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# The Legacy of the Climate Talks in Copenhagen: Hopenhagen or Brokenhagen?

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## Introduction

In December, 2009, the most anticipated climate change negotiations in a decade took place in Copenhagen, Denmark.<sup>1</sup> For two weeks, climate change took center stage with high expectations for a comprehensive global agreement on how to tackle climate change, generally recognized as one of the most complex challenges facing the human race. Well over half of the 193 parties attending the negotiations were represented by their head of state or government, making Copenhagen the largest gathering of heads of state outside New York. However, instead of making headlines with a comprehensive climate deal, Copenhagen made headlines with continuing divisions over substance, with open battles over the negotiation process, with the gradual exclusion of civil society from the process, and with demonstrations throughout Copenhagen involving up to 100,000 individuals representing a broad range of civil society.<sup>2</sup>

This article explores what took place in Copenhagen and what it may mean for the future of the climate change regime. It does so in five parts. In Part I, the article briefly considers the context within which the Copenhagen negotiations took place. In Parts II and III the substance and negotiating dynamics are assessed. Part IV considers the path forward from Copenhagen under the United Nations Framework Convention on Climate Change (UNFCCC).<sup>3</sup> The article concludes in Part V by considering some alternatives to the current approach to climate change under the UNFCCC.

Copenhagen was to mark the end of 2 years of formal negotiations toward a comprehensive global climate change regime to take effect in 2013. With the entry into force of the Kyoto Protocol in 2005, parties had started to shift their attention to the design of the post-2012 climate regime.<sup>4</sup> By 2007, time was short, so the Bali Action Plan provided a two year mandate to negotiate a final agreement on the post-2012 regime by the 15<sup>th</sup> Conference of the Parties (COP 15) in Copenhagen.<sup>5</sup>

Limited progress was made in the first year of negotiations under the Bali Action Plan. After a year of waiting for the new administration in the United States of America (US), negotiations in 2009 proceeded with a sense of urgency not seen in the climate negotiations since the

development of the Marrakech Accords in 2001.<sup>6</sup> UNFCCC led sessions in Bonn, Bangkok, and Barcelona as well as high level consultations in a range of other forums during the course of 2009 laid the foundation for two weeks of intense and complex negotiations in Copenhagen in December. In the end, Copenhagen resulted only in limited agreement on substance. The main consensus agreement was to extend the negotiations. A limited number of parties negotiated an interim agreement in the form of the Copenhagen Accord, but it was not formally adopted because it did not have universal support. It remains to be seen whether the Accord will receive broad based support from Parties.<sup>7</sup>

It is clear that these outcomes in Copenhagen are insufficient by themselves to move the international regime significantly toward its ultimate objective of preventing dangerous human interference with the climate system. What is less clear, and what is explored below, is whether Copenhagen's legacy will be one of laying the foundation for an adequate, fair and comprehensive global response to climate change, or whether it signals the failure of the United Nations (UN) led process to deal with this global challenge.

## **Part I: The Context for the 2009 Copenhagen Climate Talks**

It is important to consider the positions of the 193 participating nations and the outcomes of the Copenhagen negotiations in their historical context, not just from Bali, but from the start of the regime in the early 1990s.<sup>8</sup> Most significant in this regard is the UNFCCC, which still provides the foundation for the regime, and which has been formally endorsed by all Nations participating in the negotiations. It seeks to define both the adequacy of the overall effort and the basis on which the burdens and benefits of climate change and mitigation efforts are to be distributed. In spite of a number of provisions in the preamble and Articles 2 to 4 of the UNFCCC on adequacy and fairness, the climate change negotiations have, however, been plagued by a great diversity of views on both issues.<sup>9</sup>

The standard for adequacy set in Article 2 of the UNFCCC is the prevention of dangerous human interference with the climate system causing irreversible harm to nature, food production and sustainable development. There were no serious efforts to further clarify or quantify the adequacy of collective mitigation efforts during the Kyoto round of negotiations. This changed around 2005, when concrete proposals on how to define adequacy were first introduced.<sup>10</sup> Since then, three positions have developed on adequacy. Currently the dominant view among Parties is that 2 degrees is the maximum increase in global average temperature that can be considered adequate under Article 2. Small island states and many African nations have taken the view that 1.5 degrees is a more appropriate maximum. At the other end, a few nations still appear to hold the view that temperature increases above 2 degrees may be manageable.<sup>11</sup>

While the issue of adequacy has only recently been considered seriously, the issue of fairness has been dominant in the climate change negotiations since the entry into force of the UNFCCC in 1994.<sup>12</sup> Broadly speaking, three principles have dominated the ongoing debate on how the burdens and benefits of mitigation should be distributed among Parties, the principles of potential, capacity and historical responsibility.<sup>13</sup> Potential refers to the ability of a Party to achieve emission reductions. A country will have high potential if it can easily reduce emissions or avoid increases of future emissions<sup>14</sup>. Capacity refers to the ability to pay for emission reductions or otherwise carry the economic burden of achieving emission reductions.<sup>15</sup> Finally, historical responsibility refers to the contribution a nation has made to the problem, usually presented in terms of its contribution to the GHG emissions above natural levels in the atmosphere.<sup>16</sup>

From the start, most developing countries have taken the view that developed countries had the greatest potential and the greatest historical responsibility, and therefore needed to take the lead on mitigation.<sup>17</sup> Developed countries have generally accepted that they have to take the lead, but based on capacity rather than historical responsibility. Basing their offer to lead at home and assist developing countries on capacity rather than historical responsibility allowed developed countries to insist on conditions for offering assistance to developing countries, such as a commitment to a low emissions development path. An underlying concern for developed countries appears to be potential liability for the cost of mitigation and adaptation in developing countries and for the impacts that cannot be avoided through mitigation and adaptation. For developing countries the driving motivation appears to be a combination of preserving potential liability claims and protecting their ability to develop.<sup>18</sup>

The resulting battle between capacity and historical responsibility as the appropriate basis for allocating mitigation obligations has made it impossible for parties to agree to principle-based allocations of mitigation obligations of funding contributions, leaving in place the pledge-based process applied in Kyoto by default. It has also made progress on the key elements of the post-2012 regime more difficult. For developing countries concerned about the impacts of climate change it has created a situation where they have pushed for deep cuts from developed countries to reduce the risk from climate change, while at the same time resisting any agreement that could directly or indirectly limit their future emissions.<sup>19</sup>

Of course, the views and positions of individual developed and developing countries are a lot more nuanced. On the developed country side, European countries are generally more accepting of historical responsibility and less focused on firm mitigation commitments from developing countries than Umbrella Group (UG) countries.<sup>20</sup> On the developing country side, the Least Developed Countries (LCDs) tend to focus on adaptation help, whereas the Alliance of Small Island States (AOSIS) and Small Island Development States (SIDS) have concentrated more

and more on pushing for emission reducing from all major emitters, both developed and developing.<sup>21</sup> Emerging economies such as China, India, Brazil and South Africa have concentrated on protecting their right to develop while making non-binding commitments to keep resulting emission increases under control.

