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State of Play: Changing Climate at Copenhagen

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Introduction

Behind the current drama of climate change politics, international and domestic law play a key role, both facilitating and inhibiting progress on the Bali Action Plan (BAP).[1] The BAP is the roadmap to negotiations that calls for parties to the United Nations Framework Convention on Climate Change (UNFCCC, the Convention)[2] to agree on:

- A shared vision for long-term cooperative action on climate change, including a long-term global goal for greenhouse gas (GHG) emissions reductions.
- Nationally appropriate climate change mitigation commitments and actions, including action on deforestation and sector-specific actions.
- Enhanced action on adaptation to climate change, including risk management strategies and disaster risk reduction strategies. Climate models predict that the world's poorest countries, historically known for contributing the least to the problem, will experience the most severe impacts of climate change. Disaster risk reduction, disaster insurance for poor farmers and entire countries, migration of individuals and populations from uninhabitable regions, and the legal status of sovereign States whose territory is submerged by sea level rise are among the adaptation issues that are addressed in the draft negotiating text.
- Technology development and transfer for mitigation and adaptation. The innovation and deployment of green technology – solar panels, wind turbines, smart grid technology and biofuels, for example – offers potential wealth, the hope of access to energy for the one and a half billion people who lack even basic electricity,[3] and the main strategy for achieving GHG reduction targets. Intellectual property rights that might be used to protect profits from and restrict access to green technology are one of the toughest issues in the technology transfer discussions. Developing countries see compulsory licensing of green technologies as a matter of justice.[4] But experts argue that the real

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limitation on technology deployment in developing countries is know-how, not intellectual property.[5] Others argue that developing countries, particularly advanced developing countries like China and India, are economic competitors that may even be leading innovation in green technologies. This is a debate that may spill over into the World Trade Organization.

- Provision of additional financial resources. Financial transfers to developing countries are one of the most important elements of the negotiation. How funds will be made available, through what institutions, and with what kind of accountability are points of conflict. The source of funds is a matter of concern for receiving countries, since past promises have not been satisfied by most developed countries.

The timetable set in the BAP decision anticipated that a protocol to the Convention would be signed at the fifteenth Conference of the Parties (COP15) to the UNFCCC in Copenhagen.

However, during the COP15 meeting, which started on December 7 and will continue until December 18, 2009, there will be no "Copenhagen Protocol." U.S. President Obama and the conference host, Prime Minister Rasmussen of Denmark, announced that there would be no "legally binding" agreement at this meeting. Instead, they offered the opportunity to work for another year, and they agreed to make progress at Copenhagen toward a deal. It is encouraging that the Obama Administration has stood by its original commitment to the United Nations as the primary negotiating forum, while still pursuing bilateral contacts with China and India, and using other fora – such as the Major Economies Forum on Energy and Climate (MEF) – to advance the climate change negotiations.

Leaders of the major GHG-emitting countries have since volunteered emissions reduction goals. President Obama proposed a reduction of seventeen percent from historic 2005 baseline levels by 2020 "in the context of an overall deal in Copenhagen that includes robust mitigation contributions from China and the other emerging economies."[6] China announced that it will reduce the intensity of carbon dioxide emissions per unit of GDP by forty to forty-five percent compared with levels in 2005.[7] The European Parliament has already set its own legally binding emissions reductions of twenty percent from 1990 levels by 2020.[8]

These numbers are not sufficient to keep the global temperature within the 2°C. increase that world leaders promised at the G8/Major Economies Forum.[9] The ultimate goals of the negotiations are driven by scientific observations of current planetary change and predictions of worse to come in the future. Average per capita GHG emissions in the U.S. are about 18.7 tons; in China, current emissions average about 4.6 tons per capita; in the European Union, the average is about 7.8 tons per capita.[10] To stabilize at the desired level, global GHG emissions must start to decline rapidly by 2020, and by mid-century they should be reduced to about one ton of CO_2 per capita.[11]

Even if this stringent goal is obtained, serious effects of global warming remain to be addressed, including flooding, drought, severe weather, and

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damaging effects on the oceans. Vulnerable human populations and ecosystems will need to adapt to the new conditions. The 1992 Convention addresses all of the issues in general terms, and the current negotiations under the Bali Action Plan are intended to provide the specifics.

