the chaotic conference may seem like a slim result for all of the hype that preceded COP-15.

However, the summit was by no means a failure. The Copenhagen Accord charts a new and improved course for the international climate change regime. Whether the negotiations can make further progress this year, however, is a real question.

The accord departs from the Kyoto Protocol architecture in important respects. For the first time, it establishes a long-term goal for the climate regime: limiting the increase in global temperatures to no more than 2 degrees Celsius. Most importantly, the accord breaks down the protocol's anachronistic distinction between "developed" countries and "developing" countries. The new agreement makes clear that all major emitting countries will make mitigation commitments. And, indeed, countries such as China, India, Brazil, and South Africa already have followed through on inscribing their national commitments into the accord's schedule. Most scientists believe these commitments fall short of what is needed to avoid a 2 degree increase, but it is a start.

The Copenhagen talks also made progress on the issue of verification of commitments. In the lead-up to the talks, China had dug in its heels on this issue, asserting that any such outside verification of commitments not supported by international funding would be an affront to its sovereignty. The accord nevertheless opens the door for such verification,

albeit subject to very conditioned and ambiguous language.

The agreement also includes provisions on financial assistance from developed to developing countries, establishing an overall objective of \$100 billion per year by 2020, with a "fast start" of \$30 billion by 2012. This pledge was central to earn the support of the least-developed countries.

The Copenhagen talks also witnessed breakthrough negotiations in two other areas: needed reforms to the Clean Development Mechanism, and groundrules for activities to reduce emissions from deforestation and degradation. These outcomes are not reflected in the accord but are no less important to the future climate policy architecture.

Finally, the chaos of Copenhagen seems to have contributed to the long overdue realization that other negotiation forums are needed. With nearly 200 countries participating and the decision rules based on consensus, the United Nations framework is a recipe for continued impasse. Expect more of the action to move to the G-20 and to the Major Economies Forum on Climate Change.

For all of these reasons, the December conference may have put international climate change cooperation on a vital new path. However, the likelihood that the climate negotiations can progress from the accord blueprint to a fully elaborated program may be a function of further developments in the United States. Other countries have limited incentives to follow through on mitigation commitments without corresponding action by the United States. And the financial assistance program relies significantly on participation by the United States.

Up until now, the Obama administration has contemplated that it would do its part through an economy-wide cap-and-trade program. In addition to establishing a robust mitigation commitment, this ap-

proach also would make it possible for the United States to meet its commitments for financial transfers without building up a new taxpayer-supported fund. The program could generate international funds through the auctioning of allowances and the purchase of international offsets.

Yet, it is far from clear that 2010 will see any U.S. legislation, and even the options currently under discussion are trending toward designs that make less use of a cap-and-trade approach. These developments could make it very difficult for the United States to do its part in building on the Copenhagen Accord.

Asked what the Constitutional Convention had produced, Benjamin Franklin said, "A republic, if you can keep it." Though less momentous than the events in Philadelphia two centuries ago, the Copenhagen talks established a constructive blueprint for a more effective international climate change regime. The question is how this progress can survive a rocky year of U.S. climate change politics.

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Negotiations May Need Another Kind of Forum

BILL FANG

The international negotiations culminating in the Copenhagen Accord had some positive outcomes from a business and industry viewpoint. These include the announcement of voluntary climate commitments from China and India and a concession from China that it would not be the recipient of direct international aid in the U.N. Framework Convention on Climate Change process. China will still receive international support for projects approved through the Kyoto Protocol's Clean Development Mechanism and through internationally financed climate-related projects.

But overall, even President Obama found the outcomes of COP-15 disappointing, and I would characterize them as modest. Subsequent to COP-15, the climate convention's secretary announced that the January 31 deadline for the submittal of party commitments pursuant to the Copenhagen Accord had been waived. Fifty-six countries made submittals on or around that date, but a closer examination of those pledges reveals that the key commitments were from seven major developed nations, the European Union on behalf of its member states, and six major developing countries.

The World Resource Institute's analysis of those pledges indicates that they fall far short of the range of emissions reductions that the Intergovernmental Panel on Climate Change says will be necessary for stabilizing atmospheric concentrations of greenhouse gases at 450 parts per million. Moreover, only two sets of negotiation sessions are

currently scheduled for this year under the climate convention, while last year five such sessions were held. And there are already indications that expectations are being lowered for COP-16 in Cancun, Mexico.

