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The Copenhagen Accord and the Silent Incorporation of the Polluter Pays Principle in International Climate Law: An Analysis of Sino-American Diplomacy at Copenhagen and Beyond

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**THE COPENHAGEN ACCORD AND THE SILENT
INCORPORATION OF THE POLLUTER PAYS
PRINCIPLE IN INTERNATIONAL CLIMATE LAW:
AN ANALYSIS OF SINO-AMERICAN DIPLOMACY
AT COPENHAGEN AND BEYOND**

*Lin Feng and Jason Bui

Table of Contents

ABSTRACT	3
I. INTRODUCTION.....	4
II. BACKGROUND: THE ROAD TO COPENHAGEN	6
A. 1987-1992: Early Awareness, Activism and Preparatory Work.	7
B. 1992-1997: The UN Framework Convention on Climate Change (UNFCCC).....	12
C. 1997-2007: The Kyoto Protocol.....	14
D. 2007: The Bali Roadmap and Action Plan.....	18
III. THE FINAL DAYS: DOMESTIC MEASURES AND BILATERAL DIPLOMACY 2007-2009	20
A. The United States	21
B. The People’s Republic of China.....	24
C. Bilateral and Multinational Diplomacy	28
D. Negotiating Positions	31

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IV. THE CONFERENCE, DAY BY DAY.....	35
A. The First Week.....	37
B. The Second Week.....	41
V. THE COPENHAGEN ACCORD.....	56
A. Emissions Cuts.....	56
B. Financial Assistance.....	59
C. Verification and Compliance.....	61
D. Technology Transfer.....	64
E. Deforestation.....	67
VI. THE FUTURE GLOBAL GOVERNANCE OF CLIMATE CHANGE: A REBALANCING OF NORMS AND THE POTENTIAL FOR DIPLOMATIC REALIGNMENT.....	68
VII. CONCLUSION.....	72

ABSTRACT

Despite two years of aggressive diplomacy, the December 2009 Copenhagen Conference failed to create an internationally binding treaty to abate global warming. The negotiations resulted only in an aspirational, three-page interim agreement. While its brevity and clear retreat from the legal obligations of the Kyoto Protocol are disappointing, the Copenhagen Accord is nonetheless significant in many regards. It sets a goal of limiting global temperature rise to 2 degrees Celsius, contains an obligation for hundreds of billions of dollars to flow from developed states to the developing world, and establishes a new mechanism to prevent deforestation. The most significant result of the Conference, however, is the codification of responsibilities for developing nations – including China and India – to address global warming for the first time. This represents a fundamental shift in the balance between the environmental law maxims of “common but differentiated responsibilities” (paramount in the Kyoto Protocol order) and the “polluter pays” principle, now silently incorporated. As a result, post-Copenhagen climate diplomacy may undergo a significant realignment. Whereas the international community arrived divided along North-South lines, many nations left Copenhagen frustrated by the relatively inflexible attitudes of the world’s two largest greenhouse gas emitters: the United States and China. Both nations managed to preserve their bottom lines at Copenhagen, but subsequent negotiating rounds will feature more power struggles regarding the global governance of climate change. This article is intended to provide a detailed summary and analysis of the Copenhagen Conference and its fundamental document, the Copenhagen Accord. The legal and diplomatic implications of both are parsed, with special focus upon the two nations rightfully receiving the most attention, acclaim and blame for anthropomorphic climate change.

I. INTRODUCTION

Despite years of advance diplomacy, the December 2009 Copenhagen Conference failed to create a legally binding plan to abate global warming. Instead, the negotiations resulted in a three-page interim agreement based on moral principles and future actions. The Copenhagen Accord, as the document is titled, has been bitterly attacked. Among many desired provisions missing from its sparse text are firm goals for delivering an international treaty, or any mandatory national targets for greenhouse gas (GHG) emissions reductions. To activists it may at best represent a disappointing conclusion to a two-year process intended to produce a comprehensive and enforceable action plan; at worst it can be viewed as undermining almost two decades of UN efforts to mitigate climate change. Few are satisfied by its moral and precedential breakthroughs, or characterize it as a progressive step along a daunting path.

Despite its many shortcomings, the Copenhagen Accord is momentous and contains hard-fought compromises on many difficult issues. For example, it sets a goal of limiting GHG-induced global temperature rise to 2-degrees Celsius (“2°C”) above pre-industrial levels by 2050. Such an enterprise implies deep emission cuts over the next four decades. The Accord also contains a legal obligation for hundreds of billions of U.S. dollars to flow from developed states to the developing world, and a promising new mechanism for the prevention of deforestation.

Most importantly, the Accord codifies the responsibility for and commitments of individual nations to act on their own to address global warming including, for the first time, powerhouse developing states like China and India. However, while a system for monitoring and reporting progress toward those national goals is provided for, there are no requisite international surveillance practices – a compromise over which China bargained hard. These developments represent a fundamental ideological shift from the Kyoto Protocol order. Whereas the environmental law principle of “common but differentiated responsibilities” was absolutely paramount in the Kyoto regime, the inclusion of responsibilities for the largest developing countries incorporates the “polluter pays”

principle, which is favored by the developed world. Indeed, nations that arrived divided between North and South, developed and developing, and rich and poor, left frustrated by the relatively inflexible attitudes of the United States and China. It remains to be seen whether they may now realign and rally around the polluter pays principle to pressure the world's two largest overall greenhouse gas emitters into greater concessions. Both sides managed to compromise while preserving their bottom lines at Copenhagen, but the next rounds of negotiations will bring more critical power contests regarding the global governance of climate change.

This article is intended to provide a detailed summary and analysis of the Copenhagen Conference and its fundamental document, the Copenhagen Accord. Both the legal and diplomatic implications of the Conference and its aftermath are considered. Special focus is placed upon the two nations rightfully receiving the most attention, acclaim and blame: the United States of America and the People's Republic of China. After this introduction, Section II presents a brief overview of the two-decade old United Nations process to address climate change as primer. In Section III, the extensive international negotiations following the Bali Conference (2007) and leading up to the Copenhagen Conference (2009) are discussed, as well as domestic and bilateral events within and between the United States and China. The negotiating positions of the two sides are extrapolated and explained therein. Section IV provides a day-by-day narrative of diplomacy at the Copenhagen Conference assembled from official statements, press releases, news coverage and individual accounts. Section V analyzes the Accord's legalities in detail, especially regarding the key issues of emissions cuts, financing, verification, technology transfer and deforestation. Section VI refocuses to analyze the Copenhagen Conference and Accord from a broader diplomatic perspective, concluding that the United States and China are now exposed as the key actors on the world stage. As a result, they must take meaningful bilateral action to lead the fight against global climate change in the decades ahead. The most recent developments in Sino-US efforts on fighting climate change indicate that both countries take the issue seriously and have

started to advance bilateral mechanisms. Such developments must be encouraged as they may prove to be more effective than multi-party negotiation.

II. BACKGROUND: THE ROAD TO COPENHAGEN

Tremendous concentrations of heat-trapping GHGs are accruing in Earth's atmosphere as a result of the burning of fossil fuels and deforestation.¹ "These gases prevent heat from escaping to space...[and] as the concentrations of these gases continue to increase in the atmosphere, the Earth's temperature is climbing above past levels".² According to data from the U.S. National Oceanic and Atmospheric Administration (NOAA) and National Aeronautics and Space Administration (NASA), the Earth's average surface temperature increased by 1.2 to 1.4 °F (0.66 – 0.77°C) in the last century.³ Since 1850, records show the eight warmest years have all occurred since 1998, the warmest being the year 2005.⁴ "[C]limate models predict that the average temperature at the Earth's surface could increase from 3.2 to 7.2°F (1.77-4.0°C) above 1990 levels by the end of this century" if the emissions are unabated.⁵ These changes are expected to have catastrophic effects on human, animal and plant life on Earth, as changes in temperature, rainfall patterns, snow cover, and sea levels sew devastation.⁶

¹ *Climate Change, Basic Information*, U.S. ENVTL. PROTECTION AGENCY, <http://www.epa.gov/climatechange/basicinfo.html> (last visited Mar. 19, 2010) [hereinafter *Basic Information*]; INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE (IPCC), CLIMATE CHANGE 1995: IPCC SECOND ASSESSMENT REPORT 21 (1995); James L. Olstead, *The Global Warming Crisis: An Analytical Framework to Regional Responses*, 23 J. ENVTL. L. & LITIG. 125, 128 (2008).

² *Basic Information*, *supra* note 1.

³ *Id.*

⁴ *Id.*; see also Adam Voiland, 2009: *Second Warmest Year on Record; End of the Warmest Decade*, NATIONAL AERONAUTICS AND SPACE ADMINISTRATION (Jan. 21, 2001), <http://www.giss.nasa.gov/research/news/20100121>; James Hansen et al., *Global Temperature Change*, 103(39) Proc. Of the Nat'l Acad. Of Sci. 14288 (2006), available at <http://www.pnas.org/content/103/39/14288.full.pdf>.

⁵ 3.2 to 7.2° Fahrenheit. *Basic Information*, *supra* note 1.

⁶ *Id.*

The United Nations (UN) has led the effort to solve this climate change crisis for over 20 years. Upon due consideration of the scientific data, its member nations have agreed that the reality of global warming is “unequivocal” and that delayed action would increase the risk of “severe climate change impacts.”⁷ This section summarizes that process in unjust brevity, providing a humble primer to the two decades of climate change negotiations preceding Copenhagen while not discussing any one development or mechanism in the detail that it merits. Where possible, perspective on the developing views of the United States and China are injected.

A. 1987-1992: Early Awareness, Activism and Preparatory Work

Climate change activism began in the 1970’s, a decade of discovery culminating in the First World Climate Conference held at Geneva, Switzerland in February 1979.⁸ The evidence of causation was inconclusive at that time, so the Conference focused upon “climate variability” as opposed to “climate change.”⁹ Scientific consensus about the impact of anthropomorphic emissions on Earth’s climate grew by the mid-1980’s, at a time when China was just beginning to experiment with Deng Xiaoping’s market reforms: piecemeal policies that would inspire a dynamic manufacturing economy, propel China to economic superpower status, and eventually earn it the title of the world’s largest carbon emitter.¹⁰ It was during those years that “[i]ncreasing scientific evidence of human interference with the climate system, coupled

⁷ Framework Convention on Climate Change, Conference of the Parties, Thirteenth Session, Bali, Indon., *Bali Action Plan*, 3, U.N. Doc. FCCC/CP/2007/6/Add.1* (Mar. 14, 2008).

⁸ The World Meteorological Organization (WMO) sponsored the Conference. See John C. Rodda, *The Second World Climate Conference*, www.iahs.info/hsj/360/hysj_36_01_0083.pdf (last visited Mar. 14, 2010).

⁹ Thus, phrases like “global warming,” and “greenhouse effect” were not prevalent in the proceedings. *Id.*

¹⁰ *Id.*; John Vidal & David Adam, *China Overtakes U.S. as World’s Biggest CO₂ Emitter*, *GUARDIAN*, June 19, 2007, <http://www.guardian.co.uk/environment/2007/jun/19/china.usnews/print>.

with growing public concern over global environmental issues, began to push climate change onto the political agenda.”¹¹ Though consensus on that issue still eludes American policymakers today, the United States in 1987 was instrumental in concerting action to address one class of GHG – chlorofluorocarbons – and the growing hole in the Ozone Layer they were causing. This diplomacy ultimately led to the 1987 Montreal Protocol.¹² Later that year, with international environmental activism at an all-time high, the UN elevated the issue of climate change to its broader agenda. General Assembly Resolution 42/184, styled “International Co-operation in the Field of the Environment,” first stated that:

[The UN General Assembly] Agrees with the Governing Council that the United Nations Environment Programme should attach importance to the problem of global climate change and that the Executive Director should ensure that the Programme co-operates closely with the World Meteorological Organization and the International Council of Scientific Unions and maintains an active, influential role in the World Climate Programme.¹³

One year later the UN Environment Program (UNEP) and the World Meteorological Organization (WMO) established the UN

¹¹ United Nations Framework Convention on Climate Change (UNFCCC), *A Guide to the Climate Change Convention Process*, Preliminary 2d ed., at 7 (2002), <http://unfccc.int/resource/process/guideprocess-p.pdf> (last visited Mar. 14, 2010) [hereinafter UNFCCC Guide].

¹² The Montreal Protocol on Substances That Deplete the Ozone Layer (a protocol added to the Vienna Convention for the Protection of the Ozone Layer) is an international treaty designed to phase out production of substances responsible for ozone depletion. Since entering into force in 1989, it has undergone seven revisions: 1990 (London), 1991 (Nairobi), 1992 (Copenhagen), 1993 (Bangkok), 1995 (Vienna), 1997 (Montreal), and 1999 (Beijing). See Montreal Protocol on Substances that Deplete the Ozone Layer, Sept. 16, 1987, Misc. 1 (1988), Cmd. 283; 26 I.L.M. 1541 (1987) (entered into force Jan. 1, 1989); See *Report of the Second Meeting of the Parties to the Montreal Protocol on Substances that Deplete the Ozone Layer*, U.N. Environment Program, U.N. Doc EP/OzL. Pro. 2/3 (1990).

¹³ G.A. Res. 42/184, ¶ 6, U.N. Doc. A/RES/42/184 (Dec 11, 1987).

Intergovernmental Panel on Climate Change (IPCC) “to provide the world with a clear scientific view on the current state of climate change and its potential environmental and socio-economic consequences.”¹⁴ The IPCC is an intergovernmental scientific body open to scientists from all UN and WMO member countries. It is charged with reviewing and assessing the most recent scientific, technical and socio-economic information produced worldwide relevant to understanding climate change.¹⁵ Thousands of scientists contribute to the work of the IPCC on a voluntary basis, while governments participate in the review process and in the IPCC plenary sessions.¹⁶ As its work has always been subject to hostile scrutiny,¹⁷ the IPCC takes pride in asserting “when governments accept the IPCC reports and approve their Summary for Policymakers, they acknowledge the legitimacy of their scientific content.”¹⁸

In 1988, following a bold proposal by Malta, the UN General Assembly directly attacked the issue of climate change for

¹⁴ At its 40th Session in 1988 the WMO Executive Council decided on the establishment of the Intergovernmental Panel on Climate Change (IPCC), and the UNEP Governing Council authorized UNEP’s support for IPCC shortly thereafter. IPCC, *Sixteen Years of Scientific Assessment in Support of the Climate Convention*, Dec. 2004, <http://www.ipcc.ch/pdf/10th-anniversary/anniversary-brochure.pdf> (last visited Mar. 14, 2010); IPCC, Organization, <http://www.ipcc.ch/organization/organization.shtml> (last visited Feb. 14, 2010).

¹⁵ It does not conduct independent research nor does it monitor climate related data. IPCC, Organization, *supra* note 14.

¹⁶ The Panel, comprised of government delegations of all member countries, meets approximately once a year at the plenary level. These Sessions are attended by hundreds of officials and experts from relevant ministries, agencies and research institutions from member countries and from participating organizations. The main decisions about the IPCC work program are taken and reports are accepted, adopted and approved in plenary session, and the IPCC Bureau and Chairperson are also elected in the plenary sessions. *Id.*

¹⁷ John M. Broder, *Scientists Taking Steps to Defend Work on Climate*, N.Y. TIMES, Mar. 2, 2010, at A11.

¹⁸ Malta’s proposal was entitled “Conservation of Climate as Part of the Common Heritage of Mankind.” *What is the IPCC?*, COPENHAGEN CLIMATE COUNCIL, <http://www.copenhagenclimatecouncil.com/get-informed/climate-negotiations-updates/what-is-the-ipcc.html>.

the first time.¹⁹ The General Assembly adopted Resolution 43/53 on the “Protection of Global Climate for Present and Future Generations of Mankind.”²⁰ That document urged all governments, intergovernmental (IGO) and non-governmental organizations (NGO) and scientific institutions alike:

[T]o treat climate change as a priority issue, to undertake and promote specific, co-operative action-oriented programmes and research so as to increase understanding on all sources and causes of climate change, including its regional aspects and specific time-frames as well as the cause and effect relationship of human activities and climate, and to contribute, as appropriate, with human and financial resources to efforts to protect the global climate . . .

²¹

Furthermore, the UN Resolution encouraged the convening of conferences on climate change “at the national, regional and global levels,”²² as well as endorsed and expressed appreciation for the early progress of the IPCC.²³

The IPCC published its set of First Assessment Reports in 1990, confirming that human-induced climate change is a threat and calling for an enforceable global treaty to address the problem.²⁴ The Second World Climate Conference echoed this

¹⁹ UNFCCC Guide, *supra* note 11, at 7.

²⁰ Protection of Global Climate for Present and Future Generations of Mankind, G.A. Res. 43/53, U.N. Doc.A/RES/43/53 (Dec. 6, 1988), *available at* <http://www.un.org/documents/ga/res/43/a43r053.htm> (last visited Feb. 14, 2010).

²¹ *Id.* at 6.

²² *Id.* at 8.

²³ *Id.* at 5.

²⁴ The IPCC divides work within three working groups which each address a particular subject area. The first assessment report was released in three issues as follows: Working Group I) Scientific Assessment of Climate change, Working Group II) Impacts Assessment of Climate Change, and Working Group III) The IPCC Response Strategies. *See* IPCC Reports, http://www.ipcc.ch/publications_and_data/publications_and_data_reports.htm (last visited Mar. 14, 2010).

call,²⁵ albeit less forcefully than environmentalists would have liked.²⁶ “This omission provoked some criticism from delegates and observers who considered the EC target of achieving 1990 emissions levels for carbon dioxide by the year 2000 to be the minimum basis of an acceptable policy for developed countries.”²⁷ It was an important first step, as the participants recognized climate change as a common concern of humankind, and adopted a number of international environmental law principles to guide future climate diplomacy: the principle of sustainable development,²⁸ the precautionary principle,²⁹ and the principle of common but differentiated responsibilities (CBDR) for countries at different

²⁵ The Second World Climate Conference was held in Geneva, Switzerland, from Oct. 29 to Nov. 7, 1990. Rodda, *supra* note 8.

²⁶ The Ministerial Declaration that resulted “disappointed many of the participating scientists as well as other observers because it did not offer a high level of commitment.” *The Second World Climate Conference, Fact Sheet*, UNITED NATIONS ENVIRONMENT PROGRAMME, <http://unfccc.int/resource/ccsites/senegal/fact/fs221.htm> (last visited Mar. 14, 2010).

²⁷ The Conference consisted of discussions among heads of government and ministers from 137 states and the European Community. These discussions were preceded by preparatory negotiations between government officials, which were convened to prepare a text for submission to the ministers. *Id.*

²⁸ Incorporated at UNFCCC Art. 3(4), sustainable development is the touchstone for addressing climate change. It demands that development, poverty eradication and climate protection should be considered in a holistic and integrated manner while ensuring that developing countries have a right to development. United Nations Framework Convention on Climate Change, May 5, 1992, 1771 U.N.T.S. 107, U.N. Doc.A/AC.237/18, *available at* <http://unfccc.int/resource/docs/convkp/conveng.pdf> [hereinafter UNFCCC].