A Little History

To put this in perspective, it has only been a few months since President Obama named his special envoys for climate change, and the United States began to re-engage seriously in the current round of climate change negotiations. The United States was a leader back in 1992, when it joined other States committed to preventing "dangerous anthropogenic interference with the climate system"[12] by ratifying the United Nations Framework Convention on Climate Change. By using a framework approach, the early negotiators were able to get almost universal participation in the first global climate agreement.[13] The specifics of how to achieve the goals of the Convention were to be filled in, and legally binding GHG emissions reduction targets for industrialized nations were to be established in the Kyoto Protocol.[14] Although the U.S. signed the Protocol when it came in force in 2005, the U.S. did not ratify it and probably never will. The U.S. Senate, by a vote of 95-0, stated in part that "the United States should not be a signatory to any protocol to, or other agreement regarding, the United Nations Framework Convention on Climate Change of 1992 . . . which would . . . mandate new commitments to limit or reduce GHG emissions for the Annex I Parties, unless the protocol or other agreement also mandates new specific scheduled commitments to limit or reduce GHG emissions for Developing Country Parties within the same compliance period."[15]

Binding Commitments?

The U.S. position on "legally binding" international agreements is a factor in the negotiations. If the U.S. signs a treaty, ratifies it, and passes implementing legislation, U.S. compliance with its commitments is virtually assured. The President can sign a climate treaty, but he relies on two-thirds of the Senate vote to ratify for it to become law,[16] and Congress must subsequently pass implementing legislation.[17] But judging from expressions of opposition to recent legislative proposals, sufficient votes for ratification of a climate change agreement are not assured; the President may decide to wait until Congress passes a climate change bill before making an international commitment that requires Senate ratification.

Other options may be available for advancing the international climate change agenda with U.S. participation, even without Senate ratification. It has been proposed, for example, that a congressional-executive agreement could be used instead of a treaty.[18] The President has frequently used this constitutional authority; since the early twentieth century, over ninety percent of international agreements have been done as executive agreements rather than as treaties.[19] However, such a move would appear to contradict a statement in the Senate Foreign Relations Committee report on ratification of the UNFCCC that "a decision by the Conference of the Parties to adopt targets and timetables would have to be submitted to the Senate for its advice and consent before the United States could deposit its instruments of ratification for such an agreement."[20] Still, measures related to adaptation,

technology transfer and finance might be handled this way.

Emissions reduction targets could also be based on steps that the executive has already taken under existing legislation. The U.S. Environmental Protection Agency (EPA) is in the process of regulating GHG emissions under the Clean Air Act.[21] The EPA initiated new federal GHG emission standards for motor vehicles, and the Administrator has already granted a waiver of Clean Air Act preemption to California, allowing the state law to go into effect immediately.[22] These and other executive measures are promising, firm commitments, although they will not provide full measure of emissions reductions called for at Copenhagen.

Similarly, other major emitters that are not already bound to GHG reductions under the Kyoto Protocol – including China, India, and Brazil – have announced a variety of voluntary national actions while continuing to reject mandatory targets and timetables.[23] These countries are expected to undertake "nationally appropriate mitigation actions" (NAMAs) that take into account the principle of "common but differentiated responsibility" that recognizes their need to develop their economies.

Measuring, Reporting and Verifying

The Bali Action Plan calls for commitments regarding mitigation and financial support to be "measurable, reportable and verifiable." This is an area where real progress may be made at Copenhagen. Whether the commitments made at Copenhagen are in the form of a legal obligation or only a political commitment, every government is concerned that its negotiating partners follow through. Sovereignty and compliance concerns will have to be reconciled to achieve this aim. Key points under discussion will be:

- Establishing a registry of mitigation actions and support;
- Building a framework for international verification of mitigation actions;
- Measuring, reporting and verifying of financial support; and
- Elaborating of national climate action plans.[24]

Two-Track Negotiation

Managing a two-track negotiation is a serious headache; nonetheless, two parallel sets of meetings run concurrently through these negotiations. One track, which addresses the issues outlined by the Bali Action Plan, can result in decisions or other actions under the legal authority of the Framework Convention. The other track is on issues relating to the Kyoto Protocol, discussions in which the U.S. does not participate because it is a not a party to the Protocol. In 2005, Kyoto Protocol parties began to negotiate emissions reductions in the next commitment period for the thirty-seven industrialized nations (Annex I), binding themselves to reduction targets for 2008 to 2012.[25] If there is no further agreement, the Kyoto Protocol will continue to exist, but the legal obligations that are its essential purpose will have expired. The Kyoto parties will not relinquish what they have already achieved, but the U.S. will not join them in negotiating new mitigation measures under the Kyoto Protocol. Therefore, discussions go forward on both the Convention and the Protocol.