Under these circumstances, what can be considered a good path forward for the international community negotiating a successor to the first commitment period (i.e., post-2008–12) under the Kyoto Protocol? First, as many observers have recommended, it is well nigh time to consider alternative approaches. Frank Loy, under secretary of state in the Clinton administration, and Michael Levi have suggested a two-track international process, under which the major emitting nations (developed and developing) would negotiate significant GHG emissions reductions, and some form of the U.N. process would continue to address adaptation and funding needs of developing countries.

The Edison Electric Institute and other observers have pointed out that 20 countries are responsible for more than 80 percent of global greenhouse gas emissions. State Department officials and academics have seized upon this fundamental geopolitical fact to suggest that a relatively small number of countries should get together in a room and work out not only emission reductions, but also related energy, economic, and trade issues. This international track could be pursued under the aegis of the Major Economies Forum or an expanded G-8, G-20, or other multilateral negotiation process.

French President Nicolas Sarkozy recently proposed a balanced, representative group of 28 unnamed countries to provide ideas and prepare for the next rounds of negotiations culminating in COP-16. "The wisest option would be to pursue a twin strategy," he said, "talks among the 192 [nations], as that involves the whole international community, and among ministers and sherpas

from the Group of 28."

While including other major issues in the second track of international negotiations besides climate change could well be biting off too much, many have observed that it is simply a political reality to acknowledge that climate, energy, economics, and trade are intertwined. The battles over climate and energy legislation in the U.S. Congress have certainly brought all of these issues to the fore, and that is where those issues will land once a new binding international treaty or protocol is brought to the Senate for ratification and, assuming ratification, in the Congress for implementing legislation.

Admittedly, a two-track international process could be cumbersome and unwieldy, and could face many of the same problems that have plagued the climate convention process. But let's consider the alternative: two or three more years of grindingly dysfunctional international negotiations under the climate convention umbrella. COP-16 in Cancun and COP-17 in Johannesburg, South Africa, conceivably could be worse than Copenhagen. And barring negotiating breakthroughs, the protocol's first commitment period will be over with no succeeding binding international commitments.

Faced with such a likely scenario, the Obama administration and State Department should consider alternative international negotiating paths, such as a two-track process or forums outside of the U.N. process.

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After Summit, We Need the Senate to Act

MEGHAN MCGUINNESS

The Copenhagen talks were rescued from the brink of failure when President Obama and other key heads of state stepped in and drafted the three-page Copenhagen Accord. The agreement provides a vehicle for major emitters — most notably the United States, China, and India — to formalize mitigation commitments, establishes requirements for verification and transparency, and commits funding to developing country adaptation and mitigation. It thus represents an unprecedented level of cooperation between developed and developing nations in the global effort to address climate change.

However, the practical implications of the accord — and prospects for further international cooperation — will ultimately depend on the follow-through of its largest signatories, primarily the United States. The necessary next step toward clarifying the regulatory environment for business and maintaining momentum in the international process is passage in the Senate of bipartisan legislation that places a binding cap on greenhouse gas emissions.

On its own, the accord does little to resolve the present regulatory uncertainty facing U.S. businesses, and after Copenhagen there remains a great deal of uncertainty regarding how international talks will progress. It is reasonable to assume that in the next few months, the eyes of major signatories will be on Capitol Hill.

Under the accord, the United States has committed to a target of 17 percent below 2005 emissions levels, consistent with legislation that passed the House of Representatives. China and India have

committed to emissions intensity targets (emissions per unit of output), as well as provisions that will promote transparency in monitoring and verification. A lack of action in the Senate will prolong the current environment of regulatory uncertainty, and also limit the willingness of China and India to aggressively pursue their own targets, potentially crippling prospects for a binding international agreement in Mexico City later this year.

The good news is that through his participation in Copenhagen, emphasis on passing a comprehensive climate and energy bill in the State of the Union, and the formal announcement of U.S. targets, President Obama has sent a clear signal to Senate leaders and the rest of the world that his administration is serious about addressing climate change. However, bringing a sufficient number of moderate Republicans and Democrats on board — particularly those from coal or industry-intensive states — will remain a challenge.