²⁹ Codified at Art. 3(3) of the UNFCCC, the precautionary principle is also described in Principle 15 of the 1992 Rio Declaration: “In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.” United Nations Conference on Environment and Development, Rio de Janeiro, Braz., June 3-14, 1992, *Rio Declaration on Environment and Development*, U.N. Doc A/Conf.151/26 (1992), 31 I.L.M. 874, 876 (1992) [hereinafter *Rio Declaration*]; *see also* Jason Buhi & Lin Feng, *The International Joint Commission’s Role in the United States-Canada Transboundary Air Pollution Control Regime: A Century of Experience to Guide the Future*, 108 VT. J. ENVTL. L. 107, 130 (2009).

levels of development.³⁰ This last principle charges developed countries with taking responsibility for their historical cumulative and current per capita GHG emissions by substantially reducing their pollution and providing support to developing countries to take proactive measures to adapt to and mitigate climate change.³¹

The UN General Assembly responded to these calls in December of 1990, formally launching negotiations on a framework convention on climate change under the terms of Resolution 45/212.³² The negotiations began in February 1991 under the auspices of an Intergovernmental Negotiating Committee (INC), chaired by Jean Ripert of France.³³ These negotiations – combined with the previous General Assembly resolutions, the findings of the first IPCC Assessment Report of 1990, and the First and Second Climate Change Conferences – led to the development of the foundational UN convention on global warming.

B. 1992-1997: The UN Framework Convention on Climate Change (UNFCCC)

After just 15 months, the INC adopted by consensus the UN Framework Convention on Climate Change (UNFCCC). It opened for signature at the 1992 UN Conference on Environment and Development (UNCED, better known as the “Earth Summit”) in Rio de Janeiro and entered into force in 1994.³⁴ Along with the UNFCCC, the Earth Summit produced the Rio Declaration – a list of 27 principles intended to guide future sustainable development around the world. Principle 16 enshrined the “Polluter Pays

³⁰ Incorporated at UNFCCC Art. 3, *supra* note 28; Christopher D. Stone, *Common But Differentiated Responsibilities in International Law*, 98 AM. J. INTL. L. 276, 292 (2004).

³¹ See Stone, *supra* note 30 at 292.

³² UNFCCC Guide, *supra* note 11, at 7.

³³ *Id.*

³⁴ Ratified on 4 June 1992 and coming into force on 21 Mar. 1994, the UNFCCC is one of three conventions adopted at the Rio Earth Summit. The others – the Convention on Biological Diversity and the Convention to Combat Desertification – also involve matters strongly affected by climate change. UNFCCC Background Info, http://unfccc.int/essential_background/feeling_the_heat/items/2913.php (last visited Mar. 5, 2010).

Principle” (PPP), a long-standing norm that encourages nations to ensure that polluting actors bear the full environmental costs of their activities.³⁵ Unlike CBDR, this principle was not explicitly incorporated into the UNFCCC,³⁶ but it nonetheless commands great respect in international environmental law.

The UNFCCC sets an ultimate objective of stabilizing GHG concentrations “at a level that would prevent dangerous anthropogenic interference with the climate system.”³⁷ It further states that “such a level should be achieved within a time-frame sufficient to allow ecosystems to adapt naturally to climate change, to ensure that food production is not threatened, and to enable economic development to proceed in a sustainable manner.”³⁸ Under the CBDR rationale, the heaviest burden for fighting climate change is placed on the industrialized nations, reason being that they are the historical source of most past and present GHG emissions, and that economic development is difficult to achieve even without climate considerations for poorer states.³⁹ For the most part, these developed nations (called “Annex I” countries because they are listed in the first annex to the treaty) belonged to

³⁵ A discussion of CBDR in the context of the UNFCCC process immediately follows. The PPP is stated in the Rio Declaration, *supra* note 29. See also Jason Bui & Lin Feng, *supra* note 29 at 114 (discussing the origins of the “polluter pays” principle all the way back to the 1931 Trail Smelter Case).

³⁶ United Nations Framework Convention of Climate Change (UNFCCC), 1992, art. 3(1) states:

“The Parties should protect the climate system for the benefit of present and future generations of humankind, on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities. Accordingly, the developed country Parties should take the lead in combating climate change and the adverse effects thereof.”

³⁷ *Id.* at art. 2.

³⁸ *Id.*

³⁹ See *id.* at preface ¶ 3, stating:

“Noting that the largest share of historical and current global emissions of greenhouse gases has originated in developed countries, that per capita emissions in developing countries are still relatively low and that the share of global emissions originating in developing countries will grow to meet their social and development needs...”;

See also UNFCCC Background Information, *supra* note 34.

the Organization for Economic Cooperation and Development (OECD).⁴⁰ The UNFCCC envisions climate assistance from these nations flowing to the developing world through the provision of financial aid,⁴¹ information support,⁴² and technological transfers.⁴³

By adopting this bifurcated framework, the Parties to the UNFCCC accepted that the responsibilities of developing nations would grow in future years.⁴⁴ The Convention recognizes that it is a flexible “framework” document intended to be amended over time.⁴⁵ Many of those amendments were adopted during the annual Conferences of the Parties (COP),⁴⁶ composing a detailed rulebook for the effective implementation of the Convention.⁴⁷ With pride of place among these is the 1997 Kyoto Protocol.

C. 1997-2007: The Kyoto Protocol

The only attempt at a globally binding treaty to manage GHG emissions is the 1997 Kyoto Protocol.⁴⁸ The Kyoto Protocol is linked to the UNFCCC, but whereas the Convention merely encourages all Parties to the Convention to stabilize emissions,⁴⁹ the Protocol commits the industrialized Parties to do so.⁵⁰ “The

⁴⁰ UNFCCC, Annex I, *supra* note 28 at 23. This list also includes a number of “transitional” economies including Belarus, Bulgaria, Croatia, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Romania, the Russian Federation, Slovakia, Slovenia and the Ukraine. The UNFCCC requires precise and regularly updated inventories of GHG from these industrialized countries. *Id.* at art. 4 paragraph 1(a). It merely encourages the developing countries to do the same. *Id.*

⁴¹ *Id.* at art.4 ¶¶ 3, 4, 7, 8, and art. 11.

⁴² *Id.* at art.4, ¶ 5.

⁴³ *Id.* at art.4, ¶¶ 5 & 9, and art. 9.

⁴⁴ *Id.*; *see also* UNFCCC, *supra* note 28, at art. 4 ¶ 8. Today, nearly two decades after its adoption, 192 nations are Parties to the UNFCCC. *See generally* UNFCCC Background Information, *supra* note 34.

⁴⁵ UNFCCC, *supra* note 28 at art. 15 (Amendments to the Convention), and Art.16 (Adoption and Amendment of Annexes to the Convention).

⁴⁶ *Id.* art. 7.

⁴⁷ UNFCCC Guide, *supra* note 11.

⁴⁸ Kyoto Protocol to the United Nations Framework Convention on Climate Change, Dec. 11, 1997, 2303 U.N.T.S. 162 [hereinafter Kyoto Protocol].

⁴⁹ UNFCCC, *supra* note 28 at art. 3, ¶ 3.

⁵⁰ Kyoto Protocol, *supra* note 48, at art. 2-3.

major feature of Kyoto is that it sets binding targets for 37 industrialised countries and the European Community to reduce greenhouse gas (GHG) emissions. These amount to an average 5 percent cut in GHG emissions against a 1990 baseline over the five-year period, 2008-2012.”⁵¹Building the UNFCCC before it, the Protocol places a legal burden exclusively upon developed nations under the CBDR principle.⁵²Those industrialized countries must meet their targets primarily through national measures, engage in emissions monitoring,⁵³ submit to a compliance system ensuring that they are meeting their commitments,⁵⁴ and acquiesce to penalties if they fail.⁵⁵

The Kyoto Protocol offers some flexibility in meeting those targets by way of three innovative market-based mecha-

⁵¹ Michael Hutchinson, *Countdown to Copenhagen*, MAYER BROWN (16 Nov. 2009), [http://www.mayerbrown.com/publications/article.asp?id=7963 &nid=6](http://www.mayerbrown.com/publications/article.asp?id=7963&nid=6) (last visited Jan. 25, 2011).

⁵² Kyoto Protocol, *supra* note 48, at art. 10. Also described *infra* note 284. The Xinhua news agency made an interesting metaphor after the Copenhagen Conference concluded:

“More than 2,000 years ago, Mencius, a great thinker and philosopher in ancient China, said ‘Please extend the respect of the aged in one’s family to those of other families.’ It is hoped that every son and daughter in the world could understand the Chinese son’s concern and love for his old mother, who still relies on a coal stove for heating in the depth of winter.”

China’s point is that a large portion of the China’s and the world’s population still lacks access to basic resources, including firewood for warmth, in line with their basic equity premise of “one man, one barrel.” Fu Yunwei & Guo Xinyu, *Developing Nations’ Development Right Deserves Respect*, XINHUA, Dec. 28, 2009, available at http://news.xinhuanet.com/english/2009-12/28/content_12712513.htm (last visited Apr. 10, 2010).

⁵³ See Kyoto Protocol, *supra* note 48, art. 8, ¶ 3.

⁵⁴ See *id.* at art. 8.

⁵⁵ The Marrakesh Accord, a supplementary rulebook to implement the Kyoto Protocol, holds that states that do not fulfill their targets are required to deduct 1.3 times their excess emissions from the assigned amount in the next commitment period. Conference of the Parties to the Framework Convention on Climate Change, Seventh Session, Marrakesh, Morocco, Oct. 29-Nov. 10, 2001, *Report of the Conference of the Parties at 76*, UN DOC FCCC/CP/2001/13.Add.3 (Jan. 21, 2001).

nisms: the carbon emissions trading market,⁵⁶ joint implementation, and the clean development mechanism (CDM).⁵⁷ In true international spirit, the CDM allows industrialized countries to invest in projects that reduce emissions in developing countries as an alternative to more expensive domestic reductions.⁵⁸ This mechanism has particular appeal in China's development context, yet China reports that "[c]urrent CDM projects approved internationally (and domestically) such as HFC[-]23 and methane projects, are not targeted to the sustainable development needs of developing countries."⁵⁹

⁵⁶ Precise records must be kept of any trades carried out on the carbon market. See Kyoto Protocol, *supra* note 48, at art. 17. Today, registry systems track and record transactions by Parties under the mechanisms. The UN Climate Change Secretariat, based in Bonn, Germany, keeps an international transaction log to verify that transactions consistent with Art. 17 of the Kyoto Protocol.

⁵⁷ Kyoto Protocol, *supra* note 48, art. 12. "The mechanism known as 'joint implementation', defined in Article 6 of the Kyoto Protocol, allows a country with an emission reduction or limitation commitment under the Kyoto Protocol (Annex B Party) to earn emission reduction units (ERUs) from an emission-reduction or emission removal project in another Annex B Party, each equivalent to one tonne of CO₂, which can be counted towards meeting its Kyoto target." *Joint Implementation*, UNITED NATIONS FRAMEWORK CONVENTION ON CLIMATE CHANGE, http://unfccc.int/kyoto_protocol/mechanisms/joint_implementation/items/1674.php (last visited Nov. 15, 2010).

⁵⁸ Kyoto Protocol, *supra* note 48, art. 12. "A CDM project activity might involve, for example, a rural electrification project using solar panels or the installation of more energy-efficient boilers. The mechanism stimulates sustainable development and emission reductions, while giving industrialized countries some flexibility in how they meet their emission reduction or limitation targets." United Nations Framework Convention on Climate Change, *Clean Development Mechanism*, UNFCCC. http://unfccc.int/kyoto_protocol/mechanisms/clean_development_mechanism/items/2718.php (last visited Nov. 15, 2010). Proceeds from CDM project activities also largely finance an Adaptation Fund established to promote adaptation projects in developing Party countries. See Lin Feng and Jason Buhi, *Emissions Trading Across China: Incorporating Hong Kong and Macau into an Urgently Needed Air Pollution Control Regime Under 'One Country, Two Systems*, 19 FLA. ST. J. TRANSNAT'L L. & POL'Y 123 (2009).

⁵⁹ Jung Tae Yong et al., *Asian Perspectives on Climate Regime Beyond 2012: Concerns, Interests and Priorities*, INSTITUTE FOR GLOBAL ENVIRONMENTAL STRATEGIES (2005), at 11, available at http://enviroscope.iges.or.jp/modules/envirolib/upload/169/attach/complete_report.pdf (last visited Jan. 25, 2011).

Diplomatically, the 1997 Kyoto Protocol divided the world into two poles: developed countries, which had to accept cuts in emissions, and the rest, with no binding commitments. While this represents one possible manifestation of the CBDR principle, the dichotomy boiled down to one inescapable fact for the U.S.: China, then on pace to become the world's largest overall emitter of GHG, was under no obligation to curb its emissions. Relying on arguments saturated with PPP overtones, and due to tremendous domestic political opposition largely premised on the fact that Kyoto imposed no obligations upon emerging economies like China, the U.S. opposed the Kyoto Protocol from the outset. With their delegation still in Japan, the U.S. Senate passed a unanimous 95–0 declaration stating that the U.S. would not ratify any treaty that did not include binding targets for developing nations or “would result in serious harm to the economy of the United States.”⁶⁰ Vice President Al Gore symbolically signed it in 1998, but even he acknowledged that “we will not submit this agreement for ratification until key developing nations participate in this effort . . . [t]his is a global problem that will require a global solution.”⁶¹ Despite the support of the executive branch, the Kyoto Protocol was never submitted to the U.S. Senate for ratification.

Nevertheless, “[t]he Kyoto Protocol is generally seen as an important first step towards a truly global emission reduction regime that will stabilize GHG emissions, and provides the essential architecture for any future international agreement on climate change.”⁶² The Kyoto Protocol was adopted in 1997 and

⁶⁰ A Resolution Expressing the Sense of the Senate Regarding the Conditions for the United States Becoming a Signatory to any International Agreement on Greenhouse Gas Emissions under the United Nations Framework Convention on Climate Change, S.Res.98, 105th Cong. (1997) (as passed by Senate, July 25, 1997), *available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=105_cong_bills&docid=f:sr98ats.txt.pdf (last visited Nov. 15, 2010).

⁶¹ *Clinton Hails Global Warming Pact But Early Senate Ratification is Unlikely*, CNN, ALL POLITICS (Dec. 11, 1997), <http://www.cnn.com/ALLPOLITICS/1997/12/11/kyoto/> (last visited Mar. 13, 2010).

⁶² The detailed rules for the implementation of the Kyoto Protocol were adopted at COP-7 in Marrakesh in November 2001, and are thus called the “Marrakesh Accords.” UNFCCC, *Kyoto Protocol*, http://unfccc.int/kyoto_

finally entered into force in 2005.⁶³ “Excluding the U.S., 192 Parties have ratified it to date.”⁶⁴ However, the first commitment period will expire in 2012. The Protocol will continue to be legally binding but, in practice, if no further commitment periods are agreed upon then countries will have no targets to cut their emissions. A new international framework needs to be negotiated and ratified by that time which can deliver the stringent emission reductions the IPCC concludes are needed.

D. 2007: The Bali Roadmap and Action Plan

The negotiations on a new climate treaty began at a UN meeting hosted by the Government of Indonesia. From December 3 to December 15, 2007, over 10,000 participants (including representatives of over 180 countries, IGOs and NGOs) met at the Bali International Convention Centre to plan for the post-Kyoto era.⁶⁵ The two-week conference featured the 13th Conference of the Parties to the UNFCCC (COP-13) and the 3rd Meeting of the Parties to the Kyoto Protocol (MOP-3). The second week of negotiations was conducted at the ministerial-level.⁶⁶

That diplomacy culminated in the adoption of the so-called Bali Road Map and Bali Action Plan,⁶⁷ a series of “forward-looking decisions” designed to achieve an effective post-Kyoto

protocol/items/2830.php (last visited Nov. 15, 2010). *See also* The Marrakesh Accords and Marrakesh Declaration, available at http://unfccc.int/cop7/documents/accords_draft.pdf (last visited Mar. 23, 2010).

⁶³ *Id.*

⁶⁴ UNFCCC, *Status of Ratification of the Kyoto Protocol*, available at http://unfccc.int/essential_background/kyoto_protocol/status_of_ratification/items/5524.php (last visited Jan. 25, 2011).

⁶⁵ UNFCCC, *The United Nations Climate Change Conference in Bali*, http://unfccc.int/meetings/cop_13/items/4049.php (last visited Mar. 23, 2010).

⁶⁶ *Id.*

⁶⁷ *See* Conference of the Parties to the Framework Convention on Climate Change, Thirteenth Session, Bali, Dec. 3-15, 2007, *Report of the Conference of the Parties on its Thirteenth Session, Held in Bali From 3 to 15 December 2007*, at 3, UN DOC FCCC/CP/2007/6/Add.1 (Mar. 14, 2008) [hereinafter Bali Action Plan], available at <http://unfccc.int/resource/docs/2007/cop13/eng/06a01.pdf#page=3> (last visited Mar. 23, 2010).

Protocol climate agreement by 2009.⁶⁸ These demonstrate that the Conference had several substantive achievements. Among the most notable, the Kyoto Parties launched the Adaptation Fund, a mechanism intended to finance diverse climate change projects from constructing sea barriers to implementing early warning systems for extreme meteorological events.⁶⁹ Bali also contributed to developing the scope and content of the Article 9 review of the

⁶⁸ Rachmat Witoelar, *The Bali Roadmap: Address to Closing Plenary by His Excellency Mr. Rachmat Witoelar, President, UN Climate Change Conference, Closing of Joint High-Level Segment Bali, 15 December 2007*, at 1, available at http://unfccc.int/files/meetings/cop_13/application/pdf/close_stat_cop13_president.pdf (last visited Feb. 26, 2010).

⁶⁹ See Conference of the Parties to the Framework Convention on Climate Change, Third Session, Bali Dec 3-15 2007, *Report of the Conference of the Parties Serving as the Meeting of the Parties to the Kyoto Protocol on its Third Session, Held in Bali From 3 to 15 December 2007*, at 3, Decision 1/CMP.3, UN DOC FCCC/KP/CMP/2007/9/Add.1 (Mar. 14, 2008), available at <http://unfccc.int/resource/docs/2007/cmp3/eng/09a01.pdf#page=3> (last visited Mar. 23, 2010). The Adaptation Fund was established to finance adaptation projects in developing countries under the Kyoto Protocol. According to the World Bank, it has received USD\$23.5mn through grants and the sale of emission reduction certificates. See World Bank, *Financial Status of the Adaptation Fund Trust Fund (as of 30 November 2009)*, Nov. 30, 2009, available at http://adaptation-fund.org/system/files/AF_Financial_Status_Report_Jan%2031%202010%20-%20Final.pdf (last visited Dec. 28, 2010).

The fund is administered by the Global Environment Facility, which was established by donor governments to fund conservation projects in 1991. The World Bank is its trustee, and a 16-member board, drawn from the Conference of Parties to the Kyoto Protocol oversees it. The Adaptation Fund Board comprises 16 members representing Parties to the Kyoto Protocol, taking into account fair and balanced representation:

- (a) Two representatives from each of the five United Nations regional groups;
- (b) One representative of the small island developing States;
- (c) One representative of the least developed country Parties;
- (d) Two other representatives from the Parties included in Annex I to the Convention;
- (e) Two other representatives from the Parties not included in Annex I to the Convention.

See Bali Action Plan, *supra* note 67, Compensation.

