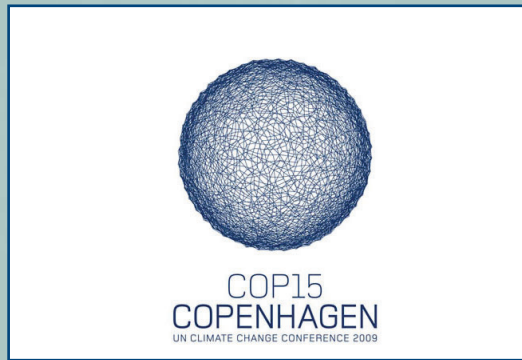


Copenhagen Accord and Discord:

COP-15 and the Many Roads to Mexico



Institute for 21st Century Energy | U.S. Chamber of Commerce

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Many of you are probably a bit confused by the outcome of the UN Framework Convention on Climate Change (UNFCCC) meeting in Copenhagen. Depending on which account you read, it was an unprecedented success or a complete failure, and everything in between. Regardless, it is important to understand exactly what happened in Copenhagen—and what did not. In this paper, we will try to make some sense of it all so you can draw your own conclusions.

Process

While there were actually a number of different tracks moving in parallel at the conference, we will be dealing with three in this paper.

The Copenhagen meeting was known colloquially as COP-15 but more formally as the 15th Conference of the Parties to the UNFCCC. The COP is the supreme body of the UNFCCC, and it is where the decisions get made.

The Copenhagen conference also was the 5th meeting of the Conference of the Parties serving as a Meeting of the Parties to the Kyoto Protocol—mercifully shortened to CMP-5. Like the COP, the CMP is the supreme body of the Kyoto Protocol, which is an appendage to the UNFCCC (see chart).

So why did the Copenhagen meeting receive so much attention? A little history is in order. At COP-13 in Bali, Indonesia in December 2007, the Parties launched a two-year negotiation process under the Bali Action Plan to strengthen the international response to climate change through the “full, effective and sustained implementation of the Convention through long-term cooperative action, now, up to and beyond 2012, in order to reach an agreed outcome and adopt a decision.” That process was to culminate with the agreement of a new, comprehensive international treaty (or treaties) in Copenhagen at the end of 2009. The Bali meeting set up an Ad Hoc Working Group on Long-Term Cooperative Action—or AWG-LCA—to develop treaty text under the UNFCCC. The AWG-LCA was given a mandate of two years, that is, until the end of COP-15 in Copenhagen.

Parties to the Kyoto Protocol also have their own negotiating track. CMP-1 in Montreal, Canada in 2005 established an open-ended Ad Hoc Working Group on the Kyoto Protocol—or AWG-KP—to develop text on a second

commitment period under that treaty. At Poznan, Poland in 2008, CMP-4 set the CMP-5 in Copenhagen as the end date for the AWG-KP.

Challenges

The world has changed considerably since the UNFCCC was launched in 1992, with large emerging economies like China, India, and Brazil industrializing at a pace unforeseen 15 years ago and becoming major players in the world’s economies and energy markets. The main challenge for developed countries, then, has been to entice these large developing countries into a binding agreement that, while it respects the differentiation between developed and developing countries as far as commitments, sets up parallel responsibilities, such as for measuring, reporting, and verifying results.

Projections of global emissions trends demonstrate that emissions reductions by the developed world alone cannot reduce global emissions appreciably. Moreover, a truly global effort is politically desirable, especially to the extent it addresses competitiveness concerns raised by unilateral domestic climate change programs.

As we noted in our pre-Copenhagen paper, there is a huge divide between the developed countries and the developing countries. The UNFCCC did not create these divisions, but it does reflect and sustain them.

The Bali Action Plan was promising in that developing countries agreed to consider “nationally appropriate mitigation actions” that are “measurable, reportable, and verifiable”. Such actions would be “supported and enabled by technology, financing and capacity-building” from developed countries. It is within these broad parameters that the negotiations over the last two years took place.

As the negotiations progressed—or not—leading up to Copenhagen, it became more and more apparent that the Parties could not narrow their differences and agree to new treaty text in time. While a legally or internationally binding treaty was not in the cards, a politically-binding statement of intent by national leaders was viewed as a way to salvage the conference and satisfy the global expectations for a positive outcome from the meeting. Out of this desire emerged the Copenhagen Accord, which received most of the attention and press coverage.

This short paper will focus on these three aspects of the Copenhagen meeting: the Copenhagen Accord; the AWG-LCA talks; and the AWG-KP talks.

Copenhagen Accord

In the months leading up to COP-15, it became apparent that the Parties would not be able to achieve comprehensive treaty text or texts. With a treaty clearly out of reach, the Danish Presidency convened a series of meetings leading up to Copenhagen to achieve a political agreement at the highest level and thereby achieve a degree of success from the COP. After many fits and starts, some ill-timed leaks of early drafts, and a clumsily-managed process, a three-page Copenhagen Accord finally surfaced at the eleventh hour.

