

COPENHAGEN CHAOS? POST-2012 CLIMATE CHANGE POLICY AND INTERNATIONAL LAW

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Introduction

The end of the first decade of the 21st century will be long remembered by the international climate change community. Those present at the Conference of the Parties (COP) to the United Nations Framework Convention on Climate Change (UNFCCC)¹ in Copenhagen may remember waiting in queues in the cold for nine long hours, after which they were denied entry to the conference premises for unclear reasons. Observer organisations, including civil society, business, research and youth constituencies, may remember the significant restrictions on their access to the decision-making process, due to security considerations and the limited capacity of the Bella Centre in Copenhagen, where the conference took place. Others may remember the media hype leading up to the conference, with presidents, prime ministers, rock and movie-stars announcing their attendance in Copenhagen, keen on witnessing the emergence of a new international climate change agreement in the Danish capital. Yet others may remember the unprecedented negotiation chaos that ensued in the last few days, with emotions running higher than ever before, and accusations between developing and industrialised countries – and among developing countries themselves – flying back and forth. Eventually, talks at the highest political level lead to a text, the Copenhagen Accord. The document was not viewed as an acceptable outcome by all parties, therefore leaving its legal status in limbo.

This short essay provides one observer's account of what happened in the run-up to, and during, the Copenhagen summit. I will first briefly discuss the scientific basis for climate change policy, which came under fire only a few weeks before the COP. I will then turn to the political game that took place in Copenhagen and that led to the Copenhagen Accord.² I will conclude with a few observations on how the role of international law might change in international climate change policy beyond 2012.

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¹ With this I also refer to the Conference of the Parties to the UNFCCC serving as Meeting of the Parties (COP/MOP) to the Kyoto Protocol.

² The text of the Copenhagen Accord can be found at http://unfccc.int/files/meetings/cop_15/application/pdf/cop15_cph_auv.pdf (last accessed 3 January 2010).

I. The Science...

There is a solid scientific basis for international action to mitigate the causes and impacts of climate change. In particular, the most recent report produced by thousands of scientists gathered in the Intergovernmental Panel on Climate Change (IPCC) concluded with 90% certainty that human activities contribute to an increase in the global average temperature. Still, the science underlying climate policy is under regular attack by sceptics questioning, *inter alia*, the attribution of climatic changes to human activities, the extent to which climate change impacts are adverse, and, in their eyes, the excessive costs of implementing climate change policies. Just a few weeks before the Copenhagen Conference, these sceptical voices could once again be heard when the news of so-called 'Climate-gate' broke. In the media, allegations arose that someone hacked e-mail accounts of researchers of the Climate Research Unit of the University of East Anglia, United Kingdom that showed there was reason to doubt the very foundations of international climate change policy, and that a large-scale conspiracy was underway to silence those who questioned the human influence on climate change.

In my view, the 'Climate-gate' affair by no means undermines the scientific basis for climate change action. First, the scientific evidence for the anthropogenic influence on climate change certainly does not only stem from the research discussed in the e-mails, but is provided by various strands of research in a plethora of disciplines. The e-mails were presented out of context, and narrowly focused on one set of climate reconstructions, whereas other scientific results have also supported the hypothesis that climate change is caused by greenhouse gas emissions from human activities. Second, there are and will always be uncertainties in science. However, rather than not taking action at all, it is important that these uncertainties are made transparent to decision-makers, enabling them to manage the risks. Indeed, in accordance with the precautionary principle, a lack of full scientific certainty should not be a justification for inaction. Again, references to the IPCC, as well as the 2006 Stern Review and various academic bodies, should provide a clear indication that there are very good reasons for concern. Third, I find it intriguing, to say the least, that while most media reports discuss in detail how the e-mails would undermine current climate science, almost no journalist has investigated *why* these e-mails were leaked, or has questioned the *when* – i.e. a few weeks before the Copenhagen Conference. Nevertheless, the e-mails – or better, the reactions to the e-mails – show that climate scientists have a serious public relations problem. Apparently, media and public opinion are prone to listen to any message that casts doubt on the scientific basis, dismissing calls for action as 'alarmism'. This points to the need for better forms of communication of climate science to the broader public, as well as greater transparency in the conduct of research. Rather than further discussing the science – which, in my opinion is pretty much settled, although there should always be room for reasonable scientific

debate – I will now turn to the political games that have been played before, in, and after Copenhagen.