Kyoto Protocol,⁷⁰ progress on technology transfer,⁷¹ and reducing emissions from deforestation.⁷²

To facilitate the conference's major goal – progress toward a new comprehensive climate agreement – the Parties adopted an Action Plan that included the establishment of an Ad Hoc Working Group on Long-term Cooperative Action under the Convention (AWG-LCA).⁷³ The Parties charged it with a mandate to complete and present the outcome of its work for adoption to the COP-15 at Copenhagen.⁷⁴ In order to stimulate meaningful compromise, the chair and vice-chair of the group were to alternate between one Annex I Party and one non-Annex I Party, respectively.⁷⁵ The Action Plan avoided substantive goals, but contributed an “indicative timetable for meetings” which scheduled seasonal gatherings for the group through 2008.⁷⁶ By following this outline, the Parties were expected to draft a long-term, post-Kyoto Protocol action plan for ratification at Copenhagen.

III. THE FINAL DAYS: DOMESTIC MEASURES AND BILATERAL DIPLOMACY 2007-2009

Extensive rounds of ministerial-level international conferences did take place in the two years between Bali and

⁷⁰ See Conference of the Parties to the Framework Convention on Climate Change, Third Session, Bali Dec 3-15 2007, *Report of the Conference of the Parties on its Third Session, Held in Bali From 3 to 15 December 2007*, at 19, available at <http://unfccc.int/resource/docs/2007/cmp3/eng/09a01.pdf#page=19> (last visited Mar. 23, 2010).

⁷¹ See Bali Action Plan, *supra* note 67, at 12.

⁷² United Nations Framework Convention on Climate Change, Conference of the Parties on Its Thirteenth Session, Bali, India, Dec. 3-15, 2007, *Decision 2/CP.13, Reducing Emissions from Deforestation in Developing Countries: Approaches to Stimulate Action* (Mar. 14, 2008), <http://unfccc.int/resource/docs/2007/cop13/eng/06a01.pdf#page=8> [Hereinafter *Approaches to Stimulate Action*].

⁷³ Bali Action Plan, Decision 1/CP.13, *supra* note 67, at ¶¶ 2-13.

⁷⁴ *Id.*

⁷⁵ *Id.* at ¶ 5.

⁷⁶ *Id.* at ¶ 7 and annex: Indicative Timetable for Meetings of the Ad Hoc Working Group on Long-term Cooperative Action Under the Convention in 2008.

Copenhagen to resolve major issues and coordinate a negotiating draft text.⁷⁷ Nonetheless, it appeared that the major players only cemented their positions to relitigate them *de novo* at Copenhagen. As international action is hostage to national events, political developments in the major nations are crucial in interpreting what happened during the Conference. This section discusses recent national events within the U.S. and China that defined their negotiating positions, as those two nations would come to occupy the decisive roles.

A. The United States

U.S. President George W. Bush (2000-2008) openly opposed the Kyoto Protocol during his administration based on the exemption of large developing countries (specifically China), perceived harm to the U.S. economy, and alleged uncertainties in the scientific evidence.⁷⁸ He finally acknowledged that climate

⁷⁷ The second session of the Ad hoc Working Group on Long-term Cooperative Action under the Convention (AWG-LCA 2) and the second part of the fifth session of the Ad hoc Working Group on Further Commitments for Annex I Parties under the Kyoto Protocol (AWG-KP 5) took place from June 2-13, 2008, in Bonn, Germany. The AWG-LCA 3 and AWG-KP 6 met at Accra, Ghana from August 21-27, 2008. The Fourteenth UN Climate Change Conference of the Parties (COP-14) was held in Poznań from December 1-12, 2008, culminating in developing the Adaptation Fund and a ministerial round table on a shared vision on long-term cooperative action on climate change. Thereafter, the AWG-KP 7 and AWG-LCA 5 met at Bonn in March 2009; the AWG-KP 8 and AWG-LCA 6 met at Bonn in June 2009; and informal intercessional consultations of the two groups met at Bonn August 10-14, 2009. The AWG-KP 9 and AWG-LCA 7 met soon thereafter in Bangkok, Thailand, and resumed in Barcelona, Spain. Both groups met to conclude their work at the COP-15, in Copenhagen. Information on all of these meetings is available through the UNFCCC web site, *available at* http://unfccc.int/meetings/ad_hoc_working_groups/lca/items/4918.php (Jan. 4, 2011).

⁷⁸ President George W. Bush acknowledged that human activity contributes to global warming in Denmark as he prepared to debate climate change with other G8 leaders at a 2005 meeting in Gleneagles, Scotland. Sean Clarke, *Bush Acknowledges 'Problem' of Global Warming*, GUARDIAN, July 6, 2005, *available at* <http://www.guardian.co.uk/environment/2005/jul/06/usnews.development>.

change is an anthropomorphic problem in his second term.⁷⁹ Publicly, President Bush proposed that all nations adopt voluntary or aspirational domestic goals to reduce overall emissions – a position designed to circumvent the legalities of the Kyoto Protocol.⁸⁰ Privately, and in response to a 2007 invitation by China, the U.S. clandestinely sent a series of Congressional envoys to China to secure a bilateral action plan for combating climate change.⁸¹ That effort continued into the next administration.⁸²

The November 2008 election of Barack Obama to the American Presidency brought new optimism. President Obama firmly acknowledged climate change as an “epochal, man-made threat to the planet” during his campaign.⁸³ Two events in the first year of his Presidency gave hope, at long last, to concerned climatologists: first, the U.S. Environmental Protection Agency (EPA) complied with a recent decision by the U.S. Supreme Court by agreeing to regulate six different GHGs; second, the U.S. House of Representatives passed the American Clean Energy and Security Act.

In 2007, the U.S. Supreme Court examined global warming for the first time and rebuked the Bush Administration’s EPA for refusing to regulate GHG emissions, holding that the EPA violated the Clean Air Act by declining to regulate new-vehicle emissions standards.⁸⁴ Justice John Paul Stevens wrote for the majority in

⁷⁹ *Id.*

⁸⁰ Caren Bohan, *Bush: Kyoto Approach on Climate is ‘Bad Policy,’* REUTERS, Oct. 15, 2007, available at <http://www.reuters.com/article/idUSN1537871920071015> (last visited Mar. 23, 2010).

⁸¹ Suzanne Goldenberg, *China and US Held Secret Talks on Climate Change Deal*, GUARDIAN, May 18, 2009, available at <http://www.guardian.co.uk/world/2009/may/18/secret-us-china-emissions-talks>.

⁸² *Id.*

⁸³ Council on Foreign Relations, *The Candidates on Climate Change* (Sept. 11, 2008), <http://www.cfr.org/publication/14765/>.

⁸⁴ *Massachusetts v. EPA*, 549 U.S. 497 (2007). The 5-4 split reinforced the division on the Supreme Court, with its four liberal members in the majority and its four most conservative members dissenting. Justice Anthony M. Kennedy characteristically provided the swing vote, as he sided with John Paul Stevens (who authored the majority opinion), Stephen G. Breyer, Ruth Bader Ginsburg and David H. Souter against Chief Justice John G. Roberts Jr., Samuel Alito Jr., Antonin Scalia and Clarence Thomas.

Commonwealth of Massachusetts et al. v. Environmental Protection Agency et al., reasoning that the “EPA has offered no reasoned explanation for its refusal to decide whether greenhouse gases cause or contribute to climate change.”⁸⁵ On December 7, 2009, the EPA responded by publishing findings that GHG emissions do threaten the public health and welfare of the American people.⁸⁶ While the findings do not impose any emission reduction requirements, they allow the EPA to finalize new vehicle emissions standards for six pollutants.⁸⁷ EPA Administrator Lisa P. Jackson hailed the news by saying “[t]hese long-overdue findings cement 2009’s place in history as the year when the United States Government began addressing the challenge of greenhouse-gas pollution and seizing the opportunity of clean-energy reform.”⁸⁸ Senator John Kerry, Chairman of the Senate Foreign Relations Committee, hoped that the EPA decision would increase pressure on Congress to take GHG reducing measures during and after the Conference.⁸⁹

The U.S. House had already acted, surprising many by passing the American Clean Energy and Security Act (ACESA) by a 219-212 vote on June 27, 2009.⁹⁰ If passed by the Senate,⁹¹ the

⁸⁵ *Id.* at 534.

⁸⁶ U.S. Environmental Protection Agency, *Endangerment and Cause or Contribute Findings for Greenhouse Gases under the Clean Air Act*, Federal Register/ Vol. 74, No. 239, Dec. 15, 2009, available at <http://edocket.access.gpo.gov/2009/pdf/E9-29537.pdf> (last visited Jan. 4, 2011).

⁸⁷ Those six newly regulated pollutants are carbon dioxide, methane, nitrous oxide, hydrofluorocarbons, perfluorocarbons and sulfur hexafluoride. *Id.* at 3.

⁸⁸ U.S. Environmental Protection Agency, *Greenhouse Gases Threaten Public Health and the Environment*, Office of Air and Radiation (Dec. 07, 2009), <http://yosemite.epa.gov/opa/admpress.nsf/7ebdf4d0b217978b852573590040443a/08d11a451131bca585257685005bf252!OpenDocument>.

⁸⁹ Andrew Ward, *Kerry Plays Central Role in Crucial Deal*, FINANCIAL TIMES, Dec. 16, 2009, available at <http://www.ft.com/cms/s/0/a18b6cbc-ea7a-11de-a9f5-00144feab49a.html> (last visited Apr. 7, 2010).

⁹⁰ American Clean Energy and Security Act, H.R. 2454, 111th Cong., available at <http://www.gpo.gov/fdsys/pkg/BILLS-111hr2454pcs/pdf/BILLS-111hr2454pcs.pdf> (last visited Jan. 4, 2011).

⁹¹ The House of Representatives approved the bill by a 219-212 vote, but the bill still requires 60 votes in the Senate and the President’s signature to become law. Powerful interest groups are aligned against it, including the U.S. Chamber of Commerce, the National Association of Manufacturers, and organizations

ACESA would put a price on GHG emissions,⁹² mandate that 20% of America's electricity come from renewable sources by 2020,⁹³ provide funding for the preservation of tropical forests around the world,⁹⁴ and impose a goal of reducing overall GHG emissions by 20% from 2005 levels by the year 2020 and 83% by mid-century.⁹⁵ However, the ACESA would also impose tariffs (called "international reserve allowances") on goods imported from countries that do not abide by similar emissions restrictions – obviously intended to address China – that could be viewed as protectionism and provoke a trade war.⁹⁶

B. The People's Republic of China

Prior to 2004, Chinese leaders obsessed about their country's economic development and rarely spoke the phrase

representing airlines, oil producers and mining companies. The 17 percent figure passed by the House and contained in the Senate's draft Waxman-Markey Bill is lower than the 20 percent cut featured in rival Senate Bill. However, that bill preferred to use command and control techniques to a cap-and-trade system. Clean Energy Jobs and American Power Act, S. 1733,,111th Cong. (sponsored by Sen. John F. Sen Kerry [MA], September 30, 2009), *available at* <http://www.gpo.gov/fdsys/pkg/BILLS-111s1733rs/pdf/BILLS-111s1733rs.pdf>; Editorial, *The Senate Climate Bill*, WASH. POST, Oct. 1, 2009, *available at* <http://www.washingtonpost.com/wp-dyn/content/article/2009/09/30/AR2009093004242.html> (last visited Apr. 10, 2010).

⁹² H.R. 2454, *supra* note 90 at Title VII - Global Warming Pollution Reduction Program: Part A – Global Warming Pollution Reduction Goals and Targets, §§ 701-735.

⁹³ H.R. 2454, *supra* note 90 at Title I--Clean Energy, §103, Federal Renewable Energy Purchases.

⁹⁴ H.R. 2454, *supra* note 90 at Title VII—Global Warming Reduction Program, Part E—Supplemental Emissions Reductions from Reduced Deforestation, §§ 751-756.

⁹⁵ H.R. 2454, *supra* note 90 at Title VII—Global Warming Pollution Reduction Program: Part A – Global Warming Pollution Reduction Goals and Targets, §702.

⁹⁶ H.R. 2454, *supra* note 90 at Title IV—Transitioning to a Clean Energy Economy, Part F – Ensuring Real Reductions in Industrial Emissions, § 768 International Reserve Allowance Program.

“climate change.”⁹⁷ Jiang Zemin, President of China from 1993-2003, stressed the development of the Chinese economy and, correspondingly, placed a low priority on environmentalism.⁹⁸ President Hu Jintao and his Premier Wen Jiabao (2004-Present) entered office with ambition to create a more “Harmonious Society,” a political platform ostensibly intended to level the inequities of raw Chinese capitalism.⁹⁹ They moved to address environmental issues, recognizing that environmental degradation generally and climate change specifically are threats to domestic economic and political stability.¹⁰⁰ Thus, Beijing’s agenda for climate change has shifted as far as Washington’s in recent years.

In 2007, noting that the UNFCCC expects all nations to formulate, publish and implement national mitigation programs,¹⁰¹ China adopted a National Climate Change Program (CNCCP)

⁹⁷ Alex Pasternack, *Are China and U.S. Really Headed for a Copenhagen Deadlock?*, Treehugger.com (Sept. 23, 2009), <http://www.treehugger.com/files/2009/09/copenhagen-prospects-us-china-climate-deal.php>.

⁹⁸ See generally Larry Catá Backer, *The Rule Of Law, The Chinese Communist Party, and Ideological Campaigns: Sange Daibiao (The Three Represents), Socialist Rule Of Law, and Modern Chinese Constitutionalism*, 16 *TRANSN'T'L L. & CONTEMP. PROBS.* 29 (2006).

⁹⁹ “Since the Sixteenth National Congress, the Central Committee of the Party has followed the guidance of Deng Xiaoping Theory and the important thought of Three Represents and, by pooling the wisdom of the whole Party to meet new requirements of development, formulated the Scientific Outlook on Development, which puts people first and calls for comprehensive, balanced and sustainable development.” Constitution of the Chinese Communist Party, General Program, ¶7, available at http://news.xinhuanet.com/english/2007-10/25/content_6944738.htm (last visited Jan 5, 2011).

¹⁰⁰ There are now more than 2,500 environmental NGOs in China, and the government estimates that 3.76 million citizens participated in over 74,000 environmentally related protests. Jonathan B. Wiener, *Climate Change Policy and Policy Change in China*, 55 *UCLA L. REV.* 1805 (2008); Srinivasan, *Regulating the Belching Dragon: Rule of Law, Politics of Enforcement, and Pollution Prevention in Post-Mao Industrial China*, 18 *COLO. J. INT'L ENVTL. L. & POL'Y* 267, 277 (2007); Abigail Jahiel, *The Organization of Environmental Protection in China*, *THE CHINA QUARTERLY*, No. 156 at 771(1998), available at <http://www.jstor.org/pss/656124>; Edward Cody, *China Grows More Wary over Rash of Protests*, *WASH. POST*, Aug. 10, 2005 at A11, available at <http://www.washingtonpost.com/wp-dyn/content/article/2005/08/09/AR2005080901323.html>.

¹⁰¹ UNFCCC, *supra* note 28, at art. 4(1)(b).

outlining basic principles, policy objectives and active measures to address climate change through 2010.¹⁰² As a result of these measures, China claims to have eliminated the inefficient production of 60 million tons of iron, 43 million tons of steel, 140 million tons of cement and 65 million tons of coke.¹⁰³ China further estimates that its energy consumption per unit of GDP has dropped 13 percent from the 2005 level: the equivalent to reducing 800 million tons of carbon dioxide.¹⁰⁴

In 2008, the State Environmental Protection Administration (SEPA) was upgraded to full ministry status.¹⁰⁵ Then, on September 22, 2009, Chinese President Hu Jintao delivered a speech to the UN General Assembly indicating that China was seriously preparing for Copenhagen.¹⁰⁶ He recalled the CNCCP and announced that China would unilaterally cut its “carbon intensity” – the amount of carbon dioxide emitted per unit of gross domestic product – per unit of GDP by 40 to 45 percent from 2005 levels by 2020.¹⁰⁷ He also announced three other measures:

Second, we will vigorously develop renewable energy and nuclear energy. We will endeavor to increase the share of non-fossil fuels in primary energy consumption to around 15 percent by 2020. Third, we will energetically increase forest carbon — (inaudible) — we will endeavor to increase forest coverage by 40 million hectares and forest stock volume by 1.3 billion cubic meters by 2020 from the 2005 levels. Fourth, we will step up our

¹⁰² *China's National Climate Change Programme*, June 2007, available at en.ndrc.gov.cn/newsrelease/P020070604561191006823.pdf (last visited Mar. 13, 2010).

¹⁰³ Yu Zhixiao, *China Plays Key Role Making Copenhagen Talks Successful*, XINHUA (Dec. 25, 2009), <http://au.china-embassy.org/eng/xw/t648276.htm>.

¹⁰⁴ *Id.*

¹⁰⁵ *Highlights: China Launches Sweeping Institutional Restructuring of Government*, XINHUA (Mar. 11, 2008), http://news.xinhuanet.com/english/2008-03/11/content_7765398.htm.

¹⁰⁶ *Hu Jintao's Speech on Climate Change*, N.Y. TIMES (Sept. 22, 2009), <http://www.nytimes.com/2009/09/23/world/asia/23hu.text.html>.

¹⁰⁷ *Id.*

efforts to develop green economy, low carbon economy and — (inaudible) — economy and enhance research, development and dissemination of climate-friendly technologies.¹⁰⁸

Though not mentioned during this speech, China's largest GHG mitigation measure is, frankly, its population policy. China is the world's most populous nation, and introduced its "One-Child" family planning policy in the late 1970s when confronted with a population explosion.¹⁰⁹ It was imposed to alleviate poverty and increase the per capita standard of living by allowing for the supply of public services to catch up to demand.¹¹⁰ Chinese officials now note environmental side-benefits, linking population size to GHG emissions at Copenhagen. In the first week of the meeting, Zhao Baige, Vice Minister of the National Population and Family Planning Commission, asserted "[t]here is a strong correlation between population growth and climate change."¹¹¹ She also acknowledged that the policies have some mixed consequences, notably an uneven sex ratio.¹¹² "I'm not saying that what we have done is 100 percent right, but I'm sure we are going in the right direction and now 1.3 billion people have benefited."¹¹³ Official figures showed the country's birth rate went down from more than 1.8 percent in 1978 to around 1.2 percent in 2007, resulting in an estimated 400 million fewer births. "Such a decline in population growth converts into a reduction of 1.83 billion tons of carbon dioxide emission in China per annum at present."¹¹⁴

¹⁰⁸ *Id.*

¹⁰⁹ Embassy of the PRC in the United States of America, *China's Population Policy Helps Slow Global Warming, Says Official*, XINHUA (Dec. 9, 2009), <http://us.chineseembassy.org/eng/zt/t633038.htm> [hereinafter *China's Population Policy*].

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.*; Andrew C. Revkin, *The Missing 'P' Word in Climate Talks*, N.Y. TIMES (Dec. 16, 2009), <http://dotearth.blogs.nytimes.com/2009/12/16/the-missing-p-word-in-climate-talks/>.

¹¹⁴ *China's Population Policy*, *supra* note 109.