It is this dynamic that dominated the development of the Bali Action Plan and the two years of negotiations between Bali and Copenhagen. It is reflected in the very ambiguous language in the Bali Action Plan about the mitigation measures to be taken on by developing countries and the US. It is reflected in the two negotiating tracks, which is in large part an effort by developing countries to keep a firewall between the economy-wide absolute emission limits for developed countries and the inevitable mitigation efforts that have to take place in developing countries to avoid the worst climate change impacts. It is also a firewall to separate the US from the Kyoto Protocol.

## **Part II: The Substantive Outcomes from Copenhagen**

To the public, the Copenhagen negotiations were generally presented as the 15<sup>th</sup> meeting of the Parties to the UNFCCC, or COP 15. In reality, the Copenhagen talks consisted of a complex set of distinct but related negotiating forums. Copenhagen served as the 5<sup>th</sup> meeting of the Parties to the Kyoto Protocol (CMP 5). Furthermore, two ad hoc working groups established in Bali were set to conclude their work in Copenhagen, one on Long Term Cooperative Action (LCA AWG) under the UNFCCC, the other on amendments to the Kyoto Protocol (KP AWG) under the Kyoto Protocol. To further complicate matters, two subsidiary bodies (one on implementation (SBI), the other on technical matters (SBSTA) that have long operated under the UNFCCC were scheduled to meet and report back on specific issues delegated to them.<sup>22</sup>

For purposes of this assessment of the results achieved in Copenhagen, a detailed understanding of the negotiating mandates of each of these forums is not critical, especially given that most of the forums involved the same parties negotiating issues related in some way to the design of the post-2012 UN climate regime. There is, however, one critical point to make. The United States, because it has not ratified the Kyoto Protocol, was not party to either the 5<sup>th</sup> meeting of the Parties to the Kyoto Protocol (CMP 5) or the working group mandated in Bali to negotiate possible amendments to the Kyoto Protocol (KP AWG).

For purposes of the assessment of Copenhagen, three outcomes are the focus of this article, the Copenhagen Accord, the results of the LCA AWG, and the results of the KP AWG.<sup>23</sup> The work of the two AWGs was not completed, though progress was made on a range of issues. Much of the progress was subtle in the sense that options were narrowed, but parties were still

far apart on many of the critical issues. The Copenhagen Accord was an attempt to focus on some of the most critical issues, but it was not universally accepted and therefore not formally adopted by the Conference of the Parties (COP).

The key elements of the Copenhagen Accord are the following:

- Endorsement of key provisions of the UNFCCC including its ultimate objective of preventing dangerous human interference with the climate system.
- Endorsement of the continuation of the two ad hoc working groups (AWGs) to conclude a more comprehensive agreement at COP 16 on the range of issues currently before the two AWGs.
- Endorsement of the goal of limiting global average temperature increases to below 2 degrees Celsius, and the need to make deep cuts in emissions to achieve this goal.
- Recognition of the importance of greenhouse gas (GHG) emissions peaking as soon as possible.
- Recognition that GHG emissions have to peak in developed countries before they can be expected to peak in developing countries.
- Recognition that developing countries need assistance with adaptation, especially LDCs, SIDS and African nations, and that developed countries will have to provide adequate, predictable, and sustainable financial resources, technology, and capacity building to support adaptation.
- Annex I Parties (A1) are asked to submit by January 31, 2010, and subsequently implement, quantified economy wide emission targets by 2020. Efforts to implement these targets will be subject to international monitoring, reporting and verification (MRV). The agreement does not include a collective target for Annex I Parties.
- Non-Annex I Parties (NA1) are similarly asked to submit a list (also by January 31, 2010) of mitigation actions they intend to implement, potentially including supported and unsupported nationally appropriate mitigation actions (NAMAs). Any involvement of LDCs and SIDS is strictly voluntary. The implementation of these actions is to be communicated through National Communications every two years. The level and nature of the monitoring, reporting and review will depend on whether the actions are supported by Annex I Parties. For unsupported actions, the focus will be on domestic oversight, but with some international transparency. For supported actions, there will be international oversight. As with Annex I parties, the agreement does not include a collective target for Non-Annex I parties.<sup>24</sup>
- A collective commitment from developed countries to contribute \$US 30 billion from 2010 to 2012 for adaptation and mitigation in developing countries.
- A collective commitment from developed countries to increase the funding to \$US 100 billion a year by 2020 from a variety of unspecified sources.

- The establishment of a funding mechanism called the Copenhagen Green Climate Fund to support activities in developing countries with respect to adaptation, REDD-plus, other mitigation, capacity building, technology development and technology transfer.
- Agreement to establish a technology mechanism to accelerate technology development and transfer for adaptation and mitigation in developing countries
- A review by 2015 to assess the implementation of the Accord and its adequacy, including in particular the need to consider the 1.5 degree global average temperature limit based on the available science at that time.<sup>25</sup>

How does the Copenhagen Accord stack up against the 6 key elements of the Bali Action Plan, shared vision, mitigation, finance, adaptation, technology and capacity building?<sup>26</sup> To start with, the Accord is short on detail on a shared vision consistent with the goal of the UNFCCC. Leaving aside the question whether 2 degrees is sufficient in the context of Article 2 of the UNFCCC, the statement on shared vision lacks many of the elements introduced in Bali and the subsequent negotiations on what would be required globally to keep global average temperature increases below 2 degrees. There is no mention of the maximum concentration of GHG emissions that would ensure the 2 degree target can be met, nor is there agreement on peak emissions or global emission reductions either in the medium or long term. Furthermore, the Accord does not address the much more difficult and controversial issue of how the global emission reductions needed to achieve the 2 degree target would be shared among the parties to the UNFCCC. In short, the Accord side steps the tough issues on adequacy and fairness.

The Accord is also weak on mitigation. If the commitments introduced by key Parties in the lead up to Copenhagen are any indication, mitigation commitments by both A1 and NA1 parties will fall well short of the 25-40% for A1 and the 15% below business as usual for NA1 suggested by the Intergovernmental Panel of Climate Change (IPCC).<sup>27</sup> There is no indication that the mitigation commitments will become binding in any legal sense. If there is progress on mitigation, it is that developing countries have agreed to put mitigation actions forward and have agreed to some level of international transparency and oversight.

Finance is the area where the most progress was made in Copenhagen. The long term finance may still fall short of what is needed to adequately support mitigation, adaptation, technology and capacity building in developing countries, but the commitment appears to be in the right order of magnitude.<sup>28</sup> Unresolved issues include sources of funding, compliance, and the details on how funds are to be allocated and disbursed.<sup>29</sup>

With respect to adaptation, technology and capacity building, the main contribution of the Copenhagen Accord is the agreement on finance. On adaptation, the commitment on finance is complemented with a statement of principles. With respect to technology, the Accord

contemplates a technology mechanism, but provides no detail on its design or function. Similarly, on capacity building, no additional detail is provided.<sup>30</sup>

Particularly disappointing in the final outcome is the absence of any agreement on the distribution of mitigation responsibility either between A1 and NA1 Parties or more individually. There is no agreement on principles to guide a fair allocation of burdens and benefits. If there is a silver lining, it is the scale of funding, and the agreement on the goal of keeping global average temperature increases below 2 degrees. At least for now, 2 degrees would appear to have become the measure of adequacy against which global efforts to reduce emissions can be measured. This should provide important context for the discussions in both AWGs following the submission of mitigation targets by A1 Parties and mitigation actions by NA1 Parties in January 2010.