II. The Politics...

Expectations for Copenhagen were high, and not without reason. Two years before, in Bali, Indonesia, all Parties to the UNFCCC had agreed to come to a new international agreement through the 'Bali Action Plan'. The Bali meeting was a crucial moment in the UNFCCC process to set in motion negotiations on a follow-up agreement to be concluded before the greenhouse gas emission reduction targets for industrialised countries enshrined in the Kyoto Protocol expire in 2012. Between Bali and Copenhagen, parties met frequently; in 2009 alone, there were six formal negotiation sessions. The discussions were organised along two formal processes. The first was the Ad Hoc Working Group on Long-term Cooperative Action (AWG-LCA), the only forum to include all Parties to the UNFCCC, including the United States, which had refused to ratify Kyoto in 2001. The other was the Ad Hoc Working Group on the Kyoto Protocol (AWG-KP), which aimed to come to an agreement on targets for the developed countries participating in the Protocol (including the countries of the European Union, Japan, Canada and Australia) for the period after 2012.

Both negotiation tracks were aimed at coming to a new agreement, but disputes arose and exacerbated as to how the tracks should eventually be connected with a view to arriving at one comprehensive agreement, and whether they should converge at all. For developing countries, it was of the utmost importance to keep the Kyoto track separate from the Convention track; after all, the Kyoto Protocol does not contain any legally binding emission reduction or limitation commitments for these countries, while it does set them for the developed countries. Merging the two tracks, in the developing countries' view, could result in the imposition of such commitments on developing countries, now or in the near future. For many developed countries, this was precisely one of the reasons why their focus was on the AWG-LCA. Countries like the US, Australia and Japan had argued that the distinction between developed and developing countries was no longer appropriate and that, while emissions abatement needed to continue in the industrialised world, increased emphasis should be placed on action in key emerging economies with rapidly growing emissions, including China, India, Brazil and South Africa (the 'BASIC' countries). For these developed countries, it was of crucial importance to involve the BASIC countries in an international agreement on climate change mitigation. For the EU, it was also imperative to more actively involve all major emitters. This meant that its focus was primarily on the AWG-LCA, the only track to include both the US and the BASIC countries. However, the EU also had an interest in retaining the legal architecture established by the Kyoto Protocol: a legally binding agreement including emission reduction targets and emissions trading mechanisms which allowed countries to reduce their

emissions cost-effectively. The EU had been instrumental in ‘saving’ the Protocol after the US had rejected it; and the EU had fully embraced the market mechanisms introduced by the Protocol.

Some weeks before the Copenhagen Summit, it became increasingly evident that a legally binding agreement would be an unlikely outcome in Copenhagen, and that a set of detailed political decisions, including a timeline for getting to a legally binding treaty, would be the best possible result. Not only had the negotiations become incredibly complex, with negotiation texts of almost 200 pages circulating earlier in 2009, it was also clear that some of the crunch issues – including mitigation commitments and actions by developed and developing countries, and financial support for developing countries – would be very difficult to resolve. While this development lowered expectations, the stakes for Copenhagen were raised by the presence of more than 100 heads of government in the second week, an unprecedented event – not even in Kyoto did so many world leaders attend a climate change conference. Expectations were thus high – perhaps unreasonably so – that heads of government could break the deadlock that had prevailed in the negotiations for more than two years. Surely, President Obama would not come to Copenhagen unless there was something to sign, right? Furthermore, Copenhagen was preceded by a large number of unilateral pledges by countries to reduce or limit their greenhouse gas emissions, including Brazil, China, South Africa and Japan. The EU had already put in place a legislative framework to reduce its emissions by 20% in 2020 compared to 1990 levels, and had stated its intention to raise this to 30% if other industrialised countries joined. While the US had not made a similar pledge, legislative discussions at the federal level in the US showed that the country might be willing to agree on an emission reduction of 17% by 2020 compared to 2005 levels (amounting to a 3% reduction compared to 1990 levels), an ambition level endorsed by President Obama shortly before the beginning of the Conference. In other words, there were some positive signs that countries were ready to enhance their climate change mitigation efforts.