While the commitments made by China and India may help persuade some moderate senators to more aggressively support an emissions cap, those who remain opposed to climate legislation are likely to question the veracity of the commitments made by these two countries, and continue to raise the complaint that they are not “legally binding.” Furthermore, enduring concerns about the economy, jobs, and financial markets, and the absence of closure on health care, are likely to further limit the willingness of the Senate to tackle climate legislation. Ultimately, successful passage of limits on greenhouse gas emissions will require sustained leadership from both the president and key moderates on the right and left, and the careful crafting of a bill that limits economic impacts and emphasizes energy security and jobs in addition to climate.

Since Kerry-Boxer failed to get

sufficient bipartisan support, the fundamental form of a climate program under a passable Senate bill remains an open question. Will there be enough support in the upper chamber for an economy-wide cap-and-trade program, or will it be necessary to scale back or address sectors individually? How will the U.S. program respond to a lack of “commensurate” action by developing countries? To what extent will the use of domestic and international offsets be permitted?

Beyond the fundamental structure, important distributional and budgetary questions persist. If the bill raises revenues, how should they be distributed among stakeholders considering inequities in impacts between regions or industries? And if it does not, or does so to a more limited degree than economy-wide cap-and-trade, how will complementary programs (that are likely necessary for passage) be funded?

In the absence of climate legislation, EPA has triggered the process to commence regulation of greenhouse gases under the Clean Air Act. While it is conceivable that the agency could attempt to use its authority under the act to achieve the Copenhagen targets, it is almost certain that any rules requiring substantial reductions will be delayed by litigation, and it remains possible that Congress will intervene to limit EPA’s authority with respect to greenhouse gases.

For both the agency and the potentially regulated, legislation remains the preferred approach. Senate action represents the best chance for making real the reductions promised by the accord, reducing regulatory uncertainty, and continuing to advance international cooperation.

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From Copenhagen, An Arduous Path Forward

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Whether COP 15 and the Copenhagen Accord mark the beginning of a promising new chapter in climate diplomacy remains to be seen. Perspective is hard to attain today, not only because of a natural tendency to indulge thoughts of “what might have been,” but because a fair assessment of the summit’s implications will turn largely on actions taken, or not taken, by the major players in this saga in 2010 and beyond. As the Obama administration signaled before going over to Denmark (and most stakeholders came to grudgingly accept), a comprehensive global treaty was not in the offing. The last-minute, highly political accord reflects an effort by several key heads of state to secure something of value; time will tell if it marks a “breakthrough” of lasting consequence.

Optimists can point to developments at and post Copenhagen as harbingers of favorable things to come. Nations participating in the accord agreed to seek to limit average global temperature increase to 2 degrees Celsius or less, and made progress on an issue that has long vexed negotiators: the monitoring, reporting, and verification of national mitigation actions. The accord also manifests developed countries’ commitment to provide substantial funding for developing country mitigation, adaptation, technology transfer, and capacity-building. Follow-on emission reduction pledges filed with the United Nations by countries emitting two-thirds of the world’s carbon dioxide (including the United States, China, several European Union nations, India,

and Brazil) affirm pledges made in Copenhagen and, if honored in keeping with upper range estimates, could have an important impact going forward. The unprecedented degree of public-private collaboration underway to enhance corporate GHG performance and competitiveness, expand the role of carbon finance, and spur deployment of low-carbon technologies and services is also meaningful.

The framers of the Copenhagen Accord left much of the heavy lifting for another day. The United States, for example, has still to forge political compromise around measures to generate cuts in greenhouse gas emissions at levels being contemplated under the framework conceived in Denmark. The scale of this national challenge, and that of securing the promised mitigation and adaptation funds (e.g., the \$646m requested in fiscal year 2011 for State Department and U.S. AID initiatives covering adaptation, clean energy, and sustainable landscapes), will remain hard to overestimate until policymakers can articulate approaches that more closely reflect the balance of prevailing American sentiment vis-a-vis other concerns, chiefly the economy and global competitiveness, unemployment, and energy security. Leading emerging economies that have registered pledges, such as India and Brazil but especially China, will be pressed to provide the degree of transparency necessary to assess their performance.

The combined threats associated with climate change and biodiversity loss call for a deeper commitment of resources and investment from both public and private sector sources, and thoughtful use of incentives and other policy instruments that harness market forces to generate sustainable benefits. These include measures to reduce GHG emissions from deforestation and degradation, or REDD. Governments, communities, and project developers

are designing national-level REDD programs and integrating formerly isolated site-based projects into full-scale national programs that address forest-related and cross-sectoral deforestation and degradation drivers.