With the announcement that the goal for COP15 is no longer a

"Copenhagen Protocol," the decision on integrating the Convention and Protocol negotiations or coordinating two separate outcomes can be deferred. Most issues under discussion – adaptation, technology transfer, and finance – can be coordinated or can be addressed within the BAP negotiations under the Convention.[26] Mitigation is the most difficult of the issues to manage, and the bifurcation of the Convention-Protocol negotiations also means that if the U.S. eventually decides to adopt emissions trading, it will not join the pre-existing global market created under the Kyoto Protocol. Managing and eventually linking a U.S. carbon market with the Kyoto markets is one of the challenges resulting from the two tracks that would best be addressed in these negotiations, but which cannot progress until the U.S. position is clarified by Congressional action.

Looking Forward

Given the complexity of the task and the late re-engagement of the U.S. in the negotiations, the extension of the BAP process for another year (or so) is neither surprising nor regrettable. Managing climate change is fundamentally different from eliminating ozone-depleting substances or controlling nuclear technology: it touches on virtually every aspect of the modern global economy. New cross-cutting issues continue to arise, from technology development to human rights, under the umbrella of climate change policy. International cooperation on climate change, if it is successful, will continue long after the Bali/Copenhagen round of negotiations.

About the Author

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Endnotes

[1] United Nations Framework Convention on Climate Change, Conference of the Parties, Dec. 3-15, 2007, *Report of the Conference of the Parties on its Thirteenth Session*, Addendum, Decision 1-CP.13 FCCC/CP/2007/6/Add.1 (Mar. 14, 2008), *available at* http://unfccc.int/resource/docs/2007/cop13/eng/06a01.pdf [hereinafter *Bali Action Plan*].

[2] United Nations Framework Convention on Climate Change, *opened for signature* May 9, 1992, S. Treaty Doc. No. 102-38, 1771 U.N.T.S. 164, *reprinted in* 31 I.L.M. 849 (1992) [hereinafter UNFCCC].

[3] GWÉNAËLLE LEGROS ET AL., THE ENERGY ACCESS SITUATION IN DEVELOPING COUNTRIES: A REVIEW FOCUSING ON THE LEAST DEVELOPED COUNTRIES AND SUB-SAHARAN AFRICA (World Health Organization [WHO], U.N. Development Programme) (2009), *available at* http://content.undp.org/go/cms-service/stream/asset/?asset_id=2198998.

[4] Proposal by the G77 & China for a Technology Mechanism under the UNFCCC, *available at* http://unfccc.int/files/meetings/ad_hoc_working_groups/lca/application/pdf/technology_proposal_g77_8.pdf.

[5] JOHN H. BARTON, ICTSD TRADE AND SUSTAINABLE ENERGY SERIES ISSUE PAPER: INTELLECTUAL PROPERTY AND ACCESS TO CLEAN ENERGY TECHNOLOGIES IN DEVELOPING COUNTRIES: AN ANALYSIS OF SOLAR PHOTOVOLTAIC, BIOFUELS AND WIND TECHNOLOGIES (2007), *available at* http://ictsd.org/i/publications/3354/.

[6] Press Release, The White House, Support for President's Copenhagen Announcement Receives Immediate Support (Nov. 25, 2009), *available at* http://www.whitehouse.gov/the-press-office/support-president-s-copenhagen-announcement-receives-immediate-support. This is about three percent below the 1990 baseline. The bill, passed by the U.S. House of Representatives this summer, provides for large emitters in the U.S. to reduce their emissions by this amount. *See* American Clean Energy and Security Act of 2009, H.R. 2454, 111th Cong. (2009) (emission reductions of 17% below 2005 levels by 2020, and 83% by 2050). A bill pending in the Senate offers a somewhat more ambitious 20% reduction from a 2005 baseline. *See* Clean Energy Jobs and American Power Act, S.1733, 111th Cong. (2009), *available at* http://kerry.senate.gov/cleanenergyjobsandamericanpower/intro.cfm.

[7] Li Xianzhi, *China Announces Targets on Carbon Emission Cuts*, CHINA VIEW, Nov. 26, 2009, *available at* http://news.xinhuanet.com/english/2009-11/26/content_12544181.htm. This would still allow China's overall emissions to rise as its GDP increases.

[8] Press release, European Commission, Climate Change: Commission Welcomes Final Adoption of Europe's Climate and Energy Package, IP/08/1998 (Dec. 17, 2008), *available at* http://europa.eu/rapid/pressReleasesAction.do?reference=IP/08/1998.