Despite these expectations, the first week of the Conference continued the stalemate that had characterised the discussions in the past two years. The most notable event was the emotional intervention by a delegate of Tuvalu, a small island nation in the Pacific under threat of rising sea levels, calling for a legally binding agreement to save the country from drowning. In the second week, things heated up when several countries accused the Danish COP Presidency of being biased and non-transparent after it had announced to work with a negotiation text that was not solely based on the texts coming from the AWG-LCA and the AWG-KP. The second week was also marked by the arrival of the heads of government. Those expecting that they merely came to rubberstamp a text agreed upon by the delegates were wrong. On the contrary, key issues such as finance and mitigation were still unresolved by the time all world leaders had arrived.

On the last official day of the conference, all eyes turned to the US. In the morning, President Obama gave a speech to the COP, disappointing many observers when he failed to go beyond the known US position at this point. However, Obama's arrival did mark the start of a series of high-level meetings. Whereas the drafting of texts had so far taken place in small groups of country delegates, it was now a small group of world leaders that took up the challenge to arrive at a text that would be acceptable to all countries. On the last evening, an agreement was reported between around twenty-five countries, including the US and all the BASIC countries. This agreement – the Copenhagen Accord – was not the end point of the conference, however. In fact, the non-transparent drafting process of the Accord provoked intense reactions of disappointment and disgust by some of the countries that had not been involved. Nevertheless, most countries agreed on the text, albeit reluctantly. Still, for the text to become a formal decision taken by the UNFCCC COP, it needed to be adopted by consensus, which proved to be impossible given the rejection by a small group of countries, including Sudan, Bolivia, and Venezuela. Eventually, countries decided to 'take note' of the Accord and to list the countries endorsing at the top of the document. What this means in practice remains to be seen.

III. ... The law?

It is clear that the Copenhagen Accord is not a legally binding international agreement. However, at the moment it is not even clear what the Accord is except for a political declaration by a limited number of countries. The Accord as it stands not only does not qualify as a treaty, but it can also not be regarded as a decision by the COP due to the opposition of a few nations. If the Accord is merely a political declaration, one could expect at least some specificity in terms of the substance of the agreement. However, the agreement is full of open-ended statements of intention, and leaves the world in the dark how crucial details should be put in practice. For instance, rather than adopting or endorsing the scientific view that the global mean temperature rise should be kept below 2 degrees Celsius, the countries drafting the Accord merely 'recognise' this view. Another example is that the countries that agreed on the Accord see that there is a need for global and national emissions to peak 'as soon as possible' but do not specify when this should happen. Also, various mechanisms and funds are called for and mentioned without any indication of the details of operation. And while a specific amount of money to assist developing countries is promised (100 billion US dollars annually from 2020 onwards), the document states that this should come from 'a wide variety of sources', thereby not providing any predictability about whether the funds will actually be delivered.

Of course, statements of good intentions and imprecise language are nothing new in the history of international lawmaking in the field of climate change, and can be found in both the UNFCCC and the Kyoto Protocol. Many

details of the Kyoto Protocol, such as the modalities of the Protocol's Clean Development Mechanism or its Adaptation Fund, were operationalised years after the treaty was adopted. However, it remains unclear how any details of the Copenhagen Accord can be further elaborated by the bodies established by the UNFCCC. The Accord specifies that this shall be done by the COP – yet the COP has so far not even reached consensus on the legal status of the Accord. In other words, whereas there was a clear basis for elaborating the provisions of the UNFCCC and the Kyoto Protocol, it remains unclear how any provisions of the Copenhagen Accord can be operationalised.

Still, the Accord may serve an important purpose: it encourages developed countries to list quantified economy-wide targets, and also requests developing countries to list their nationally appropriate mitigation actions. Arguably, no legally binding agreement coming out of Copenhagen could have achieved such lists given the opposition of developing countries to any legally binding commitments (or the international review of domestic actions). The Copenhagen Accord may eventually become more specific by listing the various targets of developed countries and actions by developing countries. In the period before the Copenhagen Conference, many countries had already announced unilateral targets or actions, which can now be included in this international document. And optimists could even argue that this may lead to a race to the top, where countries try to 'out-pledge' other countries. Furthermore, the Accord for the first time indicates that there will be some form of international scrutiny (through consultations and analysis) of developing countries' pledged mitigation actions. Notwithstanding these positive interpretations of the Accord, only one country so far – Japan – has explicitly stated its intention to list its domestic target, and it remains to be seen how many countries will in fact be willing to list their domestic mitigation activities at the international level.