While there is no possibility that population control measures will appear in any foreseeable international agreement for obvious political reasons, there is no denying the mitigating effect that this policy has had on Chinese GHG emissions. That sacrifice should be acknowledged, even though the per-capita emission of carbon dioxide in China is estimated as less than half of that in Britain and one-fifth of that in the United States.¹¹⁵

C. Bilateral and Multinational Events in the Final Days

Even after President Obama's early breakthroughs and President Hu's announcement of a carbon intensity target, the prospects for a deal at Copenhagen were not optimistic. However, several important bilateral breakthroughs occurred in the past few years that do not receive enough heralding.

Most notably, in 2006 Presidents George W. Bush and Hu Jintao created a "Strategic Economic Dialogue" (SED) between the U.S. and China to ensure that leaders of the two countries can have a forum for discussing important bilateral issues,¹¹⁶ so as "to promote understanding, expand common ground, reduce differences, and develop solutions to common problems."¹¹⁷ As noted, the two nations began a secretive climate change dialog in 2007,¹¹⁸ and at the fourth SED meeting on June 18, 2008, the two nations took a groundbreaking bilateral step by adopting a "Framework for Ten-Year Cooperation on Energy and Environment," designed to facilitate practical cooperation in all areas of energy and the environment.¹¹⁹ It includes five action plans,¹²⁰ an "EcoPartner-

¹¹⁵ *Id.*

¹¹⁶ Fact Sheet HP-107, *Creation of the U.S.-China Strategic Economic Dialogue*, U.S. DEPT. OF TREASURY, Sept. 20, 2006, <http://www.ustreas.gov/press/releases/hp107.htm>.

¹¹⁷ *US-China Joint Statement*, THE WHITE HOUSE OFFICE OF THE PRESS SECRETARY (Nov. 17, 2009), <http://www.whitehouse.gov/the-press-office/us-china-joint-statement>.

¹¹⁸ Goldenberg, *China and US Held Secret Talks*, *supra* note 81.

¹¹⁹ Joint Fact Sheet HP-1311, *U.S. - China Joint Fact Sheet: Ten Year Energy and Environment Cooperation* (Dec. 4, 2008), <http://www.ustreas.gov/press/releases/hp1311.htm>.

ship” initiative designed to promote sub-national cooperation and private-public partnerships to meet energy/environmental goals,¹²¹ and establishes a Joint Working Group composed of officials at the Assistant-Secretary level for the U.S. and the Director General level for China.¹²² In July 2009, the two sides adopted a “Memorandum of Understanding to Enhance Cooperation on Climate Change, Energy and Environment” noting that:

Cooperation on climate change, clean and efficient energy and environmental protection can serve as a pillar of the bilateral relationship, build mutual trust and respect, and lay the foundation for constructive engagement between the United States and China for years to come, while also contributing to multilateral cooperation.¹²³

Indeed, modern economics and environmentalism of scale are entwined. European Commission President Jose Barroso predicted that the outcome at Copenhagen hinged upon an agreement being outlined at the G-20 talks in Pittsburgh held over September 24

¹²⁰ The five action plans are for (1) Cooperation and Information Sharing on the Goals of Clean, Efficient and Secure Electricity Production and Transmission; (2) Clean Water; (3) Clean Air; (4) Clean and Efficient Transportation; and (5) Conservation of Forests and Wetlands Ecosystems. *Id.*

¹²¹ Seven initial EcoPartnerships were announced: (1) Energy Future Holdings Corp. and China Huadian Corporation; (2) Denver, Colorado, USA, Ford Motor Company and Chongqing, China, Changan Auto Group Corporation; (3) Wichita, Kansas, USA and Wuxi, Jiangsu, China; (4) Floating Windfarms Corporation and Tangshan Caofeidian New Development Area, Hebei, China; (5) Port of Seattle, Washington, USA and Dalian Port Corporation, Liaoning, China; (6) Greensburg, Kansas, USA and Mianzhu, Sichuan, China; and (7) Tulane University and East China Normal University (ECNU). *Id.*

¹²² The JWG is co-chaired by the Department of State and Department of Energy on the U.S. side, and by the National Development and Reform Commission on the Chinese side. *Id.*

¹²³ U.S. State Department, Bureau of Public Affairs, Office of the Spokesman, *U.S.-China Memorandum of Understanding to Enhance Cooperation on Climate Change, Energy and the Environment* (July 28, 2009), <http://www.state.gov/r/pa/prs/ps/2009/july/126592.htm>.

and 25, 2009.¹²⁴ Honoring shifts in global diplomatic and economic strength, the G7 was permanently replaced as an international forum for economic policy by the much broader G-20 including China, Brazil, India and other fast-developing countries in 2009.¹²⁵ President Obama co-chaired a meeting of the G-20's Major Economies Forum on Energy and Climate, but no climate breakthrough was announced.¹²⁶ Less than one month later, President Obama paid a three-day visit to China resulting in a "U.S.-China Joint Statement" highlighting several areas of bilateral cooperation, but once again no climate agreement followed.¹²⁷ Rather, on the eve of the Conference, the U.S. fired a warning shot across China's bow – thereby also reminding the developing world of a tactical weapon at its disposal – by imposing tariffs on imports of Chinese automobile and truck tires.¹²⁸ Chinese leaders denounced the move and threatened to retaliate with barriers against American chicken.¹²⁹

¹²⁴ "I think we need a strong commitment from the G20 for success to a global deal in Copenhagen, and also to keep our commitments regarding the Millennium Development Goals." José Barroso, SPEECH/09/160, *The G 20 – A Unique Opportunity* (Mar. 31, 2009), <http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/09/160&format=HTML&aged=0&language=EN&guiLanguage=en>.

¹²⁵ For over three decades the main economic group was the Group of 7: the U.S., Britain, Canada, France, Germany, Italy and Japan. Russia was gradually added in the 1990's to help integrate it with the West. Today the G-20 is made up of the finance ministers and central bank governors of 19 countries including the G-8 plus Argentina, Australia, Brazil, Canada, China, India, Indonesia, Mexico, Saudi Arabia, South Africa, South Korea and Turkey. G-20 Presidency, *What is the G-20*, http://www.g20.org/about_what_is_g20.aspx (last visited Jan 5, 2011).

¹²⁶ Edmund L. Andrews, *In New World Order, Global Forum Expands Permanently*, N.Y. TIMES, Sept. 25, 2009, <http://www.nytimes.com/2009/09/25/world/25summit.html>.

¹²⁷ U.S. White House Press Secretary, *US-China Joint Statement* (Nov. 17, 2009), <http://www.whitehouse.gov/the-press-office/us-china-joint-statement>.

¹²⁸ The state visit took place from November 15 to 18, 2009. *Id.*

¹²⁹ Andrews, *supra* note 126.

D. The Negotiating Positions

And so the two nations went to Copenhagen, suspicious and defensive yet ostensibly committed to mapping out a plan for combating climate change from 2012 to 2020. Each side arrived with clearly defined goals. Unfortunately, that refinement seemed to be about all the two years of diplomacy since Bali had achieved.

As President Obama would acknowledge, three key pillars divided the camps: mitigation targets, transparency, and finance.¹³⁰ The United States sought to address its classic objections and demanded that developing countries accept GHG emissions reductions subject to “transparent” external monitoring for compliance verification. To entice agreement, the U.S. knew that it could offer financial assistance as an incentive. However, this approach would carry little diplomatic weight with China who was neither asking for nor likely to receive foreign aid.¹³¹ As Todd Stern, the leader of the U.S. delegation stated, “I do not envision public funds, certainly not from the U.S. going to China.”¹³² In the alternative, the U.S. could also have offered deeper emissions cuts from it and its allies to encourage agreement. The EU, for example, indicated that it was willing to raise its emissions-cutting target from 20% off 1990 levels to 30% if other countries agreed to

¹³⁰ “Throughout the day we worked with many countries to establish a new consensus around these three points, a consensus that will serve as a foundation for global action to confront the threat of climate change for years to come.” U.S. White House Press Release, *Remarks by the President During Press Availability in Copenhagen* (Dec. 19, 2009), <http://www.whitehouse.gov/the-press-office/remarks-president-during-press-availability-copenhagen>.

¹³¹ *China Stands as Constructive Player in Copenhagen*, XINHUA (Dec. 26, 2009), http://news.xinhuanet.com/english/2009-12/26/content_12706368.htm.

¹³² “The change of tone was stark. As noted, for nearly a year prior to the Copenhagen Conference many developed countries have taken pains to praise China lavishly in public. Mr Stern told a conference this year: ‘China is doing a lot [on cutting emissions], but doesn’t get credit for it, and should.’ That was the tactic before the talks, as the US and others sought to bring a wary Beijing to the negotiating table.” Fiona Harvey, et al., *Rich Nations Step Up Pressure on Beijing*, FINANCIAL TIMES, Dec. 14, 2009, <http://www.ft.com/cms/s/0/726eb1bc-e8e2-11de-a756-00144feab49a.html>.

comparable targets.¹³³ Finally, if worse came to worst, the U.S. could resort to more punishing methods to pressure China: i.e., by threatening the types of border adjustments imposed days before and looming in the ACESA.

The Chinese came to the table with ambitious promises of GHG mitigation, but proud of its own contextual situation. China is trying to balance environmental protection with the goals of economic development and massive poverty alleviation.¹³⁴ Along with industrialization, the rate of extreme poverty in China declined from a high of 84% in 1981 to just 16% in 2005. Thus, China does not conceptualize the GHG emission issue in the same zero-sum terms employed by Western politicians. This is especially true when considering that:

For instance, the Kyoto Protocol often ignores the unique situation of export-driven economies like China, where 23% of the total carbon dioxide emissions were accrued by export goods in 2004. Significantly, the bulk of GHG emissions of export-driven economies result from manufacturing goods intended for the consumption of outside countries . . . [For true climate justice] [o]ne would need to determine the percentage of GHG emissions from exported goods and where such goods are exported in order to apportion targets.¹³⁵

Even under this “unjust” accounting method, China
still has significantly lower per capita carbon

¹³³ *Id.* For a detailed synopsis of the European negotiating position, see European Commission Position Paper, *Towards a Comprehensive Climate Agreement in Copenhagen*, available at http://ec.europa.eu/environment/climat/pdf/future_action/communication.pdf (last visited Mar. 26, 2010).

¹³⁴ “The decline occurred in both rural and urban areas: the rural poverty rate fell from 94 to 26 per cent and the urban poverty rate fell from 45 to less than 2 per cent during this period.” United Nations Report, *Poverty: The Official Numbers*, Chapter 2, pg. 12, available at www.un.org/esa/socdev/rwss/docs/2010/chapter2.pdf (last visited Mar. 26, 2010).

¹³⁵ Tan Kai Liang, *From Kyoto to Post-2012: The Implications of Engaging China for Environmental Norms and Justice*, 17 U. BALT. J. ENVTL. L. 33, 39 (2009).

emissions than citizens of developed countries.¹³⁶ In view of these realities, China frequently asserts the CBDR principle to put the onus on the developed world.¹³⁷ China entered Copenhagen wanting the developed countries to agree to emissions cuts of 40% below 1990 levels by 2020.¹³⁸ However, they opposed the institutionalization of a global target advocated by the developed countries.¹³⁹ Although such a goal would not impose specific limits on China, the Chinese nonetheless prophesy that a worldwide cap might be invoked to force them into steep national emissions targets at a later date.¹⁴⁰

China also wanted developed countries to give developing countries billions of dollars in assistance aid to cope with the effects of climate change.¹⁴¹ In advocating this position, the Chinese aligned themselves with the so-called “Group of 77.” In fact composed of 130 diverse countries, it is a coalition meant to amplify the collective bargaining power of most nations of the

¹³⁶ LAVANYA RAJAMANI, DIFFERENTIAL TREATMENT IN INTERNATIONAL ENVIRONMENTAL LAW 233 (2006).

¹³⁷ China’s pre-Conference position paper prominently cites the CBDR and Sustainable Development principles but does not mention the PPP. National Development and Reform Commission, People’s Republic of China, *China’s Position on the Copenhagen Climate Change Conference*, May 20, 2009, http://en.ndrc.gov.cn/newsrelease/t20090521_280382.htm (last visited Mar. 23, 2010).

¹³⁸ *Id.*

¹³⁹ At least one draft version included a collective agreement among all nations to reduce greenhouse gas emissions by 50% by 2050 — with developed nations pledging as a bloc to reduce emissions by 80% over the same period — that did not make the final cut. *China’s Thing about Numbers*, ECONOMIST, Dec. 30, 2009, available at http://www.economist.com/world/international/displaystory.cfm?story_id=15179774 (last visited Mar. 23, 2010).

¹⁴⁰ Fiona Harvey, *The Copenhagen Positioning of China and India - Not Always What it Seems*, FINANCIAL TIMES, Nov. 3, 2009, available at <http://blogs.ft.com/energy-source/2009/11/03/the-copenhagen-positioning-of-china-and-india-not-always-what-it-seems/> (last visited Mar. 26, 2010).

¹⁴¹ *Id.*

world.¹⁴² It is, by its nature, the opposite of monolithic. “Its richest members are 50 times as wealthy on a per-capita basis as its poorest ones, but they unite to take advantage of the far greater negotiating power and resources of countries like China, India and Brazil. All of this makes a constructive position very difficult to establish; often, the easiest thing to agree on is to obstruct action.”¹⁴³ In addition to financial assistance,¹⁴⁴ the G77 sought adherence to the binding principles espoused in the Kyoto Protocol and the limiting of global temperatures to less than 2°C.¹⁴⁵ China has built diplomatic authority with many of the G77 countries because of its extensive investments in Africa and Latin America, often involving lucrative deals to bring oil and minerals home.¹⁴⁶

Unfortunately, the lack of progress in the two years since Bali, combined with these diverse and intractable viewpoints, led most observers to give up on the idea that a legally binding treaty could be signed at Copenhagen months before the Conference began.¹⁴⁷ Hopes refocused around a “declaration” that could become legally binding at a future date.¹⁴⁸

¹⁴² John M. Broder, *Poor and Emerging States Stall Climate Negotiations*, N.Y. TIMES, Dec. 16, 2009, <http://www.nytimes.com/2009/12/17/science/earth/17climate.html> (quoting Michael A. Levi, a climate change specialist at the Council on Foreign Relations attending the Copenhagen Conference).

¹⁴³ *Id.*

¹⁴⁴ In one of the most extreme manifestations of this demand, Bolivian President Evo Morales proposed that rich countries should be hailed before an “International Climate Change Court” to pay what he characterizes as climate “reparations.” John Vidal, *Evo Morales Stuns Copenhagen with demand to Limit Temperature Rise to 1C*, GUARDIAN, Dec. 16, 2009, <http://www.guardian.co.uk/environment/2009/dec/16/evo-morales-hugo-chavez>.

¹⁴⁵ Darren Samuelsohn et al., *Copenhagen Talks Enter Final Phase*, N.Y. TIMES, Dec. 14, 2009, <http://www.nytimes.com/cwire/2009/12/14/14climatewire-copenhagen-talks-enter-final-phase-43362.html>.

¹⁴⁶ Jason Buih, *Un Negocio de China: Building upon the Santiago Principles to form an Effective International Approach to Sovereign Wealth Fund Regulation*, 31 HONG KONG L. J. 1, 197, 205 (2009).

¹⁴⁷ Fiona Harvey, et al., *Copenhagen: A Discordant Accord*, FINANCIAL TIMES, Dec. 20, 2009, <http://www.ft.com/cms/s/0/8fb70c48-ed9b-11de-ba12-00144feab49a.html>.

¹⁴⁸ *Id.*

IV. THE COPENHAGEN CONFERENCE: DAY BY DAY

The Copenhagen Conference drew representatives from 192 countries that began arriving in Denmark in time to begin the proceedings on December 6, 2009. As host nation, Denmark served as the conference chair and organizer. The New York Times offered an intimate portrait of the temporary diplomatic row created at the Bella Center:

Consider that real estate maxim: location, location, location. So it went with delegation offices in the Bella Center. Major countries secured office space in the C wing, areas defined by particle board walls and temporary doors that have been emblazoned with the nation's identity. Britain's office is decorated with photos of Prime Minister Gordon Brown; a star-studded national seal adorns Brazil's office. The United States has maintained separate but adjoining offices for the House, the Senate and the executive branch. The offices of traditional friends like Britain, France and Australia are nearby. But good luck finding China's. China, a negotiating powerhouse here and the world's biggest emitter, would certainly not be found anywhere near the United States (the No. 2 emitter), with which it locked horns during the talks. It occupies two tiny rooms in the last row of office space, which also includes the African Union, Serbia, Montenegro and Russia.¹⁴⁹

Within the G77, larger countries like Brazil and China had "well-appointed headquarters" in a central part of the Bella Center, while

¹⁴⁹ Elisabeth Rosenthal, *An Alphabet Soup of Causes and Clauses*, N.Y. TIMES, Dec. 19, 2009, <http://www.nytimes.com/2009/12/19/science/earth/19notebook.html>.

the G77's remote office featured two "Spartan" rooms equipped with only two computers.¹⁵⁰

While the siege mentality apparent between the American and Chinese delegations correctly symbolized their positions on the issues, the world sat in hope that the gulf could be bridged. Both nations often represent the most recalcitrant major player within their respective blocs and, as the old adage goes, "keep your friends close, but your enemies closer." New York Times columnist Thomas Friedman stated:

In this case, I'm just not sure if a deal is really possible. There's a lot of circles here, circles within circles, but the circle that's in the middle of the whole thing has the United States and China. And these two powers, very wary of each other, each desperate not to have a deal here that will give strategic and economic advantage to the other.¹⁵¹

The following is a brief narrative interpretation of the Conference constructed from official statements, draft texts and news reports. It would be impossible to fully represent every event from the perspective of all participants, so this section focuses on the two nations receiving the most attention, acclaim and blame. Indeed, the two keys to the deal – a dramatic offer of \$100 billion in aid from the industrialized nations to poorer countries, and a universal verification system to which all countries submit – were brokered by the U.S. and China. It becomes evident that the Conference proceeded like a roller coaster track that, for a while, seemed would unravel. On the evening of Friday, December 18th, 2009 (the proverbial 11th hour of the 12-day summit) negotiators dramatically struck a deal.

¹⁵⁰ Broder, *supra* note 142.

¹⁵¹ New York Times columnist Thomas Friedman made these statements to CBS's "The Early Show" on Friday Dec. 18, 2009. Daniel Carty, *Friedman: Copenhagen a U.S.-China Power Struggle*, CBS NEWS, Dec. 18, 2009, http://www.cbsnews.com/8301-503543_162-5994673-503543.html.

A. The First Week

DAY 1: Monday, December 7, 2009

The COP-15 and MOP-5 opened at 10am on Monday, December 7, 2009.¹⁵² The opening ceremonies began with a cultural segment offered by the Host Government of Denmark.¹⁵³ No sooner had those ceremonies ended than the Conference faced its first challenge, as the Lesotho delegation directed the Conference toward financial discussions.¹⁵⁴ The EU responded later in the week by tabling a pledge of 2.4 billion Euros per year from 2010 to 2012 for adaptation efforts in the poorest countries, but the announcement was met with criticism.¹⁵⁵ The G77 characterized the pledge as “insignificant” and, together with China, demanded increased long-term financing.¹⁵⁶ Alternative proposals from the G77 called for either \$400 billion annually,¹⁵⁷ or five percent of the total GNP of developed nations.¹⁵⁸ Such demands are politically unrealistic in the current economic environment, so gridlock quickly followed the Lesotho submission.