In spite of its many limitations, the Copenhagen Accord has the potential to have a positive impact on the development of the climate change regime. Most immediately, it should result in a quick start to finance. It can also, if accepted by the UNFCCC parties negotiating under the LCA and KP tracks, resolve some key issues, and thereby provide much needed momentum to the negotiations in the two AWGs. The acceptance of the agreement reached in the Accord by the two AWGs is, however, far from certain. There is a significant risk that these issues will be reopened when the LCA and KP AWGs pick up their work in 2010.

Regardless of what happens to the issues resolved in the Copenhagen Accord, the many outstanding issues will have to be taken up by the LCA & KP AWGs in 2010. An interesting question in assessing the impact of the Copenhagen Accord will be whether it can create momentum in these negotiations, particularly as a result of the agreement on the scale of long term finance, the level of mitigation efforts by key parties and the transparency and oversight commitments. Unfortunately, while the substance of the Accord has the potential to provide some momentum to the negotiations in these key areas, the way the agreement was reached has the potential to undermine the trust and atmosphere of cooperation needed to resolve the many outstanding issues.

The Accord has the potential to affect the enactment of domestic climate change legislation in the US. On the one hand, the mitigation actions committed by key developing countries and the acceptance of some level of international oversight over mitigation actions in developing nations should assist in efforts to pass domestic legislation in the US. On the other hand, the financial commitment to developing nations may hinder those efforts. To minimize the downside risk, one might expect the US to target its funding in areas most acceptable to the US population, such as adaptation and other support for LDCs, while avoiding funding mitigation efforts in emerging economic powers. If the Accord has a positive impact on getting strong



domestic legislation in place in the US in the first half of 2010, this might be the most important contribution it can make toward the development of the future regime.

In the end, the Copenhagen Accord reflects the level of common ground that was possible among some of the most powerful nations willing to focus on areas where agreement was possible. The outcomes of the LCA and KP AWGs, however, still represent the diversity of views and expectations of all 193 Parties, including a number of developing country Parties who arrived in Copenhagen with the firm position that nothing short of a legally binding agreement that met their expectation in terms of adequacy and distribution of burdens and benefits would do. Key among these was that 2 degrees was inadequate to protect the most vulnerable nations from the worst effects from climate change, and that 1.5 degrees was a more appropriate target. Flowing from this view on adequacy were expectations that developed countries would have to take on mitigation commitments in the range of 40% below 1990 levels and that finance would have to be significantly higher than the \$US 100 billion offered under the Copenhagen Accord.<sup>31</sup>

### **Part III: The Dynamics of the Copenhagen Negotiations**

It was clear going into Copenhagen that there were wide gaps among the positions of the Parties. Some Parties were pushing for a 1.5 degree target, while others were not prepared to accept a 2 degree target. Some developing Parties were still opposed to any mitigation commitment from developing countries, while some developed Parties wanted some or all developing Parties to take on similar mitigation and reporting, review and compliance commitments as developed Parties.

Many developed countries were not prepared to commit to more than the US was willing and able to do. The US continued to take the position that it could only commit to what was in the draft legislation before the House of Representatives and the Senate in the US, which meant a very modest reduction compared to 1990, and limited international oversight. Developing countries, while increasingly split on the detailed positions on specific issues, continued to take the view that developed countries had to lead by accepting tough new targets under the Kyoto regime, and that developing countries would make their mitigation commitments outside the Kyoto regime.

None of the major emitting countries put forward a comprehensive package that included an adequacy goal for global mitigation efforts, collective emission reduction targets for developed and developing countries for 2020, 2030 and 2050, and a breakdown of how at least the short term collective target might be allocated among parties. The AOSIS proposal does include

these elements, but it had limited impact on the negotiations because it was never supported by any of the major emitting Parties. It is based on 1.5 degrees, a carbon dioxide equivalent (CO<sub>2</sub>e) target of 350 ppm, peaking of global emissions by 2015, and global emission reductions of 85% below 1990 by 2050.<sup>32</sup>

With a few exceptions, countries who were expected to take on significant obligations put forward unilateral commitments rather than trying to increase the commitments from other parties by linking their own commitments to specific expectations from other nations.<sup>33</sup> In fact, this was a very interesting difference between the Kyoto negotiations and those in Copenhagen. In Kyoto, the final agreement on mitigation targets was achieved through complex negotiations involving individual parties putting forward their targets linked to firm and clearly expressed expectations of what other countries were going to take on. In Copenhagen, many parties made a point of putting their commitments forward on a unilateral basis.<sup>34</sup>

Another key dynamic in Copenhagen was between those who felt comfortable with the “friends of the chair” approach to working out the final deal and those that felt excluded by this process and wanted the negotiations to carry on with all 193 nations involved until the very end. This dynamic surfaced even before negotiations got under way in Copenhagen, such as when rumours started to circulate about a draft text reportedly developed by the Danish presidency in consultation with “key” Parties.<sup>35</sup> Clashes over this issue continued throughout the negotiations in Copenhagen whenever there were signs of a smaller group of Parties trying to work out an overall agreement on key issues. The refusal by a number of Parties in the final plenary to accept the Copenhagen Accord is perhaps the clearest sign of this division.<sup>36</sup>

### ***The Role of the US***

One of the key questions throughout the negotiations was whether the US would move from its pre-Copenhagen position in any of the key areas. Would it offer a tougher 2020 emission reduction target? Would it accept any of the key elements of the Kyoto architecture, such as reporting and compliance? Would it offer long term finance to developing countries? Would it continue to insist on international oversight of unsupported mitigation actions in developing countries?

In the end, the US played a critical role in shaping the outcome in a number of ways. First, its mitigation target was clearly not comparable with those put forward by Japan and Norway, and it was insufficient to put pressure on the EU to move from 20 to 30 %. The US position on mitigation also provided cover for Parties such as Canada, New Zealand, Australia and economies in transition, all of which were never put under any pressure to put meaningful domestic mitigation commitments on the table. This in turn prevented the developed countries

as a whole from putting any pressure on developing countries to come up with more ambitious mitigation efforts. The second key role the US played in the negotiations was to push developing countries on transparency and international oversight over domestic mitigation efforts, a role that was made much more challenging due to the inadequate mitigation targets put on the table by developed countries.<sup>37</sup>

The only substantive change in the US position during the course of the negotiations in Copenhagen was its support for long term finance in the range of \$US 100 billion. This came at a critical time and laid the foundation for the Copenhagen Accord. A final impact of the US on the dynamic was an unfortunate choice to hold a press conference announcing the Copenhagen Accord before it was presented to the plenary for the review and endorsement by the many parties who had not been directly involved in its development. It remains to be seen whether this blunder will have a long term impact on the negotiating dynamics. In the end, the critical question with respect to the US is whether the outcome in Copenhagen will help or hinder efforts to get domestic legislation passed.