Over the past decade, project developers have documented the effectiveness of REDD projects to contribute to climate mitigation, biodiversity conservation, and community benefits. Funding of REDD endeavors by both bi- and multilateral government sources is expanding but still limited, and nowhere near the \$10–30 billion estimated to be annually required to address deforestation and forest degradation at the global level. Thus, a notable accomplishment in Copenhagen, and one that aligns well with domestic legislative proposals was the agreement to create a mechanism to mobilize funds to reduce emissions from REDD and support conservation.

The broader implications and enduring significance of COP-15 will come into sharper focus in months ahead. With persisting uncertainty in both the international and domestic policy arenas, business leaders should continue to inform efforts in both spheres and adopt management strategies that position for success under a range of scenarios, working closely with their stakeholders. Meanwhile, between Copenhagen and Mexico City (and likely, beyond), negotiators in U.N. and other forums can meaningfully advance the climate cause by improving, and expanding the role played by, carbon financing mechanisms.

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Moving Beyond Headlines to Making History

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The Copenhagen Accord made headlines when heads of state and government from both developed and developing countries, representing the bulk of global greenhouse gas emissions called on all countries to pledge specific emissions reduction actions by the end of January. When the accord's deadline passed, 95 of the U.N. Framework Convention's 192 parties had responded. Of these, 38 developed countries and 27 developing countries lodged their targets and actions with the United Nations.

Unfortunately, these pledges fall well short of the deep cuts in emissions that will be necessary to keep global temperatures at safe levels. If the accord is going to make history as well as headlines, it must be the first of many speedy and determined steps.

What might these this next steps look like? The last minute procedural chaos that produced the accord wasn't planned, nor could it likely be repeated. Over a hundred heads of state and government arrived in the last days of the conference to discover their delegations deadlocked. The final deal was hammered out in the last hours among five governments key to climate's future and with a shared reluctance to make specific commitments: the United States and the BASIC countries (Brazil, South Africa, India, and China).

When the accord was brought back to the conference as a whole, those that felt excluded from the process and disappointed with the results blocked consensus, and the pact was given no official status as a climate convention document. It was merely taken note of. The

institutional and legal legacy of the accord was thus difficult to divine. The answer will lie with actions of governments and, in particular, the five most responsible for its content.

Hopes that this "Copenhagen 5" would lead a new process outside the climate convention and around the content of the accord have faded quickly. While collectively supportive of the agreement in the immediate aftermath of Copenhagen, the BASIC countries have since signaled strongly their desire to return to the U.N. process rather than pursue smaller leadership forums, like the G-20. While each of the five has met the accord deadline, the BASIC are the only countries that have not also formally "associated themselves" with the accord. Indeed China and India did not mention the Copenhagen agreement in their submissions. This seems best read as an effort to ensure that the accord's contribution be limited to informing future developments in the climate convention and Kyoto Protocol.

The accord and its appendices of targets and actions are not legally binding. A sentence in an early draft that would have called on parties to convert these pledges into legal text at the next COP was removed by China's refusal to contemplate legally binding commitments and the U.S. refusal to be bound without China. While the response to the accord's deadline is promising, its declining status among the BASIC countries and the anger it continues to provoke from many climate convention parties raises questions as to how the pact will fare once the U.N. process is back underway.

The indeterminate relationship between the accord and the climate convention process may leave us with an informal and open ended process of "pledge and review," nested in the formal and cumbersome institutions of a legally binding treaty body (the climate convention's Conferences of the Parties). Does the legal character of the commit-

ments matter? After Copenhagen, many have begun to dismiss the importance of a future climate agreement's legal character as way of shaping or predicting state behavior. It's the actions listed in the accord's appendices, and not the legal character, which counts.

But the aversion of countries to be legally bound may in part be an answer to the question of whether countries are going to act, to act in concert, to act with an expectation of accountability and to act quickly enough to make a difference. The legally binding nature of an agreement has value beyond the question of enforceability. It is the highest form of expression of political will; it binds countries beyond the present political leadership; it often requires ratification, which imbeds it in domestic law; and it leads to a much more significant investment by the international community in the institutional and procedural capacity necessary to promote compliance. As several World Trade Organization disputes indicate, the legal character of an international environmental agreement and who is party to it is also deeply relevant to how dispute settlement processes will view the relative importance of climate and trade policy.

The unpredictability of what may happen next is thus due in part to an unprecedented political advance, but with a document that leaves us with few legal and institutional precedents to rely on.

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