¹⁵² Note to Correspondents No. 3, Fifteenth Sess. of the Conf. of the parties to the United Nations Framework Convention on Climate Change (Dec. 5, 2009), http://unfccc.int/files/meetings/cop_15/application/pdf/cop15_note_correspondents_no3.pdf (last visited Apr. 12, 2010).

¹⁵³ *Id.*

¹⁵⁴ INTERNATIONAL INSTITUTE FOR SUSTAINABLE DEVELOPMENT, *Earth Negotiations Bulletin: Copenhagen Highlights*, (Dec. 8, 2009), <http://www.iisd.ca/vol12/enb12449e.html>.

¹⁵⁵ Nanet Poulsen, *EU Putting More Money on the Table*, ASSOCIATED PRESS, Dec. 11, 2009, available at <http://www.e-javssour.net/en/node/3659> (last visited Mar. 23, 2010); Idowu Sowunmi, *G77 Rejects EU's 7.2bn Euros for Climate Funding*, ALL AFRICA, Dec. 12, 2009, <http://allafrica.com/stories/200912120003.html>.

¹⁵⁶ Sowunmi, *supra* note 155.

¹⁵⁷ *EU Climate Cash Pledge 'Not Enough' Say Small Nations*, BBC NEWS, Dec. 11, 2009, <http://news.bbc.co.uk/2/hi/8408821.stm>.

¹⁵⁸ Sudanese Ambassador Lumumba Di-Aping, chair of the G77, insisted on this target. Henry Lutaaya, *Developing Countries Set Tougher Targets*, CLIMATE CHANGE MEDIA PARTNERSHIP, Dec. 14, 2009, <http://www.climatemediapartnership.org/reporting/stories/developing-countries-set-tougher-targets>.

DAY 2: Tuesday December 8th, 2009

On the second day, a leaked version of a draft agreement known as the “Danish text” poisoned the Conference, evoking an angry reaction from the developing nations. They alleged that developed countries excluded them altogether and drafted an accord favorable to their position.¹⁵⁹ The existence of the text was first revealed by London’s Guardian newspaper:

The agreement, leaked to the Guardian, is a departure from the Kyoto protocol’s principle that rich nations, which have emitted the bulk of the CO₂, should take on firm and binding commitments to reduce greenhouse gases, while poorer nations were not compelled to act. The draft hands effective control of climate change finance to the World Bank; would abandon the Kyoto protocol – the only legally binding treaty that the world has on emissions reductions; and would make any money to help poor countries adapt to climate change dependent on them taking a range of actions.¹⁶⁰

The document was also interpreted as setting unequal limits on per capita carbon emissions for developed and developing countries, allowing people in rich countries to emit nearly twice as much as people in developing countries in the year 2050.¹⁶¹ Another provision of the text referred to a “peak” year for carbon emissions

¹⁵⁹ “It’s an incredibly imbalanced text intended to subvert, absolutely and completely, two years of negotiations. It does not recognize the proposals and the voice of developing countries,” said Lumumba Stanislaus Dia Ping, the Sudanese ambassador and de facto voice of the G77. Hilary Whiteman, *Poor Nations’ Fury Over Leaked Climate Text*, CNN, available at <http://www.cnn.com/2009/WORLD/europe/12/09/danish.draft.climate.text.0850/> (last visited Mar. 25, 2010).

¹⁶⁰ John Vidal, *Copenhagen Climate Summit in Disarray After ‘Danish Text’ Leak*, GUARDIAN, Dec. 8, 2009, <http://www.guardian.co.uk/environment/2009/dec/08/copenhagen-climate-summit-disarray-danish-text>. Some speculate that the Chinese delegation was the source of the leak. See *China’s Thing about Numbers*, *supra* note 139.

¹⁶¹ Vidal, *supra* note 160.

from developing countries, precisely what China was determined to oppose:

The developing countries' individual mitigation action could in aggregate yield a [Y percent] deviation in [2020] from business as usual and yielding their collective emissions peak before [20XX] and decline thereafter.¹⁶²

Chinese negotiator Su Wei asserted "it is too early to talk about a peak concentration year for developing countries,"¹⁶³ but took greater offense to passages proposing international measurement, reporting and verification of developing country actions.¹⁶⁴

Yvo de Boer, Executive Secretary of the UNFCCC, responded quickly to play down the document's importance, stating "[t]his was an informal paper ahead of the conference given to a number of people for the purposes of consultations. The only formal texts in the U.N. process are the ones tabled by the Chairs of this Copenhagen conference at the behest of the Parties."¹⁶⁵ In response, smaller nations weighed a walk-out, while a draft accord written by the BASIC countries – Brazil, South Africa, India and China – was released that contrasted sharply with one put together by Denmark.¹⁶⁶ A moment of clarity arrived later in the day, when the WMO timely released a new analysis concluding that the decade of the 2000's is "likely the warmest decade in the modern record, dating back 150 years."¹⁶⁷

¹⁶² It was expected that the figures represented by "X" and "Y" would be added during the course of negotiations. Whiteman, *supra* note 160. (Poor nations' fury over leaked climate text)

¹⁶³ "Climate Talks in Disarray Over 'Danish text,'" XINHUA, Dec. 10, 2009, http://www.chinadaily.com.cn/china/2009copenhagenclimate/2009-12/10/content_9150985.htm.

¹⁶⁴ *Id.*

¹⁶⁵ Whiteman, *supra* note 159.

¹⁶⁶ James Kanter, *Smaller Nations Weigh Power of the Walkout*, N.Y. TIMES, Dec. 8, 2009, <http://www.nytimes.com/2009/12/09/world/europe/09iht-walkout.html>.

¹⁶⁷ John Pickrell, *Global Warming 'Marches On'; Past Decade Hottest Known*, NAT. GEOGRAPHIC NEWS, Dec. 8, 2009, available at <http://news>.

DAY 3: Wednesday, December 9, 2009

The island nation of Tuvalu led a walkout in response to the Danish Text controversy and the proposal of a 2°C limit on global temperature increase, forcing negotiations to stall for several hours.¹⁶⁸ Tuvalu and the faction known as the Alliance of Small Island States (AOSIS) sought stronger regulations than the Danish text called for. They envisioned strengthening the Kyoto Protocol,¹⁶⁹ and insisting upon a cap at 1.5°C instead.¹⁷⁰ Sudanese diplomat Lumumba Di-Aping, voice of the G77, asserted that the 2°C target will “result in massive devastation to Africa and small island states.”¹⁷¹

Day 4: Thursday, December 10, 2009

Two senior U.S. officials arrived bringing hope that the U.S. is ready to constructively participate as well as confirming their bottom line. EPA Administrator Lisa Jackson detailed many measures that the Obama Administration took to cut U.S. GHG emissions, telling the Conference, “[w]e are seeking robust engagement with all of our partners around the world.” But two hours later, the U.S. Special Envoy for Climate Change, Todd Stern, made clear that the U.S. considers carbon reductions by

nationalgeographic.com/news/2009/12/091208-copenhagen-climate-conference-global-warming-climategate.html (last visited Mar. 27, 2010); see also Andrew C. Revkin, et al., *No Slowdown of Global Warming, Agency Says*, N.Y. TIMES, Dec. 8, 2009, http://www.nytimes.com/2009/12/09/science/earth/09climate.html?_r=2&hp; Press Release No.869, 2000–2009: *The Warmest Decade*, WMO, Dec. 8, 2009, http://www.wmo.int/pages/mediacentre/press_releases/pr_869_en.html (last visited Mar. 23, 2010).

¹⁶⁸ John Vidal, *Copenhagen Talks Break Down as Developing Nations Split over ‘Tuvalu’ Protocol*, GUARDIAN, Dec. 9, 2009, <http://www.guardian.co.uk/environment/2009/dec/09/copenhagen-tuvalu-protocol-split>.

¹⁶⁹ John Vidal, *Vulnerable Nations at Copenhagen Summit Reject 2C Target*, GUARDIAN, Dec. 10, 2009, <http://www.guardian.co.uk/environment/2009/dec/10/copenhagen-climate-change>.

¹⁷⁰ *Id.*

¹⁷¹ John M. Broder, *Many Goals Remain Unmet in 5 Nations’ Climate Deal*, N.Y. TIMES, Dec. 18, 2009, <http://www.nytimes.com/2009/12/19/science/earth/19climate.html>.

China and other major developing countries as “a core part of this negotiation.”¹⁷² Ambassador Yu Qingtai, China’s Special Representative for Climate Change, responded by suggesting that the U.S. perform some “deep soul-searching.”¹⁷³ These ongoing exchanges, to be repeated many more times, symbolically pit the CBDR and PPP principles against each other in spirit if not by name.

DAYS 5-7: Weekend of 11 – 13 December 2009

The remainder of the first week followed a similar path: draft agreements bandied about followed by varying degrees of indignation. The EU responded to Lesotho’s financing challenge by pledging 2.4 billion Euros per year from 2010 to 2012 for adaptation efforts in the poorest countries, only to be met with criticism.¹⁷⁴ Both sides returned to their touchstones, with the U.S. asserting the right to impose border adjustments in a draft version of a deal, while powerful emerging economies moved to strike.¹⁷⁵

B. The Second Week

Tensions continued to mount at the beginning of the second week, as the negotiations became more fevered and urgent.

DAY 8: Monday, 14 December 2009

The African countries walked-out of the negotiations on Monday, kicking off the second week and forcing a five-hour

¹⁷²Juliet Eilperin, *U.S. Pushes for Emissions Cuts from China, Developing Nations*, WASH. POST, Dec. 10, 2009, <http://www.washingtonpost.com/wp-dyn/content/article/2009/12/09/AR2009120904596.html>.

¹⁷³*Id.*

¹⁷⁴Nanet Poulsen, *EU Putting More Money on the Table*, ASSOCIATED PRESS, Dec. 11, 2009; Idowu Sowunmi, *G77 Rejects EU’s 7.2bn Euros for Climate Funding*, ALLAFRICA, Dec. 12, 2009, available at <http://allafrica.com/stories/200912120003.html>.

¹⁷⁵REUTERS, *Obama Notifies Congress of Asia-Pacific Trade Pact Intentions*, N.Y. TIMES, Dec. 15, 2009, <http://www.nytimes.com/2009/12/16/business/global/16trade.html>.

suspension of the talks.¹⁷⁶ They protested in favor of the paramountcy of continuing the Kyoto Protocol's binding emissions caps for developed countries.¹⁷⁷ China, which also considers this issue vital, echoed African concerns when He Yafei, the Chinese Vice-Foreign Minister, demanded "as a matter of principle" that Kyoto's successor incorporate the principles enshrined in the Kyoto Protocol.¹⁷⁸ But, China also repeated its refusal to submit to binding caps or international emissions monitoring.¹⁷⁹

The developed countries pushed back in the afternoon by continuing the issue of border adjustments raised over the weekend, and possible taxes on aviation and shipping fuel were discussed.¹⁸⁰ This met with a stern rebuke, "[w]e are totally against [border adjustments] — totally against it," from Jairam Ramesh, India's chief negotiator.¹⁸¹ In a more positive development, U.S. Energy Secretary Steven Chu promised a \$350 million fund for the development of new clean energy technologies,¹⁸² an offering

¹⁷⁶ The walkout was led by the Sudanese diplomat Lumumba Stanislaus Di-Aping, saying the developed nations' offer of \$10 billion in "quick-start" financing after completion of a deal was wholly inadequate. He had the support of China and India. See Urmi A. Goswami, *Africa Calls Rich Nations' Bluff*, ECONOMIC TIMES OF INDIA, Dec. 15, 2009, available at <http://economictimes.indiatimes.com/news/economy/foreign-trade/Africa-calls-rich-nations-bluff/articleshow/5338077.cms> (last visited Mar. 27, 2010); Broder, *supra* note 140 (Poor and Emerging States).

¹⁷⁷ Goswami, *supra* note 176.

¹⁷⁸ Fiona Harvey, *Rich Nations Step Up Pressure on Beijing*, FINANCIAL TIMES, Dec. 14, 2009, <http://www.ft.com/cms/s/0/726eb1bc-e8e2-11de-a756-00144feab49a.html>.

¹⁷⁹ John Broder, et al., *China and U.S. Hit Strident Impasse at Climate Talks*, N.Y. TIMES, Dec. 14, 2009, <http://www.nytimes.com/2009/12/15/science/earth/15climate.html>.

¹⁸⁰ REUTERS, *supra* note 173. See also Ed Crooks, et al., *Copenhagen talks enter 'new phase'*, FINANCIAL TIMES, Dec. 15, 2009, <http://www.ft.com/cms/s/101d459fc38-e97d-11de-be51-00144feab49a.html>.

¹⁸¹ REUTERS, *Obama Notifies Congress of Asia-Pacific Trade Pact Intentions*, N.Y. TIMES, Dec. 15, 2009, <http://www.nytimes.com/2009/12/16/business/global/16trade.html>.

¹⁸² Suzanne Goldenberg, *Stephen Chu Pledges \$350M Clean Tech Fund to Sweeten Deal at Copenhagen*, GUARDIAN, Dec. 14, 2010, <http://www.guardian.co.uk/environment/2009/dec/14/copenhagen-steven-chu-us>.

meant to illustrate the Obama Administration's commitment to address climate change.

When the Conference recommenced, ministerial working groups dedicated to addressing the most difficult diplomatic issues – including financing and emissions caps – worked through the night until 2am on Tuesday morning.¹⁸³

DAY 9: Tuesday, 15 December 2009

The ministerial working groups reconvened at 10 a.m. with new vigor,¹⁸⁴ but Ban Ki-moon, the Secretary-General of the UN, downplayed their importance by conceding that a deal could be struck without a firm commitment on long-term financing from richer to poorer countries. He stated “[w]e can start next year discussing this matter.”¹⁸⁵

Luminaries began trickling in to try to break the deadlock as the intensity of the negotiations grew. Highlighting this gearshift, Denmark's Prime Minister, Lars Løkke Rasmussen, assumed the conference presidency from Connie Hedegaard, Danish Minister for Climate and Energy, to oversee the final stages.¹⁸⁶ The idea to invite the heads of state was part of Denmark's high-risk strategy, a gamble that diplomatic protocol would somehow endure and that no supreme leader would want to leave Copenhagen empty-handed.¹⁸⁷ Fresh welcoming ceremonies were held in the afternoon, attended by Ban Ki-Moon and new arrivals including Britain's Gordon Brown and Prince Charles,¹⁸⁸

¹⁸³ Crooks, *supra* note 180.

¹⁸⁴ *Id.*

¹⁸⁵ Fiona Harvey, *Climate Deal in Balance Over Aid*, FINANCIAL TIMES, Dec. 15, 2009, <http://www.ftchinese.com/story/001030319/en/>.

¹⁸⁶ Broder, *supra* note 142.

¹⁸⁷ Fiona Harvey et al., *Procedural Disputes Block Climate Accord*, FINANCIAL TIMES, Dec. 16, 2009, <http://www.ft.com/cms/s/0/3e382b9a-ea3f-11de-aeb6-00144feab49a.html>.

¹⁸⁸ Prince Charles of the U.K. gave a somber address during the formal opening of high-level talks, telling ministers that “our planet has reached a point of crisis,” leaving only seven years before “we lost the levers of control” on the climate. Press Association, *Prince Charles Copenhagen Speech: The Eyes of the World are Upon You*, THE GUARDIAN, Dec 15, 2009, <http://www.guardian.co.uk/environment/2009/dec/15/prince-charles-speech-copenhagen-climate> (last visited Mar. 23, 2010); see also John Vidal, *Prince of Wales Warns Copenhagen*

Australia's Kevin Rudd, and Venezuela's Hugo Chavez.¹⁸⁹ Soon thereafter, any scheduled activities gave way to ad hoc – sometimes chaotic – meetings between chief executives. Imposing 120 heads of state on a process normally driven by career diplomats commenced what was described as a “wild roller coaster ride.”¹⁹⁰

Despite the fresh presence, the border adjustments negotiations continued into the Tuesday afternoon docket. Drawing a line in the sand, Australia, the U.S. and the EU firmly refused to renounce tariffs as part of their climate control negotiating strategies.¹⁹¹ However, one reporter indicated that the issue may have turned a corner, as Australia, the U.S. and China agreed in principle not to use climate objectives as a cloak for protectionism.¹⁹² Yu Qingtai warned that his country would “always oppose the actions by any countries to make use of protection of the environment or climate as a pretext to conduct trade protectionism,”¹⁹³ and China and the U.S. remained at an impasse over emissions caps and China's repeated refusal to submit to international emissions monitoring.

Summit That Planet is in Crisis, GUARDIAN, Dec. 15, 2010, available at <http://www.guardian.co.uk/environment/2009/dec/15/copenhagen-redd-deforestation>.

¹⁸⁹ President Obama spoke via telephone with leaders of some of the world's most vulnerable countries including Prime Minister Sheikh Hasina of Bangladesh and Prime Minister Meles Zenawi of Ethiopia. Hasina highlighted how Bangladesh's people will be especially affected by global warming, while Meles underscored the need for progress on the three pillars of emission cuts, adaptation and financing to help the world's poorest countries. Darren Sameulsohn et al., *Nations Play Hardball as Hillary Clinton Heads to Climate Summit*, N.Y. TIMES, Dec. 15, 2009, <http://www.nytimes.com/gwire/2009/12/15/15greenwire-nations-play-hardball-as-hillary-clinton-heads-61556.html>.

¹⁹⁰ This term was used to describe the later diplomacy by Robert C. Orr, the UN Assistant Secretary General for Policy and Planning. Andrew Revkin et al., *U.N. Climate Talks 'Take Note' of Accord Backed by U.S.*, N.Y. TIMES, Dec. 19, 2009, <http://www.nytimes.com/2009/12/20/science/earth/20climate.html>.

¹⁹¹ Reuters, *supra* note 175.

¹⁹² *Id.*

¹⁹³ *Id.*

DAY 10: Wednesday, 16 December 2009

Growing tensions outside the Conference boiled over, as Danish police arrested hundreds of protesters and stopped thousands more from storming the convention hall.¹⁹⁴ Inside, the proceedings remained bogged down in procedural and substantive disputes. One meeting to discuss a draft text slated to begin at 1 p.m. “had yet to convene at 8:15 p.m.”¹⁹⁵ A group of developing countries reopened a draft text on technology transfer, which developed countries immediately rejected as unacceptable and destructive international intellectual property rights.¹⁹⁶ Japan attempted to break the deadlock by offering more financial assistance to the developing world, raising its aid proposal from \$9 billion to about \$15 billion until 2012, contingent upon a broader agreement.¹⁹⁷

The Conference’s first breakthrough came on the issue of deforestation, as a proposed agreement would compensate developing countries for preserving their forests.¹⁹⁸ The agreement would set up a CDM-like system whereby poorer countries could collect foreign monies while richer nations use the program to cancel out domestic emissions under cap and trade mechanisms.¹⁹⁹ The U.S. pledged \$1 billion to help poor countries preserve their forests, while Australia, France, Japan, Norway and the UK pledged an additional \$2.5 billion if an overall climate change deal could be reached.²⁰⁰

The notable happening of the day, however, was how the media was increasingly used to bring pressure to bear across the two camps. Grandstanding took precedence over actual negotiation

¹⁹⁴ Jonathan Watts et al., *Copenhagen Day of Mass Protest Passes Without Major Incident*, GUARDIAN, Dec. 16, 2009, <http://www.guardian.co.uk/environment/2009/dec/16/copenhagen-protest>.