### ***The Role of China***

With respect to China, some of the key questions leading up to Copenhagen related to its mitigation commitment and the issue of international oversight over mitigation in China. There was considerable debate before the negotiations got under way on whether the mitigation target of a 40 to 45% reduction in emissions per unit of gross domestic product (GDP) from 2005 to 2020 offered by China reflected a significant domestic effort or whether it represented more or less business as usual improvements in GHG emission intensity in China. Interestingly, the adequacy of China's mitigation target never became a big issue in Copenhagen. Rather, the focus was on transparency and review of mitigation actions in China and other key developing countries.<sup>38</sup>

China remained firm for most of the two weeks in its position that any international oversight over unilateral mitigation efforts was an invasion of its sovereignty. China first moved on this issue 24 hours before the scheduled close of the negotiations, when it agreed to consider "international exchange, dialogue, and cooperation" on this issue. China indicated that it was willing to "further enhance the domestic statistical, monitoring and evaluation methods, improve the way for releasing emission reduction information, increase transparency and actively engage in international exchange, dialogue and cooperation".<sup>39</sup>

There has been lots of talk that China blocked a stronger deal, but the conditions for pushing China to accept anything that would limit its right to emit in the future simply were never on the table. Developed countries in particular could have put considerable pressure on China to do more, but this would have required a willingness to collectively put emission reduction

targets on the table more consistent with the IPCCs fourth assessment report. Much has been made of China's apparent opposition to a global emission reduction target of 50% in combination with a developed country target of 80% by 2050. This again is directly linked to inadequate mitigation efforts by developed countries, given that it is the combination of developed and developing country reductions that have to add up to an adequate mitigation effort.<sup>40</sup> If China is to be blamed, it is for the same failure to push for a stronger deal as all other major emitting nations. It could have done so by putting clearly on the table the conditions under which it would have been willing to accept firm limits on its right to emit in the future. In other words, China in the end played the same game as most developed countries; it did nothing to put pressure on anyone to increase their mitigation efforts.<sup>41</sup>

### ***The Role of the EU***

The European Union (EU) entered the negotiations in Copenhagen with a unilateral emission reduction target of 20% below 1990 by 2020, with an offer to increase the target to 30% if other developed nations took on comparable targets. Given that most other developed nations (with the exception of a few, such as Norway, Japan) were looking to the US target for guidance on how ambitious their domestic target to be, the EU was never put in a position of having to seriously consider its offer to increase its target to 30%. As a result, the EU was never a significant factor in the Copenhagen negotiations, other than its contribution to the commitment of \$US 100 billion funding a year by 2020.

### ***The Role of the G-77***

The role of the Group of 77 (G-77) is perhaps the most interesting story of Copenhagen.<sup>42</sup> Instead of a more or less unified position from the G-77 as was the case at previous COPs, tracking the positions from developing countries in Copenhagen was a real challenge. As never before in the climate regime, smaller groups of Parties preferred to actively engaged in the negotiations directly rather than resolve their differences within the G-77. Historically, public positions taken by groups such as AOSIS, LDCs, the African Union, SIDS and members of the Organization of the Petroleum Exporting Countries (OPEC) were relatively rare, and positions that were at odds with those of the G-77 were even more unusual. Brazil, South Africa, India and China in the past also tended to work within the G-77, though these four Parties had always taken individual positions on a regular basis.<sup>43</sup>

In Copenhagen, the G-77 rarely spoke with one voice. The BASIC group had clearly been enticed through the G-20 process and similar initiatives to negotiate directly with key developed countries to protect their interests. AOSIS, LDCs, SIDS and the African Union had similarly decided that the G-77 did not sufficiently serve to protect their interests.

The interests of these various alliances of small and vulnerable developing countries have over time become increasingly at odds with two powerful influences within the G-77. One is the BASIC group, representing the highly populated emerging economies. The other is OPEC. The key differences between these emerging economies and the most vulnerable nations are on how to define an adequate global mitigation effort, and on the mitigation effort needed from emerging developing countries to ensure an adequate global mitigation effort. OPEC and BASIC continue to resist mitigation commitments as well as the push from AOSIS and the African Union for an adequacy target of 1.5 degrees Celsius.

The BASIC group emerged as a powerful player in Copenhagen. This not surprising, given its economic power and its growing influence in the MEF, G-8 and G-20 forums on climate change. An interesting development from this group is that it appears to be moving away from any expectation of financial assistance from developed nations. Brazil, for example, in its high level address indicated that it will meet its target without international assistance, and that it was in fact prepared to offer assistance to Parties in need.<sup>44</sup> Similar comments have been attributed to China, and even India and South Africa have made gestures in this direction.<sup>45</sup>

AOSIS, SIDS, the African Union and LDCs in many ways are in a position similar to the position of the G-77 in the 1997 Kyoto negotiations. Because no one is asking for significant commitments toward the new climate change regime, the influence of these nations is limited. The assumption appears to be that because there will be some assistance available for to them, mainly in the form of adaptation funding, these nations will accept whatever other Parties are able to negotiate. As a result, these groups are increasingly using the only real power they have in the negotiations, the refusal to consent to agreements reached among major emitters. Beyond this, the focus of these groups has been to highlight the moral obligation major emitting Parties have to them and to future generations to collectively take adequate mitigation actions to prevent the worst impacts, such as the loss of whole small island states, or the desertification of major parts of Africa.<sup>46</sup>

### ***Taking Stock on Negotiating Dynamics***

In the end, the most encouraging dynamics from Copenhagen are that the BASIC countries appear willing to engage in reviewable mitigation efforts, and that Parties are getting reasonably close to agreeing on the scale of finance needed. The most discouraging outcome from Copenhagen is that so many of the dynamics that have prevented progress toward an effective post-2012 climate regime remain. Key among them are the following:

- Mitigation targets pledged collectively by developed countries continue to be inadequate, with Canada and the US looking the worst as a result of inaction between 1997 and 2008.<sup>47</sup>

- The fact that few developed parties have put adequate conditional targets on the table is an indication that developed countries as a group are not ready to take mitigation action science and equity would demand of them.
- BASIC countries also have not put conditional mitigation commitments on the table. They could have put more pressure on A1 Parties by putting mitigation commitments on the table that were conditional on A1 Parties reaching a certain percentage reduction target by 2020. Basic countries could also have made transparency and oversight conditional on such a target and conditional on adequate financing. The fact that these countries have not taken this approach is a sign that they are also not eager to push the global mitigation effort forward by offering to do more if others are willing to do more.
- There is still no willingness to consider some of the most promising mechanisms for stable adequate funding for adaptation, mitigation, technology and capacity-building in developing countries. Examples include levies on international aviation and marine bunker fuels, and the selling or auctioning of assigned amount units (AAUs).<sup>48</sup>
- The continuation of the two negotiating tracks has been an ongoing challenge. A key underlying problem is the unwillingness of the US to join other developed Parties with binding targets and international oversight. A secondary problem is the unwillingness of other developed Parties to treat the US as a special case by continuing with the Kyoto architecture as long as there is sufficient assurance that the US will make a comparable effort. A third level of the problem is the high level of distrust from a number of developing countries which leads to their rejection of the single Protocol option and a single negotiating track.<sup>49</sup>