From the perspective of international law, the Copenhagen Accord is significant. First, the Copenhagen Accord hints at the limitations of the traditional forms of international lawmaking. International climate change law was already characterised by non-traditional forms of lawmaking, notably through COP decisions. The Copenhagen Accord – while clearly not falling within the traditional definition of a treaty – also seems intended to have at least some effect on the behaviour of nation states. But while the use of decisions in climate change law can be primarily justified by the complex and technical nature of the issue at hand, avoiding the use of a treaty in the case of the Copenhagen Accord was rather politically motivated: key countries did not want to sign up to anything legally binding. The question is whether countries are willing to make use of the instrument again, or whether political declarations like the Copenhagen Accord form a new *modus operandi*. In this regard, it is interesting to note that the Accord does not provide a timeline under which a legally binding agreement needs to be concluded, for instance, by the time of the next COP in Mexico in December 2010. Second, and related to the first point, if the Copenhagen Accord forms the *de facto*

architecture of post-2012 climate policy, it could provide an important test of the question whether legally binding agreements are more effective than non-legally binding agreements. Third, the ‘pledge and review’ system of the Copenhagen Accord calls for a dynamic form of international cooperation, where countries should be enabled to make renewed pledges on a continuous basis. This is in stark contrast with the Kyoto Protocol’s approach of ‘targets and timetables’, where an international agreement specifies the targets for a specific period, and after the period it is assessed whether those targets have been reached. The process called for in the Copenhagen Accord resembles the negotiations in the context of the World Trade Organization, where every few years countries make new pledges to reduce their trade barriers. However, the difference with the trade regime is that for combating climate change it is important that the pledges made add up to aggregate emission reductions sufficient to avoid dangerous climate change. Fourth, it should be noted the Copenhagen Accord does not render the existing climate treaties null and void. The UNFCCC as it stands will continue to provide the framework for any climate policy developments under the auspices of the UN, while the Kyoto Protocol will also continue to exist, even though the targets for developed countries expire in 2012. In other words, traditional international law will continue to be a key point of reference for the international negotiations.

Concluding remarks

While the COP in Copenhagen was one of the most chaotic UN conferences in recent history – and certainly the most bizarre conference I have attended – and while the outcomes disappointed even some observers with low expectations (except perhaps observers in the US), all hope need not be lost. First, important shifts can be witnessed in the positions of China and the United States, and the fact that these countries have agreed on something in the first place can be regarded as a success. Second, many countries seem to agree on the need for a legally binding agreement, although it will be some time before all countries are actually ready to agree on such a treaty. Third, it should be remembered that not all climate change action originates from the UN process. Indeed, autonomous action is already taking place in many countries irrespective of an international agreement, while many initiatives have also been started at the sub-national level and by non-state actors. For instance, the European Union’s emissions trading scheme has been launched independent from the international legal framework. Indeed, carbon pricing policies such as emissions trading schemes implemented at the domestic level can provide an important incentive for large-scale behavioural change, although their effectiveness in the area of climate change is not undisputed.

However, avoiding the dangerous impacts of climate change ultimately requires collective action – both in terms of reducing emissions and supporting vulnerable countries in adapting to climate impacts – and the Copenhagen Accord does not provide any firm guarantees that such action

will indeed take place. The bottom-up nature of the agreement enables countries to only pledge what they are politically willing to do, rather than what is required on the basis of considerations of environmental effectiveness and equity. Although the Accord alludes to a long-term temperature target, it does not provide any pathway for global emissions to actually stay below that target, and does not specify how the remaining atmospheric space to achieve the target should be shared among countries. Furthermore, while the compliance system of the Kyoto Protocol has its weaknesses, the Copenhagen Accord does not provide any mechanism to incentivise countries to fulfil their pledges.

In sum, while I believe that Copenhagen does not need to go into history as the conference that wrecked the climate, I think that it is at best a small step forward in the fight against climate change. Only time will tell whether countries are willing to step up their efforts, and ensure that the potentially catastrophic effects of climate change are avoided.