¹⁹⁵ Harvey et. al., “Procedural Disputes,” *supra* note 187.

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ Elisabeth Rosenthal, *Climate Talks Near Deal to Save Forests*, N.Y. TIMES, Dec. 15, 2009, <http://www.nytimes.com/2009/12/16/science/earth/16-forest.html>.

¹⁹⁹ *Id.*

²⁰⁰ Harvey et. al., “Procedural Disputes,” *supra* note 187.

as the leaders arrived.²⁰¹ Secretary of State Hillary Clinton opened the day by publishing an editorial stressing the importance of international verification standards to the developed bloc.²⁰² In her editorial she stated:

A successful agreement depends upon a number of core elements, but two are shaping up to be essential: first, that all major economies set forth strong national actions and resolve to implement them; and second, that they agree to a system that enables full transparency and creates confidence that national actions are in fact being implemented.²⁰³

She added that “[t]ransparency, in particular, is what will ensure that this agreement becomes operational, not just aspirational,” noting a position shared by many members of the U.S. Senate. The PPP theme reemerged in these comments, “[w]e all need to take our share of responsibility, stand behind our commitments, and mean what we say in order for an international agreement to be credible.”²⁰⁴ Reports also began surfacing in the Western media blaming the developing countries, especially China, for raising the interminable procedural objections that prevented the talks from progressing.²⁰⁵ Though not conceding obstructionism, Jairam Ramesh, India’s environment minister, confirmed that China, India, Brazil and South Africa were united and “coordinating our positions almost on an hourly basis.”²⁰⁶

Later in the day, these major emerging countries announced their intention to collectively reduce carbon emissions by 2.1 gigatons by 2020 but, in a major show of force, insisted that they do it voluntarily and without outside verification.²⁰⁷ This

²⁰¹ *Id.*

²⁰² Hillary Rodham Clinton, *The U.S. is on Board*, N.Y. TIMES, Dec. 15, 2009, <http://www.nytimes.com/2009/12/15/opinion/15iht-edclinton.html>.

²⁰³ *Id.*

²⁰⁴ *Id.*

²⁰⁵ Harvey et. al., “Procedural Disputes,” *supra* note 187.

²⁰⁶ Sameulsohn et. al., *supra* note 189.

²⁰⁷ *Id.*

announcement was accompanied by demands. China and India, in particular, repeated their GBDR-charged call that industrialized countries increase their legally-binding reduction targets under the terms of the Kyoto Protocol.²⁰⁸ “Developing countries are taking their actions, and we are calling for developed countries to take their historical responsibilities squarely,” said Xie Zhenhua, a Chinese envoy, adding “[w]e demand developed countries cut emissions seriously.”²⁰⁹ Premier Wen Jiabao, the highest Chinese official to attend the Conference, arrived to take command of the Chinese delegation that evening.²¹⁰

Despite the day’s progress, Andreas Carlgren, Sweden’s Environmental Minister and holder of the rotating European Union presidency, admitted that the overall negotiations were proving increasingly “frustrating.” Minister Carlgren offered more EU concessions conditional on the U.S. and China showing flexibility, stating “[w]e’re still expecting them both to raise their ambition level for emissions reduction.”²¹¹ Yvo de Boer gave a dour metaphor to summarize the day’s events, claiming that the negotiating “cable car” had ground to a stop.²¹² Former U.S. Vice President Al Gore further lowered expectations, suggesting that a binding agreement may not come before the July 2010 COP-16 meeting in Mexico City, rather than by the end of the week.²¹³

²⁰⁸ *Id.*

²⁰⁹ *Id.*

²¹⁰ Permanent Mission of the PRC to the UN Office at Geneva, *Wen Jiabao Arrives in Copenhagen for the Leaders’ Meeting of the Climate Change Conference*, Dec. 12, 2009, <http://www.china-un.ch/eng/bjzl/t646415.htm> (last visited Mar. 23, 2010).

²¹¹ Crooks, et al., *Copenhagen Talks Enter ‘New Phase,’* FINANCIAL TIMES, Dec. 14, 2009, <http://www.ft.com/cms/s/0/d459fc38-e97d-11de-be51-00144feab49a.html>.

²¹² Bryan Walsh, *With One Day to Go, Climate Talks Remain Stalled*, TIME, Dec. 17, 2009, http://www.time.com/time/specials/packages/article/0,28804,1929071_1929070_1948612,00.html.

²¹³ Bill Blakemore, *Copenhagen Climate Talks: Gore Takes Stage*, ABC NEWS, Dec. 16, 2009, <http://abcnews.go.com/Technology/gore-schwarzenegger-copenhagen-%20climate-summit/story?id=9344940>.

DAY 11: Thursday, 17 December 2009

The Americans took command of the headlines early on Thursday when Secretary Clinton announced support for a plan for developed countries to provide poorer nations with \$100 billion per year by 2020 to fight climate change.²¹⁴ The plan calls for \$30 billion a year in the short term, rising to \$50 billion per year by 2015 and culminating for \$100 billion a year by 2020. Secretary Clinton said the money would be a mix of public and private funds that, although not specified, would include “alternative sources of finance.”²¹⁵ She also did not state what the American contribution to the fund would be, but it is typical for the U.S. to contribute 20% in such international financing efforts.²¹⁶

That \$100 billion offer came with two familiar strings, however: first, that it would only be made available in the event of a legally binding agreement and, second, that the resulting agreement incorporates a commitment from China and other developing nations about greater transparency and verification in its emissions reporting.²¹⁷ “If there is not even a commitment to pursue transparency, that is a kind of deal breaker for us . . . it would be hard to imagine that there could be the level of financial commitment I have just announced in the absence of transparency from the biggest emitter and soon-to-be and possibly already the second-biggest economy,” Clinton said.²¹⁸

The American proposal inspired strong responses and revitalized the negotiating process. Developing countries previous-

²¹⁴ Suzanne Goldenberg, *US Bids to Break Copenhagen Deadlock with Support for \$100bn Climate Fund*, GUARDIAN, Dec. 17, 2009, <http://www.guardian.co.uk/environment/2009/dec/17/us-copenhagen-100bn-climate-fund>.

²¹⁵ John Broder et al., *Obama Has Goal to Wrest a Deal in Climate Talks*, N.Y. TIMES, Dec. 17, 2009, <http://www.nytimes.com/2009/12/18/science/earth/18climate.html>.

²¹⁶ *Id.*

²¹⁷ *Id.*; see also Helene Cooper & John Broder, *Obama Presses China for Accountability on Climate*, N.Y. TIMES, Dec. 19, 2009, available at <http://www.elsalvador.org/Embajadas/eeuu/Prensa2.nsf/aac7d56ca8fd884b852563be00610639/f9dcb7c6e760389685257690004ea2b6?OpenDocument> (last visited Mar. 23, 2010).

²¹⁸ Fiona Harvey et al., *Race Against the Clock for Climate Deal*, FINANCIAL TIMES, Dec. 17, 2009, <http://www.ft.com/cms/s/0/c852a4c4-eb00-11de-a0e1-00144feab49a.html>.

ly opposed the \$100 billion figure as too low, demanding 0.5 percent of rich countries' gross domestic product, amounting to about \$250 billion annually.²¹⁹ Though some developing countries rejected the offer out of hand, Ethiopian Prime Minister Meles Zenawi – a key African voice – voiced satisfaction.²²⁰ China's He Yafei also responded positively by indicating that his country would consider voluntary “international exchanges” of information on its climate programs.²²¹

Yvo de Boer celebrated the new tone of these announcements by declaring “[t]he cable car is moving again.”²²² However, despite being the most successful day of the conference so far, Thursday ended on a sober note as the Chinese delegation downplayed overall expectations. Chinese officials forecast the most optimistic outcome of the Copenhagen Conference to be a two-page agreement, lacking “immediate, operational” significance. Such a brief document would surely contain few details and postpone any meaningful progress for years.²²³

DAY 12: Friday, December 18, 2009

Air Force One touched down in Copenhagen on Friday morning, introducing President Obama to the diplomatic equation. Within hours he was in an ad hoc meeting with 17 other high-level world leaders,²²⁴ a session which delayed the opening of the

²¹⁹ Ed Crooks, *Hopes for Climate Deal Face Setback*, FINANCIAL TIMES, Dec. 16, 2009, <http://www.ft.com/cms/s/0/5a4fd2d8-e9d6-11de-ae43-00144feab49a.html>; see also Henry Lutaaya, *Developing Countries Set Tougher Targets*, *Climate Change Media Partnership*, Dec. 14, 2009, <http://www.climatepartnership.org/reporting/stories/developing-countries-set-tougher-targets>.

²²⁰ Juliet Eilperin & David A. Fahrenthold, *At Copenhagen, Both Rich and Developing Nations Offer Concessions*, WASH. POST, Dec. 17, 2009, <http://www.washingtonpost.com/wpdyn/content/article/2009/12/16/AR2009121600701.html>.

²²¹ Broder et. al., *supra* note 215.

²²² *Copenhagen Climate Conference Moving Again: UN Official*, XINHUA, Dec. 17, 2009, http://news.xinhuanet.com/english/2009-12/17/content_12663621.htm.

²²³ Juliet Eilperin and Anthony Faiola, *U.S. Pledges Billions, China Says Climate Pact is Doubtful*, WASH. POST, Dec. 17, 2009, available at <http://positivereform.com/5329/> (last visited Mar. 24, 2011).

²²⁴ Cooper & Broder, *supra* note 217.

morning plenary session.²²⁵ According to the Western media, the U.S. and EU delegations considered it a snub that Premier Wen did not attend, sending He Yafei in his place instead.²²⁶ The Chinese characterize the event as a miscommunication due to the ad hoc nature of the meetings, claiming that Premier Wen was never formally invited.²²⁷

While President Obama conducted these exclusive negotiations, Premier Wen made unilateral pledges to the plenary, conceding that China would report its emissions as part of an international plan, but would not submit to external verification by stating “[w]e will further enhance domestic surveillance and monitoring methods, increase transparency and actively engage in international dialogue and cooperation.”²²⁸ He stressed that China is voluntarily reducing its emissions growth rate and has “not attached any condition to the target or linked it to the target of any other country. We are fully committed to meeting or even exceeding the target.”²²⁹ Premier Wen also provided statistics to support China’s climate mitigation actions and apply pressure to the developed countries. He asserted that there has been a 51% growth in China’s renewable-energy output between 2005-2008, that China planted 20 million hectares of forests during the same time period, and that developed countries had produced 80% of emissions over the past 200 years.²³⁰

Shortly after noon, President Obama delivered a brief address to the assembly of world leaders designed to influence the final hours of negotiations.²³¹ Eleven minutes long, it included

²²⁵ *Id.*

²²⁶ *Id.*

²²⁷ Wen says he was never formally notified of the late-night Dec. 17 event and sent Foreign Minister Yang Jiechi to register a protest. Wen said no explanation had been given about the lack of a formal invitation. *China Alleges Diplomatic Snub at Copenhagen Summit*, ASSOCIATED PRESS, Mar. 14, 2010, <http://www.google.com/hostednews/ap/article/ALeqM5hIFHfH4ch0M4bTr15oijjlnyyPgD9EE7NUO0>; see also Cooper & Broder, *supra* note 217 (noting Wen speaking to Plenary Conference).

²²⁸ Cooper & Broder, *supra* note 217.

²²⁹ *Id.*

²³⁰ *China’s Thing About Numbers*, *supra* note 139.

²³¹ Cooper & Broder, *supra* note 217.

pointed remarks about China's resistance to emissions monitoring mechanisms, making it clear that U.S. participation was contingent upon Chinese flexibility.²³² "Without such accountability, any agreement would be empty words on a page."²³³ After the speech, President Obama and Premier Wen met privately for 55 minutes. The meeting broke up a little after 1:35 p.m., with a White House official reporting only that the two "made progress."²³⁴

After a tedious afternoon and with the prospects for an agreement fading fast, Danish Prime Minister Rasmussen invited about 25 heads of state to a "Friends of the Chair" session for private negotiations.²³⁵ The breakthrough finally came later that night. According to senior American officials, a dramatic moment occurred in the middle of the night when President Obama and Secretary Clinton burst into a clandestine meeting of the BASIC leaders and inspired new talks.²³⁶ Sergio Serra, a senior Brazilian negotiator, recalled the late meeting and President Obama's entrance, but did not confirm that he was uninvited.²³⁷ Regardless of theatrics, in a matter of hours President Obama would announce that these five major nations – Brazil, China, India, South Africa and the United States – forged a deal.

²³² John M. Broder, *Many Goals Remain Unmet in 5 Nations' Climate Deal*, N.Y. TIMES, Dec. 18, 2009, <http://www.nytimes.com/2009/12/19/science/earth/19climate.html>.

²³³ Barack Obama, *Obama in Copenhagen Speech: Full Text*, HUFFINGTON POST, Dec. 18, 2009, http://www.huffingtonpost.com/2009/12/18/obama-in-copenhagen-speech_396836.html.

²³⁴ Cooper & Broder, *supra* note 217.

²³⁵ The "Friends of the Chair" is a UN device where a small number of negotiators meet separately from the main negotiations and try to overcome an impasse on a specific issue. Participants are usually chosen by the main negotiating body; however, in this case, many delegates in the COP plenary were opposed to forming another negotiating track, and it is not quite clear how much was known to other delegations and leaders about the final composition of the group, its goals, and even whether or not it was indeed meeting. International Institute for Sustainable Development [IISD], *Summary of the Copenhagen Climate Change Conference, 7-19 December 2009*, (UK), Dec. 22, 2009, <http://www.iisd.ca/vol12/enb12459e.html>.

²³⁶ Revkin, *supra* note 189.

²³⁷ Broder, *supra* note 232.

DAY 13: Saturday, December 19, 2009

Though calling the three-page accord “an unprecedented breakthrough,” President Obama simultaneously acknowledged that it fell well short of what was required to combat global warming. Nonetheless, it was he that formally submitted it to the COP.²³⁸ By early morning it seemed that the COP may not approve the deal. Many countries were upset by the final stages of the process, averring that they were locked out of the most vital negotiations.²³⁹ By 9 a.m. four countries – Venezuela, Bolivia, Cuba and Nicaragua – expressed their “implacable opposition,” destroying any hope that the Accord could be formally adopted as a UN decision.²⁴⁰ Sudanese diplomat Lumumba Stanislaus Di-Aping, voice of the G77, articulated the most animated denunciation of the Accord, declaring it “the worst development in climate change negotiations in history.”²⁴¹ “Only after several more hours of back-room wrangling did a restarted plenary, with a new chair, get the Accord adopted after a fashion.”²⁴²

In the end, the UN conference settled upon a much weaker “decision to note” the Accord, leaving countries free to abide by it, but requiring a consensus at a future general meeting to implement it into the foundation of a new treaty. Thus, the bottom line at Copenhagen was not good: the world emerged without a framework to address climate change post-2012.

DAY 14+: THE IMMEDIATE AFTERMATH

The nationalistic and factional blame exchanges that defined the negotiations boiled over into all-out recriminations at its close. It is clear that several Western governments were

²³⁸ Broder, *supra* note 232.

²³⁹ Revkin, *supra* note 189.

²⁴⁰ Harvey, *supra* note 140.

²⁴¹ Such rhetoric proved abrasive. “I call on my brother from Sudan to rethink his conclusions and get hold of his emotions,” admonished Dessima Williams of Grenada, representative of the Alliance of Small Island States, as she accepted a deal that fell far short of the islanders’ hopes. Broder, *supra* note 233; *China’s Thing About Numbers*, *supra* note 139.

²⁴² *China’s Thing About Numbers*, *supra* note 139.

frustrated by positions advocated by Beijing,²⁴³ and angered by Premier Wen's alleged snub of President Obama.²⁴⁴ One of the most pointed criticisms came from British Energy and Climate Change Secretary Ed Miliband, who stated that China tried to "hijack" the Conference and displayed "a farcical picture to the public."²⁴⁵ The Chinese Foreign Ministry responded quickly, characterizing the remarks as being made by "an individual British politician" and containing "obvious political attempts" to escape obligations and foment discord among developing countries.²⁴⁶ The state-run Xinhua news agency lamented that "after the conference ended, China has taken the brunt of the blame,"²⁴⁷ and moved to highlight positive Chinese contributions:

China, at the conference, also made some concessions to show its sincerity and the spirit of

²⁴³ "China reject[ed] the target of 80 percent emission reductions by 2050 for developed countries which some European governments believed had already been agreed upon." Geoff Dyer, *China Hails Deal Despite Being Cast Villain*, FINANCIAL TIMES, Dec. 21, 2009, <http://www.ft.com/cms/s/0/c42ead8c-ee54-11de-944c-00144feab49a.html>.

²⁴⁴ "Twice during the day, Mr. Wen sent an underling to represent him at the meetings with Mr. Obama. To make things worse, each time it was a lower-level official [Vice Foreign Minister He Yafei and Special Representative on Climate Change Yu Qingtai] . . . The White House made a point of noting the snub in a statement to reporters. Mr. Obama, for his part, said to his staff: "I don't want to mess around with this anymore. I want to talk to Wen," according to an aide. Andrew C. Revkin & John M. Broder, *A Grudging Accord in Climate Talks*, N.Y. TIMES, Dec. 19, 2009, <http://www.nytimes.com/2009/12/20/science/earth/20accord.html>.

²⁴⁵ Ed Miliband, *China Tried to Hijack Copenhagen Climate Deal*, GUARDIAN, Dec. 20, 2009, <http://www.guardian.co.uk/environment/2009/dec/20/ed-miliband-china-copenhagen-summit>.

²⁴⁶ Embassy of the PRC in the USA, *China Refutes British Official's "Hijack" Attack Over Copenhagen Talks*, XINHUA, Dec. 22, 2009, <http://www.china-embassy.org/eng/zt/t647253.htm>; Embassy of the PRC in the USA, *China Says Rich Countries Responsible for Slow Copenhagen Talks Progress*, Embassy, XINHUA, <http://www.china-embassy.org/eng/zt/t645668.htm>. ("If the talks have encountered some difficulties and made slow progress, the main reason is that the developed countries have moved backward on the key issues of funding and technology," said Jiang).

²⁴⁷ Lu Xuede, *Obstruction of Developed Nations*, XINHUA, Jan. 11, 2010, http://www.chinadaily.com.cn/opinion/2010-01/11/content_9297092.htm.

cooperation. For example, China backed off and conceded the target of limiting global warming to a maximum 2 degrees Celsius over pre-industrial times be written into the Copenhagen Accord. Moreover, China has not only helped developing countries gain as much fund as possible from developed countries to fight climate change, but provided aid within its capacity to developing countries.²⁴⁸

Xinhua editorials also expressed Chinese disappointment at the U.S., saying “[t]he world has high hopes that the U.S. can take the lead in coping with the global warming challenge. But Obama failed to offer new U.S. commitments for deeper emission cuts that some see as crucial,”²⁴⁹ and developed nations in general:

Compared with China’s pragmatic and problem-solving approach, developed countries were imposing unreasonable and unilateral demands on developing countries. For example, in the conference’s run-up to the Copenhagen Accord, developed countries still were not authorizing the Bali Action Plan and its proposed international supervision on less-compliant emissions reduction plans by less-developed countries.²⁵⁰

The Chinese media is also keen to highlight the first major exercise of China’s new diplomatic authority:

²⁴⁸ Yu Zhixiao, *China plays key role in ensuring success of Copenhagen climate talks*, XINHUA, Dec. 25, 2009, <http://lr.china-embassy.org/eng/majorevents/t648141.htm>; *China Stands as Constructive Player in Copenhagen*, *supra* note 134.