One would be remiss to discuss the negotiating dynamics at Copenhagen without noting what it exposed of the limitations of the UN process and its ability to deal with an issue as complex and urgent as climate change. On the one hand, the consensus based process has resulted in relatively few Parties blocking agreement on key issues or holding the negotiations hostage to their issues. The US unwillingness to initiate negotiations on the post-2012 regime during much of the last decade is but one example. On the other hand, the UN process has been a consensus based process in name only for a long time, with the more powerful nations dominating the negotiations and a small group of “friends of the chair” negotiating final agreements. The Kyoto Protocol, the Marrakech Accords, the Montreal Declaration and the Bali Action Plan were all negotiated using some version of the “friends of the chair” approach in the final hours of the negotiations.<sup>50</sup>

#### **Part IV: The Path Forward from Copenhagen under the UNFCCC**

The path forward from Copenhagen will not be an easy one. A key first step will be the acceptance of the Accord and the submission of mitigation efforts by Parties by February 1, 2010. It will send important signals about the level of agreement on the key elements of the Accord and the level of ambition on mitigation. Another key stepping stone will be the enactment of legislation in the US.

Without close to universal acceptance of the Accord and adequate domestic legislation in the US by the summer or early fall of 2010, the UNFCCC process is clearly in trouble. Even with favourable outcomes in these two areas, the path forward will be difficult. Somehow, parties need to find the political will to shift from the lowest to the highest common denominator on mitigation, so that the collective effort has some hope of avoiding the tipping points scientists are increasingly alarmed about.<sup>51</sup> In most countries, this requires a shift in policy at the government level. In some, such as the US, it may still require a shift in public opinion, something that is difficult to foresee taking place in the months to come.

If the adequacy of mitigation efforts in developed and key developing countries can be resolved, and adequate sources of funding can be confirmed, the resolution of the remaining issues would appear a realistic goal for COP 16 in Mexico. For a reasonable chance of success in Mexico, it will be important to agree on the overall scale of mitigation of key Parties as early as possible in 2010 to leave enough time to work out important details on issues such as land use land use change and forestry (LULUCF), surplus credits from the first commitment period, the future of the clean development mechanism (CDM) and joint implementation (JI), and MRV & compliance. It is important to note that a strong agreement on the scale of mitigation and finance in Mexico without effective rules on these critical issues can undermine the effectiveness of the mitigation effort as much as inadequate mitigation targets.<sup>52</sup>

Another obstacle to be overcome is the resistance of the US to accepting international oversight and compliance. This hurdle could potentially be overcome through the concept of equivalency. The basic idea would be to establish criteria under which domestic monitoring, reporting, verification and compliance is sufficient. Any party that meets the criteria would be exempt from international oversight and compliance. The criteria would have to be carefully designed to ensure they are sufficiently stringent and consistent with international rules that the choice is one of form and process, not one of substance.<sup>53</sup>

A similar though necessarily separate effort could be made with respect to the monitoring, reporting and verification of mitigation actions in developing countries.<sup>54</sup> For developing countries that meet specific criteria in terms of monitoring, reporting and transparency through domestic measures, international oversight could be minimal, such as the bi-annual report currently envisaged in the Copenhagen Accord. For countries that do not meet those criteria, additional international reporting and verification requirements could be considered.

It is too early to predict whether the positive or negative aspects of the Copenhagen Accord will dominate developments in 2010. There is still hope that the agreement on long term finance, the commitment from key developing countries to take on mitigation action and their willingness to consider international transparency will help achieve the breakthrough that is so desperately needed. There is little doubt that this is the last chance for the UNFCCC regime in its current form, without a breakthrough by the end of 2010, it is difficult to see much of a future for it.<sup>55</sup>

## **Part V: Possible Alternatives to the Current UNFCCC Regime**

The future of the climate change regime clearly hangs in the balance in 2010. There is still every opportunity to develop a strong post-2012 regime to reach the mitigation and adaptation goals set out in the UNFCCC almost two decades ago. Time, however, is running out. Copenhagen should therefore give anyone who has been following the development of the climate change regime cause for pause. Fifteen years of effort to move the UNFCCC regime from agreement on broad principles and process to meaningful action have produced overall inadequate and limited concrete results to date. It may be time to ask whether the approach is working or whether there are other approaches worth considering.

There is no shortage of blame to assign for the failure of the UNFCCC regime to produce an adequate result to date. Powerful lobbying by those who stand to gain from prolonging the status quo may be at the top of the list. Related to this might be the lack of political will in key countries at critical times in the development of the regime. The gradual development of the science did hamper progress in the early days, but really has not been a factor since the 3<sup>rd</sup> assessment report of the IPCC in 2001.<sup>56</sup> It is important to recognize that many of these causes of the failure of the regime to date are not obviously linked to the design of the UNFCCC or the way negotiations are conducted. Looking for alternatives will therefore not be an easy fix. Given the state of the regime, however, a closer look at the design of the regime to consider whether it has contributed to the problem would appear warranted.<sup>57</sup>

A question that may have to be answered in the months ahead is whether the basic approach of the UNFCCC has contributed to the problem, and whether there are better ways to move the international community forward on this issue. Among the aspects of the UNFCCC regime that are open to some blame for the inadequate progress to date are the following:

- The UN process has, as a matter of principle, accommodates any party interested in participating in the development of the climate change regime, even countries who have demonstrated that their objective is to slow down that process as much as



possible. An example is Saudi Arabia, a country that time and time again has delayed progress, blocked agreement, and raised issues that have distracted the negotiations from their important work.<sup>58</sup>

- The UNFCCC has had to resolve all issues by consensus. The Parties have never been able to agree to proceed by some level of majority or some other decision making process, even though there are precedents for this from other multilateral environmental agreements (MEAs), most notably the regime on ozone layer depletion.<sup>59</sup>
- The UNFCCC seeks to include all human activities that contribute to climate change, including emissions from production and consumption of energy, agriculture, deforestation, etc. This alone has made the regime incredibly complex.
- The regime also has tended to include a broad range of mitigation measures, further adding to the complexity of the regime and the negotiations.<sup>60</sup>
- The regime has also sought to be comprehensive in terms of its expectations of all 193 Parties with regard to mitigation, adaptation, finance, capacity building, and technology.

It may be time to ask whether this is the only way toward international cooperation on this issue. Is it necessary, for example, to invite all countries to participate in all aspects of the negotiations? Would it be possible to negotiate separate agreements on certain components without having all 193 Parties involved in all aspects? For example, if all 193 Parties could agree on an adequate mitigation goal for 2020, would it be possible to allow those parties expected to make a contribution to the mitigation effort by 2020 negotiate how to allocate the burden of meeting this goal?