[9] A 2°C. average global temperature increase is associated with atmospheric greenhouse-gas concentrations of 450 ppm CO2-equivalent. *See* International Energy Agency, *World Energy Outlook 2009 Fact Sheet: What might a low-carbon energy future look like?* (Nov. 10, 2009), *available at* http://www.worldenergyoutlook.org/docs/weo2009/fact_sheets_WEO_2009.pdf.

[10] International Energy Agency, *World Energy Outlook* (Nov. 10, 2009), *available at* http://www.worldenergyoutlook.org/.

[11] IAN ALLISON ET AL., THE COPENHAGEN DIAGNOSIS, 2009: UPDATING THE WORLD ON THE LATEST CLIMATE SCIENCE 60 (2009), *available at* http://www.ccrc.unsw.edu.au/Copenhagen/Copenhagen_Diagnosis_LOW.pdf.

[12] UNFCCC art. 2.

[13] 192 countries are parties to the UNFCCC.

[14] The Kyoto Protocol sets targets for six of the most important climate-forcing gases: Carbon dioxide (CO2); Methane (CH4); Nitrous oxide (N2O); Hydrofluorocarbons (HFCs); Perfluorocarbons (PFCs); and Sulfur hexafluoride (SF6). Kyoto Protocol to the UN Framework Convention on

Climate Change, Dec. 10, 1997, U.N. Doc. FCCC/CP/1997/7/Add.2, *reprinted in* 37 I.L.M. 22 (1998) [hereinafter Kyoto Protocol] (the Protocol entered into force on February 16, 2005).

[15] Res. 98, 105th Cong. (1997) [hereinafter Byrd-Hagel Resolution].

[16] U.S. CONST. art. 2.

[17] *See* ABA/ASIL, JOINT TASK FORCE ON TREATIES IN U.S. LAW (Mar. 16, 2009), *available at* http://www.asil.org/files/TreatiesTaskForceReport.pdf.

[18] There are about 15,000 executive agreements to which the U.S. is a party. *See* Nigel Purvis, *Paving the Way for U.S. Climate Leadership: The Case for Executive Agreements and Climate Protection Authority* (Apr. 2008), *available at* http://www.rff.org/documents/RFF-DP-08-09.pdf.

[19] *See* Oona A. Hathaway, *Treaties' End: The Past, Present, and Future of International Lawmaking in the United States*, 117 Yale L.J. 1236 (2008).

[20] DAVID M. ACKERMAN, CONG. RESEARCH SERV., CRS REPORT FOR CONGRESS: GLOBAL CLIMATE CHANGE: SELECTED LEGAL QUESTIONS ABOUT THE KYOTO PROTOCOL (1998).

[21] The EPA Administrator launched the process in June 2009, when she made a proposed finding that the current and projected concentrations of the mix of six key greenhouse gases in the atmosphere threaten the public health and welfare of current and future generations. This follows the U.S. Supreme Court decision on April 2, 2007, in *Massachusetts v. EPA*, 549 U.S. 497 (2007), finding that greenhouse gases are air pollutants covered by the Clean Air Act, *available at* http://epa.gov/climatechange/endangerment.html.

[22] Notice, 74 Fed. Reg. 32744, No. 129 (July 8, 2009), *available at* http://epa.gov/otaq/climate/ca-waiver.htm.

[23] *See, e.g.*, SUSAN R. FLETCHER & LARRY PARKER, CONG. RESEARCH SERV., CRS REPORT FOR CONGRESS: CLIMATE CHANGE: THE KYOTO PROTOCOL, BALI "ACTION PLAN," AND INTERNATIONAL ACTIONS (2008), *available at* http://ncseonline.org/NLE/CRSreports/08Jun/RL33826.pdf.

[24] *See* Hilary McMahon & Remi Moncel, *Keeping Track: National Positions and Design Elements of an MRV Framework* (World Resources Institute, Working Paper, June 2009), *available at* http://pdf.wri.org/working_papers/keeping_track_mrv.pdf. *See also* CLARE BREIDENICH & DANIEL BODANSKY, PEW CTR. REPORT: MEASUREMENT, REPORTING AND VERIFICATION IN A POST-2012 CLIMATE AGREEMENT (2009), *available at* http://www.pewclimate.org/docUploads/mrv-report.pdf.

[25] The Kyoto Protocol negotiations take place within the Ad Hoc Working Group on Further Commitments for Annex I Parties under the Kyoto Protocol (AWG-KP).

[26] For a discussion of the options available, *see* Daniel Bodansky, *Legal Form of a New Climate Agreement: Avenues and Options* (Pew Ctr. April

2009), *available at* http://www.pewclimate.org/docUploads/legal-form-of-new-climate-agreement-paper.pdf.