²⁴⁹ Fu Jing & Li Jing, *Wen Meets Obama on Day of Whirlwind Diplomacy*, XINHUA, Dec. 19, 2009, http://www.chinadaily.com.cn/china/2009-12/19/content_9202260.htm.

²⁵⁰ Xuede, *supra* note 246.

China's confidence was highlighted in its adherence to its substantial principles on climate change. First, China stuck to the dual-track mechanism of the UN Framework Convention on Climate Change and the Kyoto Protocol on the principle of "common but differentiated responsibilities." Second, China turned down some developed countries' demands to link China's voluntary mitigation actions with developed countries' compulsory emissions reduction targets. Premier Wen said the Chinese commitments are "nonnegotiable and unconditional." Third, China refused to set a fixed year for peak emissions, as it would more or less hinder the development of developing countries, which are still faced with the priority tasks of economic development and poverty reduction. China believed it was unhelpful to prescribe such a year, as different countries had different characteristics and were at different development stages, and developing countries may face more uncertainties in their future development.²⁵¹

Others take a more "balanced" view, such as Swedish Environment Minister Andreas Carlgren, who blames the U.S. and China equally for the failure to make more progress.²⁵² Likewise, the noted American commentator Friedman mocked positions of the superpowers:

The Chinese have basically said "We promise not to go over the speed limit, but we want no police, no courts, no stoplights, no real transparency on their carbon emissions...[a]nd President Obama is

²⁵¹ Yu Zhixiao, *China Plays Key Role Making Copenhagen Talks Successful*, XINHUA, Dec. 25, 2009, http://news.xinhuanet.com/english/2009-12/25/content_12704224.htm.

²⁵² Yu Zhixiao, *Unreasonable to Rebuke China Over Climate Talks*, XINHUA, Dec. 24, 2009, http://news.xinhuanet.com/english/2009-12/24/content_12698130.htm.

saying, “If you think I can get that through the U.S. Congress – that China promises to be good on carbon – well, I’ve got a bridge in Brooklyn I’d like to sell you.”²⁵³

Indeed, the U.S. and China are likely to be blamed, and are perhaps deserving of the blame, because they are the largest contributors to global warming, hold the strongest bargaining positions and any ultimate agreement will need their blessing. After all, their compromises were crucial to the existence of the Copenhagen Accord.

V. THE COPENHAGEN ACCORD

The Copenhagen Accord did not meet even the modest expectations that the Conference leaders had set. First, it notably failed to meet the goal of creating an international treaty. Second, it failed to result in any binding emissions caps or an international benchmark. Third, it failed to promise an international treaty, as language calling for a binding accord “as soon as possible,” and no later than November, 2010, was dropped at the behest of China, India and Saudi Arabia.²⁵⁴

However, the text is not empty. Significant compromises were made on the “three pillars:” emissions cuts, financing and verification, discussed herein. Notably missing is any significant progress on technology transfer, but the adoption of a new deforestation program is a pleasant surprise.

A. Emissions Cuts

The Accord honored an objective agreed upon by most of the delegations to cap the rise in global temperatures at 2°C, the

²⁵³ Daniel Carty, *Friedman: Copenhagen a U.S.-China Power Struggle*, CBS NEWS, Dec. 18, 2009, http://www.cbsnews.com/8301-503543_162-5994673-503543.html.

²⁵⁴ XINHUA, *New Climate Draft Drops Treaty Deadline*, CHINA DAILY, Dec. 19, 2009, http://www.chinadaily.com.cn/world/2009-12/19/content_9201708.htm; Broder, *supra* note 232; *China’s Thing About Numbers*, *supra* note 139.

maximum level the IPCC predicts could avert the worst effects of global warming.²⁵⁵

To achieve the ultimate objective of the Convention to stabilize greenhouse gas concentration in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system, we shall, recognizing the scientific view that the increase in global temperature should be below 2 degrees Celsius, on the basis of equity and in the context of sustainable development, enhance our long-term cooperative action to combat climate change.²⁵⁶

To achieve the 2°C goal, scientists predict that the concentration of carbon dioxide in the atmosphere should not exceed 450 parts per million.²⁵⁷ The International Energy Agency (IEA) calculates that if the US were to increase its cut to 18%, the EU to 27%, and China to 47%, then 450ppm would be achievable, but predicts that it will require an expenditure of \$10.5 trillion in low-carbon technologies between 2010 and 2030.²⁵⁸

²⁵⁵ International Panel on Climate Change, *IPCC Fourth Assessment Report*, <http://www.ipcc.ch/ipccreports/ar4-wg1.htm>.

²⁵⁶ The Copenhagen Accord, FCCC/CP/2009/L.7 at ¶ 1., available at http://unfccc.int/documentation/documents/advanced_search/items/3594.php?rec=j&preref=600005666&data=&title=&author=&keywords=&symbol=&meeting=%22Conference+of+the+Parties+%28COP%29%2C+Fifteenth+session%2C+7-18+December+2009%2C+Copenhagen%2C+Denmark%22&mo_from=&year_from=&mo_to=&year_to=&last_days=&anf=0&sorted=date_sort&dir=DESC&seite=1#beg (last visited Apr. 10, 2010).

²⁵⁷ The Copenhagen Accord, *supra* note 256, at P. 12 (leaving open the possibility of attaining the long term goal of a temperature rise of 1.5 degrees Celsius); See also John Vidal, *Vulnerable Nations at Copenhagen Summit Reject 2C Target*, GUARDIAN, Dec. 10, 2009, <http://www.guardian.co.uk/environment/2009/dec/10/copenhagen-climate-change> (noting the that many countries pushed for a lower target, such as 350 ppm, that would limit global warming to no more than 1.5°C); Ed Crooks & Fiona Harvey, 'Big Prize' *Appears Out of Reach*, FINANCIAL TIMES, Dec. 16, 2009, <http://www.ft.com/cms/s/0/168b0dfc-ea70-11de-a9f5-00144feab49a.html>.

²⁵⁸ Crooks and Harvey, *supra* note 257.

How achieving this goal will be implemented is unclear, as the Copenhagen Accord does not mandate any binding emissions cuts. This is a significant retreat from the Kyoto Protocol. Rather, each developed nation is invited to commit to cuts and list them in an appendix, laying out only what each country's voluntary intentions are:

Annex I Parties commit to implement individually or jointly the quantified economy-wide emissions targets for 2020, to be submitted in the format given in Appendix I by Annex I Parties to the secretariat by 31 January 2010 for compilation in an INF document.²⁵⁹

President Obama stressed their non-binding effect on the United States during his final address:

It will not be legally binding ... With respect to the emissions targets that are going to be set, we know that they will not be by themselves sufficient to get to where we need to get by 2050. So that's why I say that this is going to be a first step . . . From the perspective of the United States, I've set forth goals that are reflected in legislation that came out of the House that are being discussed on a bipartisan basis in the Senate. And although we will not be legally bound by anything that took place here today, we will I think have reaffirmed our commitment to meet those targets.²⁶⁰

Developing nations like China and India are once again not required to take on binding targets to cut their emissions, but they are encouraged to take on "nationally appropriate mitigation

²⁵⁹ Copenhagen Accord, *supra* note 256, at ¶ 4.

²⁶⁰ Barack Obama, *Text: Obama's Remarks on the Climate Agreement*, N.Y. TIMES, Dec. 19, 2009, <http://www.nytimes.com/2009/12/19/science/earth/19climate.text.html>.

actions,” or NAMAs.²⁶¹ These NAMAs would set out “measurable, reportable and verifiable” actions that the countries would take to curb the growth of their emissions in future.²⁶² The Accord reads:

Mitigation actions taken by Non-Annex I Parties will be subject to their domestic measurement, reporting and verification the result of which will be reported through their national communications every two years.²⁶³

These actions include investing in energy efficiency and renewable sources of energy. Both China and India formalized their pledges on Tuesday, March 9, 2010.²⁶⁴ Although their promises are not as concrete as the West would like they are nonetheless significant, marking the first time that developing countries have accepted their growing responsibility and voluntarily offered mitigation targets. Thus, reading between the lines of the Accord, the PPP is given formal credence in the post-Kyoto era.²⁶⁵

B. Financial Assistance

The most vulnerable developing countries came to Copenhagen seeking financing from developed countries in order to help them cut emissions and adapt to the effects of climate change. They found a friend in China. While He Yafei pledged that his country did not expect money from the U.S. or other “rich countries,”²⁶⁶ he insisted that “financial resources for the efforts of

²⁶¹ Copenhagen Accord, *supra* note 256, at ¶ 4.

²⁶² *Id.*

²⁶³ *Id.*

²⁶⁴ John M. Broder, *China and India to Join Copenhagen Climate Change Accord*, N.Y. TIMES, Mar. 9, 2010, <http://www.nytimes.com/2010/03/10/science/earth/10climate.html>.

²⁶⁵ India set a domestic emissions intensity reduction target of 20 to 25 percent by 2020 compared with 2005 levels, excluding its agricultural sector. *Id.*

²⁶⁶ *China Stands as Constructive Player in Copenhagen*, XINHUA, Dec. 26, 2009, http://news.xinhuanet.com/english/2009-12/26/content_12706368.htm; Crooks, *supra* note 219.

developing countries [are] a legal obligation.”²⁶⁷ Yu Qingtai cited the original 1992 UNFCCC as precedent saying “the developed countries committed themselves to cover the full incremental costs of developing countries actions to adapt or mitigate against climate change.”²⁶⁸ China’s advocacy for financing revalidates its diplomatic alliances among the world’s poorest nations, particularly in Africa, to whom financing is the highest priority. Their enthusiasm was matched by stiff and realistic resistance on behalf of the developed countries, suffering a collective economic malaise and wallowing in oppressive domestic debts. Yet pleasant surprises emerged, such as when one developing country – Brazil – vowed to contribute to financing to help poorer countries deal with climate change, becoming the first developing country to do so.²⁶⁹

Indeed, financing is the only legal obligation any parties accept under the Accord. Thus, the longest and most detailed provision of the Accord regards it. A goal of mobilizing \$10 billion a year in public and private financing to help poor countries cope with climate change over the next three years, with a long-term goal of \$100 billion annually by 2020 is codified therein:²⁷⁰

8. Scaled up, new and additional, predictable and adequate funding as well as improved access *shall be provided* to developing countries, in accordance with the relevant provisions of the Convention, to enable and support enhanced action on mitigation The collective commitment by developed countries is to provide new and additional resources . . . approaching USD 30 billion for the period 2010. 2012 with balanced allocation between adaptation and mitigation. Funding for adaptation will be prioritized for

²⁶⁷ Crooks, *supra* note 219.

²⁶⁸ Andrew C. Revkin, *China Presses Case for Climate Aid*, N.Y. TIMES, Dec. 16, 2009, <http://dotearth.blogs.nytimes.com/2009/12/16/china-presses-case-for-climate-aid/>.

²⁶⁹ CLIMATICO, *Copenhagen De-briefing: An Analysis of COP15 for Long-Term Cooperation*, Jan. 2010, <http://www.climaticoanalysis.org/wp-content/uploads/2010/01/post-cop15-report52.pdf> at 11.

²⁷⁰ The Copenhagen Accord, *supra* note 256, at ¶ 8 (*emphasis added*).

the most vulnerable developing countries, such as the least developed countries, small island developing States and Africa. In the context of meaningful mitigation actions and transparency on implementation, developed countries commit to a goal of mobilizing jointly USD 100 billion dollars a year by 2020 to address the needs of developing countries. This funding will come from a wide variety of sources, public and private, bilateral and multilateral, including alternative sources of finance. . .

A new, multilateral governance structure is envisioned to disburse the funds, a significant portion of which will flow through the new Copenhagen Green Climate Fund.²⁷¹ Furthermore, a “high-level panel” is to be established to study the contribution of the potential sources of revenue, including alternative sources of finance, to meeting this goal.²⁷²

C. Verification and Compliance

Bifurcated responsibilities on Annex I and non-Annex I parties were present at the creation, enshrined in the UNFCCC. For example, while UNFCCC Article 12 requires both Annex I and non-Annex I parties to submit national communications of GHG inventories,²⁷³ the frequency and detail of the submissions required of the two camps is very different.²⁷⁴ Furthermore, the Convention does not contain a compliance mechanism. It does provide for the development of a “Multilateral Consultative Process” to address

²⁷¹ *Id.* Mexico and Norway put forth a proposal to establish a new Copenhagen Green Climate Fund that would finance mitigation and adaptation actions of the developing countries. The Green Fund would receive financial resources through two tracks – one that would have a determined amount of emission allowances for countries for auctioning, and one track that would utilize public resource contributions from developed countries according to their amount of emissions, GDP, and population.

²⁷² Copenhagen Accord, *supra* note 256, at ¶ 9.

²⁷³ UNFCCC, *supra* note 28, art. 12.

²⁷⁴ *Id.* (For example, the inventories of non-Annex I parties need not be reported separately, but as part of their national communications).

issues regarding implementation of commitments,²⁷⁵ but none has yet been established under its auspices.²⁷⁶ The Kyoto Protocol and Marrakesh Accords, by contrast, established a Compliance Committee. Composed of both a Facilitative Branch and an Enforcement Branch, it may impose strict consequences if an Annex I party breaches its emission targets or reporting requirements.²⁷⁷ Kyoto expanded the inventory reporting requirements for Annex I parties to enable compliance determinations²⁷⁸ and such compliance is precondition for participating in emissions trading and the other flexible mechanisms.²⁷⁹

The Copenhagen Accord represents a step backwards. The verification requirements are on par with previous agreements and Annex I Parties commit that their emissions reductions will be measured, reported and verified in accordance with existing guidelines to ensure that such accounting is “rigorous, robust and transparent.”²⁸⁰ However, there are no compliance mechanisms, enforcement mechanisms, or penalties.

In accordance with UNFCCC and Kyoto precedent, the developing countries again refused to accept international verification of their mitigation actions. Yet, in order for a final agreement to be achieved, China agreed to increase the transparency of and voluntarily submit records of its mitigation actions.²⁸¹ Specifically, China and other Non-Annex I Parties agreed to implement mitigation actions subject to “domestic measurement, reporting and verification the result of which will be reported

²⁷⁵ UNFCCC, *supra* note 28, art. 13.

²⁷⁶ UNFCCC Glossary of Climate Change and Forestry, *Ad Hoc Group on Article 13 or AG13*, http://unfcccballi.org/unfccc/component/option,com_glossary/Itemid,99/func,view/catid,31/term,Ad+Hoc+Group+on+Article+13,+or+AG13/; *see also* <http://unfccc.int/cop3/resource/ag13.htm>.

²⁷⁷ Conference of the Parties to the Framework Convention on Climate Change, Seventh Session, Marrakesh, Morocco, Oct. 29-Nov. 10, 2001, *Report of the Conference of the Parties* at 68, UN DOC FCCC/CP/2001/13.Add.3 (Jan. 21, 2001).

²⁷⁸ Kyoto Protocol, *supra* note 48, art. 8.

²⁷⁹ *Id.*

²⁸⁰ The Copenhagen Accord, *supra* note 256, at ¶ 4.

²⁸¹ *China Stands as Constructive Player in Copenhagen*, XINHUA, Dec. 26, 2009, http://news.xinhuanet.com/english/2009-12/26/content_12706368.htm.

through their national communications every two years.”²⁸² They were careful to assert, however, that any such communications include “provisions for international consultations and analysis under clearly defined guidelines that will ensure that national sovereignty is respected.”²⁸³ For all of its drawbacks, this approach has the advantage of giving greater latitude to national governments, thereby creating less domestic resentment.

However, it carries the disadvantage of international suspicion and distrust.²⁸⁴ Indeed, China demands autonomy and respect, the U.S. seeks reassurance. These concerns may not be as incompatible as they seem, especially in light of the final comments made by President Obama:

The problem actually is not going to be verification in the sense that this international consultation and analysis mechanism will actually tell us a lot of what we need to know. And the truth is that we can actually monitor a lot of what takes place through satellite imagery and so forth. So I think we’re going to have a pretty good sense of what countries are doing.²⁸⁵

President Obama’s speech indicated that the U.S. intends to practice non-intrusive monitoring of China’s GHG emissions. Instead of trying to place “boots on the ground,” the international community can employ alternative means such as satellite imaging, weather observatories, and aeronautical and marine tests to gauge compliance from the outside. China is on notice that such efforts will be made.

²⁸² The Copenhagen Accord, *supra* note 256, at ¶ 5.

²⁸³ *Id.*

²⁸⁴ *Id.* (It is also worth noting that NAMAs relying upon international financing are subject to stricter scrutiny: namely, international measurement, reporting and verification in accordance with guidelines adopted by the Conference of the Parties).

²⁸⁵ Barack Obama, *Text: Obama’s Remarks on the Climate Agreement*, N.Y. TIMES, Dec. 19, 2009, <http://www.nytimes.com/2009/12/19/science/earth/19climate.text.html>.

D. Technology Transfer

Notably missing from the Copenhagen Accord is any significant progress on the issue of technology transfer: the distribution of intellectual property from companies in rich countries.²⁸⁶ Legally speaking, Article 4.5 of the UNFCCC affirmed by Article 10 of the Kyoto Protocol committed developed countries to taking “all practicable steps to promote facilitate and finance, as appropriate, the transfer of, or access to, environmentally sound technologies and know-how to other Parties.”²⁸⁷ Yet, recalcitrance is high in addition to ideological and practical difficulties, and entrenched patent laws protect private property.²⁸⁸

On May 19, 2009 the UNFCCC released a draft negotiating text including various “measures to address intellectual property rights” by attacking patent laws.²⁸⁹ One controversial option provided:

Specific measures {shall / should} be established to remove barriers to development and transfer of technologies from developed to developing Parties arising from intellectual property rights (IPR) protection, including: (a) Compulsory licensing for specific patented technologies; (b) Pooling and

²⁸⁶ The only mention of technology transfer in the Accord is a single sentence. See The Copenhagen Accord, *supra* note 256, at ¶ 11.

²⁸⁷ United Nations Framework Convention of Climate Change (UNFCCC), 1992, art. 4.5, available at http://unfccc.int/essential_background/convention/background/items/2853.php (last visited Mar. 15, 2010); Kyoto Protocol to the United Nations Framework Convention on Climate Change, Dec. 11, 1997, 2303 U.N.T.S. 162, art. 10.

²⁸⁸ Cyrus Frelinghuysen, *Countdown to Copenhagen: The Debate Over Technology Transfers and the Protection of Intellectual Property*, GLOBAL CLIMATE L. BLOG, July 13, 2009, <http://www.globalclimatelaw.com/2009/07/articles/intellectual-property/countdown-to-copenhagen-the-debate-over-technology-transfers-and-the-protection-of-intellectual-property/> (last visited Apr. 10, 2010).