Another way to focus the international effort might be to first identify critical areas for global cooperation to accelerate the transition needed to address climate change. Ideally, the focus would be on integrated solutions, i.e. solutions to climate change that also address other pressing environmental and social challenges. In other words, there is an opportunity to start this process with an integration process that results in the identification of the integrated solutions, to be followed by negotiations on how to move forward with each sector identified. Examples of such areas of focus might be energy efficiency and conservation, renewable energy, sustainable transportation, forests, and agriculture.<sup>61</sup>

Careful thought will have to be given to the combination of issues and parties to ensure fairness and effective outcomes. A detailed proposal on this is clearly beyond the scope of this paper. By way of illustration, however, consider the renewable energy sector. One option might be to pursue proposals such as the global feed in tariff for all sources of renewable energy.<sup>62</sup> The process could either involve all 193 parties to the UNFCCC or only those interested in supporting such an initiative. Another valuable initiative might be for Parties who are leading on particular sources of renewable energy to lead negotiations on how to maximize its

penetration both in developed and developing countries in an equitable and sustainable manner. These initiatives can feed into the technology component of the post 2012 UNFCCC regime, but do not have to wait for it.

So where to go from here? Based on the science, we don't have the luxury of starting over and experimenting with alternatives to the current UNFCCC process.<sup>63</sup> At the same time, continuing to bet on the UNFCCC process alone producing the results we need is a high-stakes gamble, with the odds looking increasingly bad. It may be time to move forward on multiple complementary tracks. Agreements on efficiency, renewable energy, transportation, conservation, agriculture and forests all would make a global agreement on climate change easier and more likely. It may be time to consider these other options, not as alternatives to the UNFCCC, but as complements to the current regime.

## Conclusions

It is perhaps easy to write off the failure of the international community to establish an effective climate regime as an aberration, as mission impossible, due to its complexity, the economic implications of the transition needed to address climate change, and because of the unequal distribution of costs and benefits among regions and over time. However, the lack of progress under the regime raises some serious questions about the willingness of nations to each make a commitment contribute equitably to a collective effort that is in the interest of all. The stakes may be unusually high, but so is the incentive to get it right. What a failure of the climate change regime would say about our ability to work together as a global community is not encouraging. It suggests that we have not learned the lessons of the past, and that we are not capable of collective action to prevent incalculable harm to all. Time will tell whether the implications of Copenhagen will spread beyond the climate change regime.

For the climate change regime, the implications are more obvious and immediate. With time running out, a breakthrough within the UNFCCC process by the end of 2010 is critical. For this, it is critical that other measures must support rather than undermine the efforts of the UNFCCC. However, equally critical is that complementary measures along the lines suggested in this article be initiated both to support the efforts of the UNFCCC and to guard against its failure to overcome the deep gap between mitigation efforts currently on the table and the level of effort the current state of the science demands. The time has come to look to parallel efforts to move the global community forward. Critical will be that decisions about which parties are involved and what issues get taken on are made based on legitimate interests and an a commitment to supporting rather than undermining the UNFCCC regime, which remains the only hope for a comprehensive global agreement.

<sup>1</sup> See UNFCCC <http://unfccc.int/2860.php> (website last accessed January 2010) for general information about the Copenhagen climate talks.

<sup>2</sup> During the second week of the negotiations, nongovernmental organizations (NGOs) were gradually restricted from entering the venue of the negotiations. By the end, only a few selected individuals were permitted inside the facilities. Many accredited long time observers were completely excluded from the negotiations.

<sup>3</sup> Framework Convention on Climate Change, Intergovernmental Negotiating Committee for a Framework Convention on Climate Change (1992), 31 I.L.M. 849, hereinafter the UNFCCC, available online at <http://unfccc.int/resource/docs/a/18p2a01.pdf> (website last accessed January 2010).

<sup>4</sup> Report of the Conference of the Parties on its Third Session, Kyoto Protocol to the U.N. Framework Convention on Climate Change, 3rd Sess., pt. 2, Annex I, U.N. Doc. FCCC/CP/1997/7/add. 1, reprinted in 37 I.L.M. 22 (1998), hereinafter the Kyoto Protocol, available online at <http://unfccc.int/2860.php> (website last accessed January 2010).

<sup>5</sup> United Nations Framework Convention on Climate Change (UNFCCC). (2007) 1/CP. 13, “Bali Action Plan”, available online at <http://unfccc.int/2860.php> (website last accessed January 2010).

<sup>6</sup> For the key decisions that make up the Marrakech Accords, see United Nations Framework Convention on Climate Change, “Conference of the Parties”; United Nations Framework Convention on Climate Change, “Report of the Conference of the Parties on its Seventh Session”, October 29 to November 10, 2001, U.N. Doc. FCCC/CP/2001/13/Add.1 (Decisions 1/CP.7 - 14/CP.7), FCCC/CP/2001/13/Add.2 (Decisions 15/CP.7 - 19/CP.7), FCCC/CP/2001/13/Add.3 (Decisions 20/CP.7 - 24/CP.7), FCCC/CP/2001/13/Add.4 (Decisions 25/CP.7 to 39/CP.7 and Resolution 1/CP.7 and 2/CP.7) (Marrakesh Accords), available online at <http://unfccc.int/2860.php> (website last accessed January 2010).

<sup>7</sup> The Accord invites parties to formally indicate their support by the end of January, 2010, but it is not clear whether this will be treated as a firm deadline, or whether support will continue to be accepted during the course of 2010.

<sup>8</sup> For an overview of the evolution of the regime, see M. Doelle, *From Hot Air to Action? Climate Change, Compliance and the Future of International Environmental Law* (Toronto: Carswell, 2005) at 23. See also Michael Grubb *et al.*, *The Kyoto Protocol: A Guide and Assessment* (Washington, D.C.: Royal Institute of International Affairs, 1999) and Farhana Yamin, Joanna Depledge, *The International Climate Change Regime: A Guide to Rules, Institutions and Procedures* (Cambridge: Cambridge University Press, 2005).

<sup>9</sup> UNFCCC, Preamble, and Articles 2,3,and 4.

<sup>10</sup> One of the first to raise this issue was the following report: W. Hare, *et al.*, “How Much Warming are we Committed to and How Much can be Avoided?” (2004) PIK Report No. 93, Potsdam Institute for Climate Impact Research, online: <[http://www.pik-potsdam.de/publications/pik\\_reports](http://www.pik-potsdam.de/publications/pik_reports)>. (website last accessed January 2010).

<sup>11</sup> See <http://www.climateactiontracker.org/> for a summary and assessment of mitigation positions parties have put forward (website last accessed January 2010). The mitigation commitments proposed are perhaps the best indication that some countries hold the view that increases above 2 degrees may be manageable. See also See also, Nicholas Stern, *Action and ambition for a global deal in Copenhagen* (London: Centre for Climate Change Economics and Policy Grantham Research Institute for Climate Change and the Environment December 6, 2009)

<sup>12</sup> Kevin A. Baumert, ed., *Building on the Kyoto Protocol: Options for Protecting the Climate* (Washington, D.C.: World Resources Institute, 2002), online: WRI <[http://pdf.wri.org/opc\\_full.pdf](http://pdf.wri.org/opc_full.pdf)> (website last accessed January 2010)

<sup>13</sup> For a more detailed discussion of these principles and their role in the negotiation and implementation of the current regime, see M. Doelle, *From Hot Air to Action? Climate Change, Compliance and the Future of International Environmental Law* (Toronto: Carswell, 2005). See also H. Ott, et al, “*South-North Dialogue on Equity in the Greenhouse*” May 2004, Wuppertal Institute, Germany, online: Wuppertal Institute <<http://www.wupperinst.org/en>>. (website last accessed January 2010)

<sup>14</sup> A Party has high potential, if either the countries current emissions are high or its projected future emissions are high, and there are technically feasible alternatives available to reduce emissions at a relatively low cost.