²⁸⁹ Ad Hoc Working Group on Long-term Cooperative Action Under the Convention, Sixth Session, *FCCC/AWGLCA/2009/8: Negotiating Text*, May 19, 2009, at pp. 46-53, ¶ 180-197, <http://unfccc.int/resource/docs/2009/awglca6/eng/08.pdf> (last visited Apr. 10, 2010).

sharing publicly funded technologies and making the technologies available in the public domain at an affordable price; (c) Taking into account the example set by decisions in other relevant international forums relating to IPRs, such as the Doha Declaration on the TRIPs Agreement and Public Health.²⁹⁰

Another controversial proposal that “LDCs [least developed countries] be exempted from patent protection of climate-related technologies for adaptation and mitigation, as required for capacity-building and development needs.”²⁹¹

In response, the U.S. House of Representatives preemptively passed legislation opposing any global climate change treaty that weakens IP rights.²⁹² They declared that:

With respect to the [UNFCCC], the President, the Secretary of State and the Permanent Representative of the United States to the United Nations should prevent any weakening of, and ensure robust compliance with and enforcement of, existing international legal requirements as of the date of the enactment of this Act for the protection of intellectual property rights related to energy or environmental technology, including wind, solar, biomass, geothermal, hydro, landfill gas, natural gas, marine, trash combustion, fuel cell, hydrogen, micro turbine, nuclear, clean coal, electric battery, alternative fuel, alternative refueling infrastructure,

²⁹⁰ Negotiating Text, *supra* note 289, *Option 2*, pg. 48, ¶ 188.

²⁹¹ Negotiating Text, *supra* note 289, *Option 3*, pg. 49, ¶ 189.

²⁹² Foreign Relations Authorization Act, Fiscal Years 2010 and 2011, H.R. 2410, 111th Cong. H. Amend. 187 (A007), (sponsored by Rep. Rick Larsen, [WA-2], June 10, 2009), *available at* <http://thomas.loc.gov/cgi-bin/bdquery/z?d111:HR02410:@@L&summ2=m&> (last visited Apr. 10, 2010) (Section 1120A is entitled “Statement of Policy Regarding Climate Change”).

advanced vehicle, electric grid, or energy-efficiency-related technologies.²⁹³

The prospects thus looked bleak before Copenhagen. During the negotiations the U.S. committed to provide \$85 million toward a new five-year, \$350 million effort to deploy clean energy technologies in developing countries.²⁹⁴ Yet, the only reference to technology transfer codified in the Accord reads:

In order to enhance action on development and transfer of technology we decide to establish a Technology Mechanism to accelerate technology development and transfer in support of action on adaptation and mitigation that will be guided by a country-driven approach and be based on national circumstances and priorities.²⁹⁵

This “Technology Mechanism” is undefined; its structure, scope and governance must therefore be decided later. Fortunately recent negotiations have taken a more constructive turn, with developing countries talking more of technology collaboration and cooperation than transfer per se, as many energy companies now manufacture their products in the developing world, notably China.²⁹⁶ Others predict that any official action is better suited to a series of bilateral or multilateral agreements outside the UNFCCC, given the

²⁹³ *Id.*

²⁹⁴ Suzanne Goldenberg, *Stephen Chu Pledges \$350M Clean Tech Fund to Sweeten Deal at Copenhagen*, GUARDIAN, Dec. 14, 2010, <http://www.guardian.co.uk/environment/2009/dec/14/copenhagen-steven-chu-us>; Darren Samuelsohn et al., *Copenhagen Talks Enter Final Phase*, N.Y. TIMES, Dec. 14, 2009, <http://www.nytimes.com/cwire/2009/12/14/14climate-wire-copenhagen-talks-enter-final-phase-43362.html> (noting Australia and Italy as the other countries contributing funds).

²⁹⁵ The Copenhagen Accord, *supra* note 256 at ¶ 11.

²⁹⁶ This reflects the reality of low-carbon technology deployment: companies such as General Electric, Siemens and Vestas have moved to manufacture wind turbines in the developing world, especially China. China is now one of the world’s biggest makers of wind turbines and the biggest exporter of solar panels. Frelinghuysen, *supra* note 288.

complexity of reaching a single arrangement for a range of technologies and contexts.²⁹⁷ Analysts assert that these developments make official calls for a global tech transfer agreement appear bygone.²⁹⁸

E. Deforestation

Costa Rica and Papua New Guinea originated a plan to reduce deforestation in developing countries at COP-11 in Montreal, Canada.²⁹⁹ This led to the adoption of the Reducing Emissions from Deforestation in Developing Countries (REDD+) mechanism at Bali.³⁰⁰ Discussions to flesh out the REDD+ progressed considerably in the negotiations leading up to Copenhagen.³⁰¹ Although no final REDD+ agreement emerged from Copenhagen, mentioned is made of it in the Accord thus elevating it into official international climate law. The Accord provides that:

We recognize the crucial role of reducing emission from deforestation and forest degradation and the need to enhance removals of greenhouse gas emission by forests and agree on the need to provide positive incentives to such actions through the immediate establishment of a mechanism

²⁹⁷ CLIMATICO, *Copenhagen De-briefing: An Analysis of COP15 for Long-Term Cooperation* at 24, Jan. 2010, <http://www.climaticoanalysis.org/wp-content/uploads/2010/01/post-cop15-report52.pdf>.

²⁹⁸ Frelinghuysen, *supra* note 288.

²⁹⁹ UNFCCC, *Fact Sheet: Reducing Emissions from Deforestation in Developing Countries: Approaches to Stimulate Action*, June 2009, http://unfccc.int/files/press/backgrounders/application/pdf/fact_sheet_reducing_emissions_from_deforestation.pdf.

³⁰⁰ “The original Bali agreement simply called for reducing emissions from deforestation (RED) and then progressed to include land degradation (REDD).” CLIMATICO, *supra* note 297 at 12.

³⁰¹ Discussion is built upon the preliminary work of the Subsidiary Body for Scientific and Technological Advice (SBSTA) and the Ad-hoc Working Group on Long-term Cooperative Action under the Convention (AWG-LCA). CLIMATICO, *supra* note 297.

including REDD-plus, to enable the mobilization of financial resources from developed countries.³⁰²

The Copenhagen Green Climate Fund is intended to mobilize the promised \$30 billion funding from developed countries on REDD+ among mitigation related activities such as adaptation, technology, and capacity-building for the years 2010 through 2012.³⁰³ As discussed, several developing nations promised fast track financing of \$3.5 billion. The implementation stage (2013-2020) is expected to cost between \$20 billion and \$30 billion.³⁰⁴

VI. THE FUTURE GLOBAL GOVERNANCE OF CLIMATE CHANGE: A REBALANCING OF NORMS AND THE POTENTIAL FOR DIPLOMATIC REALIGNMENT

The 192 delegations returned home with the task of fulfilling their commitments, disparate as they may be. The Copenhagen Accord will be meaningless if the Parties, especially the U.S. and China, fail to implement it as domestic policy. The Chinese recognized well in advance that any Accord would depend on Sino-American diplomacy, stating “[w]hether the Copenhagen Conference succeeds will be decided by the positions of China and the United States.”³⁰⁵ The renewed engagement and compromises by the U.S. and China to the UNFCCC procedure over the past two years and at Copenhagen are worth celebrating.

President Obama’s domestic and international credibility are on the line, as he has pledged to secure firm commitments on GHG emissions and billions of dollars in long-term financing for developing nations. Acquiring these from the U.S. Congress was never going to be easy, especially considering the U.S.’s economic recession and long-standing debt crisis. This unlikelihood is aggravated by events such as President Obama committing a large

³⁰² The Copenhagen Accord, *supra* note 256 at ¶ 6.

³⁰³ *Id.* at ¶ 8, 10.

³⁰⁴ CLIMATICO, *supra* note 297 at 15.

³⁰⁵ Tang Yonglin, *Zhongmei Yu Re Xin Yi Lun Quan Qiu Qi Hou Tan Pan* [China and US Preheating New Round Global Climate Negotiations], SOUTH CHINA MORNING POST, June 3, 2009, <http://www.infzm.com/content/29460>.

portion of his political capital toward controversial domestic initiatives such as health care reform, a concerted attack on climate science credibility following the publication of leaked communications between several overzealous climatologists,³⁰⁶ and significant Democratic losses in the November 2010 Congressional elections. President Obama does not need the bill to be a leader at future negotiations, but failure would undermine U.S. credibility to make any significant commitments.

Premier Wen also returned to China with his Party's and nation's credibility on the line before the international community. Premier Wen committed China to achieving or exceeding the emission reduction targets it has set for itself, pledging the 119 present heads of state that "[w]e will honor our word with real action..."³⁰⁷ Domestically, Premier Wen and President Hu are under intense pressure to make China greener due to the unyielding nature of their political system. Unlike the bifurcated political party system in the U.S. that inspires always ideological and sometimes hypocritical wrangling, China's one political party has no domestic opposition to blame. The Chinese Communist Party must continually justify its ongoing relevance. Indeed, China is

³⁰⁶ The unauthorized release of hundreds of e-mails from a major climate research center in England led to revelations about a handful of errors in an IPCC report. Opponents of climate change, who call the episode "climategate," are using the episode in an attempt to undermine the UN Process. No scientific body is under more hostile scrutiny than the IPCC, and "[t]he battle is asymmetric, in the sense that scientists feel compelled to support their findings with careful observation and replicable analysis, while their critics are free to make sweeping statements condemning their work as fraudulent." Nonetheless, climatologists have responded by pledging to make their work more transparent. John M. Broder, *Scientists Taking Steps to Defend Work on Climate*, N.Y. TIMES, Mar. 2, 2010, <http://www.nytimes.com/2010/03/03/science/earth/03climate.html>.

³⁰⁷ Speaking at an informal high-level meeting, hosted by Danish Prime Minister Lars Lokke Rasmussen, on the last day of the conference, Wen elaborated China's achievements in developing clean energy and cutting greenhouse gas (GHG) emissions. Stressing that this is a voluntary move taken by China, Wen said: "We have not attached any condition to the target, nor have we linked it to the target of any other country." Li Xing, et al., *China Committed to Emission Cut: Wen*, XINHUA (Dec. 19, 2009), http://www.china daily.com.cn/china/2009-12/19/content_9201775.htm.

seeing the rapid growth of environmental activism.³⁰⁸ There are now more than 2,500 environmental NGOs in China, and the Government estimates that 3.76 million citizens participated in over 74,000 environmentally-related protests.³⁰⁹ China's leadership should expect to be taken to task internationally as well. China portrays itself as a universally cooperative partner who represents of the most vulnerable people of the world and,³¹⁰ indeed, the world will be watching.

Thus, the Copenhagen Accord may have changed the polarity of the negotiating process. As one analyst keenly stated before the Conference, “[j]ustice demands that old assumptions of the North-South divide be revisited....”³¹¹ Nations came in allied between the developed-developing and rich-poor divide institutionalized at Kyoto, but may realign or at least overlap around a new axis: overall emissions.³¹² International environmental law contains provisions for legitimizing this occurrence. Whereas CBDR almost exclusively dominated the post-Kyoto climate change order and was used to absolve China of any legal responsibilities in light of its local context, both the U.S. and China are guilty under the PPP formulation which focuses upon current emissions instead of historical responsibility. By sharing moral responsibility for a solution with the developing world, the PPP is between the lines of the Accord. Some balance now exists between the two principles, albeit at the cost of many crucial Kyoto provisions. The international community may emphasize the PPP to extract greater commitments from the world's major GHG emitters at later stages. “Indeed, the north-south divide is no longer able to capture ‘the complicated nature of the international political

³⁰⁸ Jahiel, *supra* note 100; Sitaraman, *supra* note 100; Cody, *supra* note 100.

³⁰⁹ Jahiel, *supra* note 100; Sitaraman, *supra* note 100; Cody, *supra* note 100.

³¹⁰ Xu Suxia, *Zhongguo Fou Ren Yu Mei Si Gao Qihou Xieyi, You Guanping Lun Yu Shi Shi Bu Fu* [China Denies That it Reached a Climate Treaty with the U.S. in Secret], JIAXING, Dec. 21, 2010, http://www.cnjxol.com/cjpd/content/2009-12/21/content_1241036.htm.

³¹¹ Tan Kai Liang, *supra* note 135 at 55.

³¹² Andrew Light, a senior fellow at the Center for American Progress, also notes this. See Geoff Dyer, *China Hails Deal Despite Being Cast Villain*, FINANCIAL TIMES, Dec. 21, 2009, <http://www.ft.com/cms/s/0/c42ead8c-ee54-11de-944c-00144feab49a.html>.

system’ and is an ‘overly simplistic binary classification of the world’....”³¹³ CBDR should accommodate change and, “the focus of attention [must be shifted] to issues . . . and the problems of *the disadvantaged peoples* of the developing world[.]”³¹⁴ i.e., those from arid areas and small island nations having the most to lose from climate change.

If pursued this would force the U.S. and China into the same corner, encouraging them to be partners instead of antagonists. A healthy dialog between the two nations would eliminate the unnecessary posturing and theatrics at formal conferences, which should be more about signing and celebrating than posturing and dramatics. Ongoing commentary about environmental issues (which tangentially include so many other issues of common concern), may yield many positive effects. Both Governments, through a long and slow process, will gain a better sense of the other. China welcomes this advantage:

[B]oth sides should carry out cooperation on the climatic change issue because not only is it advantageous that international society deal with climatic change together, but moreover promoting the development of the Sino-U.S. relationship has important meaning.³¹⁵

Both sides recognize the need for cooperation. The world would benefit by transforming these factions into a partnership. The U.S.-China Strategic and Economic Dialogue began this process. The

³¹³ Nina E. Bafundo, Comment, *Compliance with the Ozone Treaty: Weak States and the Principle of Common but Differentiated Responsibility*, 21 AM. U. INT’L L. REV., 461, 466, 495 (2006), quoted in Tan Kai Liang, *supra* note 136 at 56.

³¹⁴ M Sornarajah, *Power and Justice in International Law*, 1 SING. J. INT’L & COMP. L. 28, 33 (1997), quoted in Tan Kai Liang, *supra* note 135 at 56.

³¹⁵ Cao Xin, *Qi Hou Tan Pan: Zhongmei de Li Chang yu Cha Yi* [Climate Negotiations: China and U.S.’s Standpoint and Differences], SOUTH CHINA MORNING POST, Nov. 18, 2009, <http://www.infzm.com/content/37696> (author’s own translation).

second round was held in Beijing in May 2010.³¹⁶ Though the focus of the second round was once again upon economic and financial issues,³¹⁷ the two sides “reiterate[d] to continue to actively implement the China-US Memorandum of Understanding on Strengthening Climate Change, Energy and Environment Cooperation and the 10-Year Cooperation Framework of Energy and Environment.”³¹⁸ The nations also signed memoranda promising to pursue cooperative partnerships on energy, nuclear safety and green development.³¹⁹ Joint ventures on the development of new clean energy technologies may be the linchpin of progress. Indeed, U.S. Secretary for Commerce, Gary Locke, predicted at the U.S.-China Business Council Annual Forecast Conference that “clean energy and energy efficiency technologies can be one of the most beneficial areas of cooperation in the history of U.S.-China relations.”³²⁰ Such cooperation can provide a new and feasible means to remove the thorny obstacle of technology transfer which is defeating progress on many multilateral environmental initiatives. Thus, the SED instrumentality may play a constructive (if not decisive) role in the future. Through it, the U.S. and China may reach bilateral solutions to a global crisis.

VII. CONCLUSION

In many aspects the Copenhagen Accord represents a significant regression from the Kyoto Protocol. While it does register some breakthroughs – such as setting a maximum global

³¹⁶ Press Release, U.S. Dep’t of Treasury Press Room, *TG-722 Second Meeting of the U.S.–China Strategic Economic Dialog*, 27 May 2010, available at <http://www.ustreas.gov/press/releases/tg722.htm>.

³¹⁷ *Id.*

³¹⁸ Embassy of the PRC in the United Kingdom, “Draft Written Briefing on the Second Round of China-US SED,” 26 May 2010, available at <http://www.chinese-embassy.org.uk/eng/zgyw/t704318.htm>.

³¹⁹ *Id.*

³²⁰ Press Release, Gary Locke, U.S. Commerce Dept., “Remarks at U.S.-China Business Council Annual Forecast Conference,” 28 Jan. 2010, <http://www.commerce.gov/news/secretary-speeches/2010/01/28/remarks-us-china-business-council-annual-forecast-conference>.

temperature increase, a system for monitoring and reporting progress toward national pollution reduction goals (without international surveillance), and for hundreds of billions of dollars to flow from wealthy, developed nations to the developing world – it is disappointing in many regards.

Most notably, the Accord sets neither binding obligations for emissions reductions nor a timetable for concluding a binding international treaty, leaving the implementation of its provisions uncertain. It is likely to undergo many years of negotiations and transformations before it emerges in any internationally enforceable form. The next annual U.N. conference is slated for November 2010 in Mexico City, but several influential leaders have already downplayed expectations and aim to the next blip on the comfortably indefinite horizon, South Africa 2011.³²¹ Whether there or thereafter, at some stage a document with specific numbers and legal obligations will again become necessary.

The chaotic nature of the conference did not help to focus the delegations, yet may produce a positive result. Whereas the post-Kyoto era was the pinnacle of Common but Differentiated Responsibilities, the “Polluter Pays” Principle may gain more traction following Copenhagen. Nations that arrived divided between developed and developing, rich and poor, left frustrated by the relatively inflexible attitudes of the United States and China. They may now cross-sides to realign and attack the world’s two largest overall GHG emitters. This would push the U.S. and China into the same diplomatic corner, giving them two options. Ideally, this would encourage them to be political allies instead of antagonists, finding bilateral solutions instead of each blaming the other and obstructing the broader negotiations. On the other hand, if China and the U.S. steel their positions, the two sides risk

³²¹ “The European Union’s climate commissioner, Connie Hedegaard of Denmark, said Tuesday that nations should now aim to reach an agreement in 2011 at a United Nations conference in South Africa. Speaking at the European Parliament in Strasbourg, France, Ms. Hedegaard said she had hoped to complete a treaty this year in Mexico, ‘but the signals coming out of various capitals of big emitters unfortunately do not make that likely.’” John M. Broder, *China and India Join Climate Accord*, N.Y. TIMES, Mar. 9, 2010, <http://www.nytimes.com/2010/03/10/world/10climate.html>.

wasting billions of dollars in an environmental Cold War while the talks decline into the interminable years of debate.

The recently closed second round of the U.S.-China Strategic and Economic Dialogue has provided hope for the positive development of a cooperative, bilateral partnership between the U.S. and China to deal with various international issues of common concern, including climate change. Indeed, the joint development of clean energy technologies may prove an effective mechanism to remove a core obstacle to the multilateral climate change negotiations. The U.S. and China reaching a firm bilateral agreement would greatly contribute to the final success of the Post-Copenhagen negotiations.

All sides managed to preserve their bottom lines at Copenhagen, but the next round of negotiations will bring more fascinating power contests regarding global governance of climate change. Now exposed, the human race can only hope that the U.S. and China use the powerful mechanisms at their disposal to find new solutions in the manner President Obama described at the end of the Copenhagen Conference:

To continue moving forward we must draw on the effort that allowed us to succeed here today – engagement among nations that represent a baseline of mutual interest and mutual respect. Climate change threatens us all; therefore, we must bridge old divides and build new partnerships to meet this great challenge of our time. That’s what we’ve begun to do here today.³²²

³²² Barack Obama, *Obama’s Remarks on the Climate Agreement*, N.Y. TIMES, Dec. 18, 2009, <http://www.nytimes.com/2009/12/19/science/earth/19climate.text.html>.