<sup>15</sup> A Party with high capacity (high GNP, or high on the Human Development Index) has the ability to pay or make available technology to achieve emission reductions either at home or elsewhere.

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<sup>16</sup> A Party has high historical responsibility if its cumulative emissions are high. Most controversial in the application of this principle is whether all historical emissions count, or whether only emissions count that have occurred since we have known about the danger of human induced climate change. In other words, does historical responsibility operate on absolute or strict liability? A further question one might pose is whether a due diligence defense would be available.

<sup>17</sup> Some developing countries have shifted to framing the issue as carbon debt, suggesting that until developed countries make up the carbon debt they owe, developing countries have no obligations on this issue.

<sup>18</sup> For a discussion of the potential for liability, see P. Barton, 'State Responsibility and Climate Change: Could Canada be Liable to Small Island States?' (2002) 11:1 *Dalhousie Journal of Law and Society* 65.

<sup>19</sup> This has, for example, led to the rejection by some developing countries of long term emission reduction targets from developed countries combined with a global reduction target. The reason for this is that this combination actually identifies a specific share of GHG emissions remaining for developing countries. In other words, some developing countries have rejected any targets that directly or indirectly suggest a firm limit on emissions in developing countries, either individually or collectively.

<sup>20</sup> The Umbrella Group has generally consisted of the US, Canada, Australia, New Zealand, Japan, Russia, Iceland, Norway, and at times Ukraine. Its profile as a negotiating group has diminished in recent years.

<sup>21</sup> Collectively these groups represent the Parties who have contributed the least to the problem, who are least likely to contribute to the problem in the future, who have the lowest capacity to adapt to climate change and are likely to be hardest hit by climate change.

<sup>22</sup> For more information on the mandate and work carried out under these various negotiating groups, see the UNFCCC website at <http://unfccc.int/2860.php> (website last accessed January 2010).

<sup>23</sup> See UNFCCC website at <http://unfccc.int/2860.php> (website last accessed January 2010) for official UNFCCC documents from the various negotiating processes underway in Copenhagen. For the results of the LCA AWG, see FCCC/AWGLCA/2009/L.7/Rev.1 and Add.1, Add.2/Rev.1, Add.3.7, Add.8/Rev.1 and Add.9. For the results of the KP AWG, see FCCC/KP/AWG/2009/L.15.

<sup>24</sup> Annex I Parties are parties who were assigned emission reduction targets under the Kyoto Protocol, Non-Annex I Parties refers to all parties to the UNFCCC who were not assigned emission reduction targets in the Kyoto Protocol.

<sup>25</sup> The Copenhagen Accord was at the time of writing available as part of document FCCC/CP/2009/L.7, available on the UNFCCC website at <http://unfccc.int/2860.php> (website last accessed January 2010).

<sup>26</sup> See Meinhard Doelle and John Terry "The Kyoto Protocol and Related Treaties – The International Climate Change Regime, in D. Mahony et al *Climate Change Law in Canada* (Aurora: Canada Law Book, 2009) forthcoming

<sup>27</sup> This should probably be updated in the final proof assuming parties have made their mitigation submissions by the time of publication

<sup>28</sup> For a perspective on the level of finance required, see Andrew Pendleton, Simon Retallack, *Fairness in Global Climate Change Finance* (London: Institute for Public Policy Research, 2009) available online at <http://www.boell.de> (website last accessed January 2010)

<sup>29</sup> See Copenhagen Accord, FCCC/CP/2009/L.7.

<sup>30</sup> See Copenhagen Accord, FCCC/CP/2009/L.7.

<sup>31</sup> See, for example, ALLIANCE OF SMALL ISLAND STATES (AOSIS) DECLARATION ON CLIMATE CHANGE 2009, available on AOSIS website at: <http://www.sidsnet.org/aosis/index.html> (website last accessed January 2010).

<sup>32</sup> Aosis Proposal For KP Survival And New Copenhagen Protocol. For a copy of the proposal submitted at the conference in Copenhagen on December 10, 2009, see <http://www.slideshare.net/ecopreneur/aosis-proposal-for-kp-survival-and-new-copenhagen-protocol-final> (last accessed January 2010).

<sup>33</sup> The most notable exception is the long held position of the EU that it is prepared to increase its mitigation target from 20 to 30 percent if other parties are prepared to commit to comparable targets. Even the EU position is not very specific on what is required of other Parties for the EU to move to 30 percent.

<sup>34</sup> China and Brazil, for example, made a point in their addresses at the high level plenary of pointing out that they would meet their commitments regardless of the level of funding, and regardless of what other parties were willing to do.

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<sup>35</sup> See John Vidal, "Copenhagen Climate Talks in Disarray after 'Danish Text' Leak" Guardian, December 8, 2009, available online at: <http://www.guardian.co.uk>. The leaked Danish text is also available on the Guardian website (website last accessed January 2010).

<sup>36</sup> A number of Parties, including Tuvalu, Venezuela, Bolivia, and Nicaragua, oppose the Copenhagen Accord on substance and because of the process through which it was negotiated. In effect, they even rejected the Accord as an interim agreement while negotiations under the two AWGs would continue. A final list of countries who reject the Accord should be available by January 31

<sup>37</sup> The US was pushing developing countries on this issue while at the same time rejecting the application of the oversight and compliance process under the Kyoto Protocol to its commitments.

<sup>38</sup> See <http://www.climateactiontracker.org/> for a summary and assessment of mitigation positions parties have put forward (website last accessed January 2010).

<sup>39</sup> Based on simultaneous translation of China's high level address on Friday, December 18, 2009 at the COP plenary

<sup>40</sup> Simply put, an adequate global target with inadequate effort from developed Parties means an unfair burden on developing Parties.

<sup>41</sup> For a critical assessment of China's role, see Guardian: [http://m.guardian.co.uk/ms/p/gmg/op/sflcGpZLLAB3R-DQO91AOKg/view.m?id=284038&tid=120787&cat=Climate\\_change](http://m.guardian.co.uk/ms/p/gmg/op/sflcGpZLLAB3R-DQO91AOKg/view.m?id=284038&tid=120787&cat=Climate_change) (website last accessed January 2010).

<sup>42</sup> This group of developing countries originally consisted of 77 nations, but has grown significantly to well over 130 over the years.

<sup>43</sup> Brazil, South Africa, India and China were collectively referred to in the Copenhagen negotiations as the BASIC group.

<sup>44</sup> See Draft report of the Conference of the Parties on its fifteenth session. Rapporteur: Ms. Gertraud Wollansky (Austria). Part one: Proceedings FCCC/CP/2009/L.1, agenda item 9, available at <http://unfccc.int/2860.php> (website last accessed January 2010).

<sup>45</sup> Ibid

<sup>46</sup> The African Union played an increasing role in Copenhagen. Most notable was the deal struck between the EU and the Union in the last days of the negotiations on long term finance. It was this deal, followed by an announcement of support by US Secretary of State Hilary Clinton that eventually led to the inclusion of the \$US 100 billion in the Copenhagen Accord. See <http://en.cop15.dk/news/view+news?newsid=3021> (website last accessed January 2010).

<sup>47</sup> See <http://www.climateactiontracker.org/> for a summary and assessment of mitigation positions parties have put forward (website last accessed January 2010).

<sup>48</sup> The basic idea behind the selling or auctioning of AAUs is to generate revenues from the allocation of the emission allowances reflected in the targets allocated to Annex I Parties.

<sup>49</sup> See below for a discussion of equivalency as a possible solution to the unwillingness of the US to accept the oversight and compliance provisions of the Kyoto Protocol. The basic concept is to allow the US (and possibly any other A1 Party) to opt out of international oversight and compliance under strict conditions that ensure comparability of effort.

<sup>50</sup> See Part V for some very preliminary thoughts on how this might be addressed

<sup>51</sup> For the IPCCs most recent summary for policy makers, see Working Group I, Intergovernmental Panel on Climate Change, Climate Change 2007, "The Physical Science Basis, Summary for Policymakers"; Intergovernmental Panel on Climate Change, Climate Change 2007, "Impacts, Adaptation, and Vulnerability, Summary for Policymakers"; Intergovernmental Panel on Climate Change Working Group II, Climate Change 2007, "Mitigation of Climate Change, Summary for Policymakers", all available online at [www.ipcc.ch](http://www.ipcc.ch) (website last accessed January 2010). See also Public Interest Research Centre (PIRC) *Climate Safety* (Machynlleth, Wales: PIRC, 2008) available online at [www.pirc.info](http://www.pirc.info) (website last accessed January 2010), and *The Copenhagen Diagnosis, 2009: Updating the World on the Latest Climate Science*. I. Allison, N.L. Bindoff, R.A. Bindshadler, P.M. Cox, N. de Noblet, M.H. England, J.E. Francis, N. Gruber, A.M. Haywood, D.J. Karoly, G. Kaser, C. Le Quéré, T.M. Lenton, M.E. Mann, B.I. McNeil, A.J. Pitman, S. Rahmstorf, E. Rignot, H.J. Schellnhuber, S.H. Schneider, S.C. Sherwood, R.C.J. Somerville, K. Steffen, E.J. Steig, M. Visbeck, A.J. Weaver. The University of New South Wales Climate Change Research Centre (CCRC), Sydney, Australia.

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<sup>52</sup> For example, if surplus credits from the current commitment period are made available in future commitment periods, this will reduce the actual emission reductions required in the future. Similarly, if rules for land use and land use change and the clean development mechanism credit business as usual, actual emission reductions required will be less than would appear from the targets set.

<sup>53</sup> Conditions might include that there would have to be domestic legislation in place that covered X% of emissions, rigorous domestic monitoring, reporting and review generally consistent with methodologies developed under the UNFCCC, a strong domestic compliance regime that include strong economic incentives for domestic actors to comply, and offsets limited to those recognized under the UNFCCC.

<sup>54</sup> Separate because developing countries will not accept being subject to the same review and compliance system as developed parties, in part based on their position regarding historical responsibility, and in part because it was developed countries that failed to live up to voluntary commitments under the UNFCCC, not developing countries.

<sup>55</sup> Even under the most optimistic scenarios, including strong domestic legislation in the US, and a strong commitment to the adequacy target of 2 degrees, overcoming the deep divisions by COP 16 in Mexico will be challenging. For an optimistic perspective on Copenhagen, see the Natural Resources Defense Council in the US at: [http://switchboard.nrdc.org/blogs/ddoniger/the\\_copenhagen\\_accord\\_a\\_big\\_st.html](http://switchboard.nrdc.org/blogs/ddoniger/the_copenhagen_accord_a_big_st.html) (website last accessed January 2010).

<sup>56</sup> Houghton, John T. *et al.*, eds., *Climate Change 2001: The Scientific Basis: Contribution of Working Group I to the Third Assessment Report of the Intergovernmental Panel on Climate Change* (IPCC) (Cambridge, England: Cambridge University Press, 2002).

<sup>57</sup> The most obvious looming alternative to the UNFCCC process appears to be unilateral action by some Parties in combination with trade measures to seek to protect affected domestic industries. Such measures have been considered within the EU for some time, and the US is considering similar measures as part of its domestic legislation.

<sup>58</sup> M. Doelle, *From Hot Air to Action? Climate Change, Compliance and the Future of International Environmental Law* (Toronto: Carswell, 2005) at 17

<sup>59</sup> M. Doelle, *From Hot Air to Action? Climate Change, Compliance and the Future of International Environmental Law* (Toronto: Carswell, 2005) at 1

<sup>60</sup> For example, the regime includes forests as sinks and sources of emissions, and with the exception of the CDM, it allows Parties to pursue any possible mitigation measure, from carbon capture and storage to nuclear power.

<sup>61</sup> For example, a process focused on renewable energy could explore the idea of a global feed in tariff for renewable energy as a possible mechanism to accelerate the transition to low GHG energy sources. Ref UN report on global feed in tariff. For a more detailed discussion on the role of integration in developing an effective climate regime, see "Integration among Global Environmental Regimes: Lessons Learned from Climate Change Mitigation" in Aldo Chircop *et al* eds., *The Future of Regime-Building in the Law of the Sea: Essays in Tribute to Douglas M. Johnston* (Leiden, The Netherlands: Martinus Nijhoff Publishers, 2009) 63

<sup>62</sup> See, for example, United Nations Department of Economic and Social Affairs, "A Global Green New Deal for Climate, Energy, and Development" (New York: United Nations, December, 2009)

<sup>63</sup> For an overview of developments since the fourth assessment report of the IPCC, see Public Interest Research Centre (PERC) *Climate Safety* (Machynlleth, Wales: PIRC, 2008) available online at [www.pirc.info](http://www.pirc.info) (website last accessed January 2010), and *The Copenhagen Diagnosis, 2009: Updating the World on the Latest Climate Science*. I. Allison, N.L. Bindoff, R.A. Bindaschadler, P.M. Cox, N. de Noblet, M.H. England, J.E. Francis, N. Gruber, A.M. Haywood, D.J. Karoly, G. Kaser, C. Le Quéré, T.M. Lenton, M.E. Mann, B.I. McNeil, A.J. Pitman, S. Rahmstorf, E. Rignot, H.J. Schellnhuber, S.H. Schneider, S.C. Sherwood, R.C.J. Somerville, K. Steffen, E.J. Steig, M. Visbeck, A.J. Weaver. The University of New South Wales Climate Change Research Centre (CCRC), Sydney, Australia.