The trick with any political agreement reached outside of official UNFCCC channels, of course, was always going to be finding a way to bring it into the formal UN process and get it blessed by the COP. Although 113 national leaders, including President Obama, attended the high-level segment in Copenhagen, the Accord itself was agreed to by a much smaller group of 28 leaders. Discussions on the Accord were dominated largely by the U.S., China, India, Brazil, and South Africa. The European Union, which already has embarked on a comprehensive climate change mitigation program, reportedly played a very minor role in drafting the accord. (This is food for thought for those who think the U.S. would have had greater influence if its negotiating team had a climate bill in its back pocket. It did not work out that way for the Europeans, who with nothing left to offer had little negotiating leverage.)

Because it operates by consensus, the UNFCCC provides developing countries, particularly the least developed countries and small island states concerned about the impacts of climate change, with an equal voice in the negotiations. Developing countries therefore jealously guard their prerogatives in the UN system, and they are loath to give them up cheaply.¹

The short-circuiting of the formal UN process, it is not surprising to learn, was received with suspicion by many developing countries, which saw it as an attempt by the “big” countries to by-pass the UN process to strike a back-room deal that would be forced on the COP for its rubber stamp. It did not work out that way. Despite efforts of the Danish Presidency of the COP to insert the discussions

into formal process, developing countries—even some participating in the political discussions—began speaking out against the process. COP decisions are by consensus, and because least developed, Africa, and small island countries felt they were being shut out of the discussions, they were unwilling to see it adopted as a COP decision.²

Instead, the COP decided to “take note” of the Accord. The Accord is not, then, a binding decision of the COP, but rather more like a statement from the G20 or Major Economies Forum on Energy and Climate signaling political intent at the highest level of government. Still, there was a general feeling, whether justified or not, that the Accord fell below even the lowered expectations heading into the meeting.

So what is in the Accord and what are Parties that signed onto the Accord expected to deliver? Cast as an “operational” document, the Accord starts with a restatement of broad goals that were outlined in the Major Economies Forum on Energy and Climate (MEF) leaders’ declaration from Italy in July 2009. It sets a 2°C goal, but while earlier drafts referenced a global emission reduction target of 50% by 2050, the final Accord (like the MEF leaders declaration) is silent on any long-term emissions goal, though it does call for a peaking of global emissions “as soon as possible.”

Mitigation: Whereas Annex I countries “commit to implement ... economy-wide emissions targets for 2020,” Non-Annex I countries “will implement mitigation actions.”³ The Accord contains two appendices, one for Annex I Parties to record their emissions reduction goals for 2020 and base years and another for Non-Annex parties to record their mitigation actions.⁴ The Accord also calls for Annex I Kyoto Parties to “further strengthen” their emissions reduction goals. There is a January 31, 2010 deadline for countries to submit to the UNFCCC secretariat actions for listing in the appendices.⁵

While reductions and financing by Annex I Parties will be subject to UNFCCC measuring, reporting, and verification (MRV) rules, only those actions by Non-Annex I Parties undertaken with international financial or other support will be subject to international MRV rules. “Nationally appropriate mitigation actions” undertaken without international support will be subject to domestic MRV rules only. The Accord, however, does provide for “international



COPENHAGEN ACCORD AND DISCORD: COP-15 AND THE MANY ROADS TO MEXICO

consultations and analysis” of developing country domestic action, but it is unclear at this point what those guidelines might entail and how they would be implemented.

Finance: Developed countries committed to providing \$30 billion for mitigation and adaptation for the period 2010 to 2012.⁶ This funding is expected to be “new and additional,” not a rebranding of existing financial aid. Developed countries also committed to a “goal of mobilizing jointly \$100 billion” a year by 2020 for mitigation, which would include public, private, bilateral, and multilateral sources. New multilateral support for adaptation also will be delivered, and governance of this funding would be evenly divided between developed and developing countries.

Most of the adaptation funding will flow through a Copenhagen Green Climate Fund “established as an operating entity of the financial mechanism of the Convention,” that is, the UN’s Global Environment Facility. In contrast, developed countries donors, not the UN, are expected to exercise considerable control over the \$100 billion in desired mitigation funding. If history is any guide, the U.S. would be responsible for about 20% to 25% of this funding.

In addition, a High Level Panel will be established under the COP “to study the contribution of the potential sources of revenue” to meeting the finance goal. This is something the business community will have to keep a close eye on.

Technology: The Accord sets up a Technology Mechanism to accelerate technology development and transfer. This should be seen as a placeholder for technology discussion that has advanced well in the COP’s Subsidiary Bodies. There have been a number of proposals put forward for a technology transfer framework, linked to financial resources, that could include ideas such as regional technology centers. Technology is perhaps one of the few areas where progress was made in Copenhagen,⁷ and a COP conclusion highlighted the value of business participation in a technology mechanism. However, while business would welcome opportunities to participate, it also needs to be on guard against attempts to use a technology mechanism to weaken intellectual property protections.

Reducing emissions from deforestation and forest degradation (REDD) and adaptation were among the other issues addressed.

The Accord also calls for an assessment of progress on implementation to be completed by 2015 that could lead to lowering of the temperature goal to 1.5°C (the number advocated by the small island states).

The Accord raises as many questions as it answers. Because it has no legal standing within the UN process, it provides limited guidance for the next steps in general and a route to a legally binding agreement in particular. Indeed, the Accord’s text does not even reference a legal agreement. And while it states that it is operational immediately, many of its provisions (e.g., regarding finance) appear to require COP decisions, which cannot occur until December 2010 at COP-16 and which could re-open negotiations on issues now thought settled.

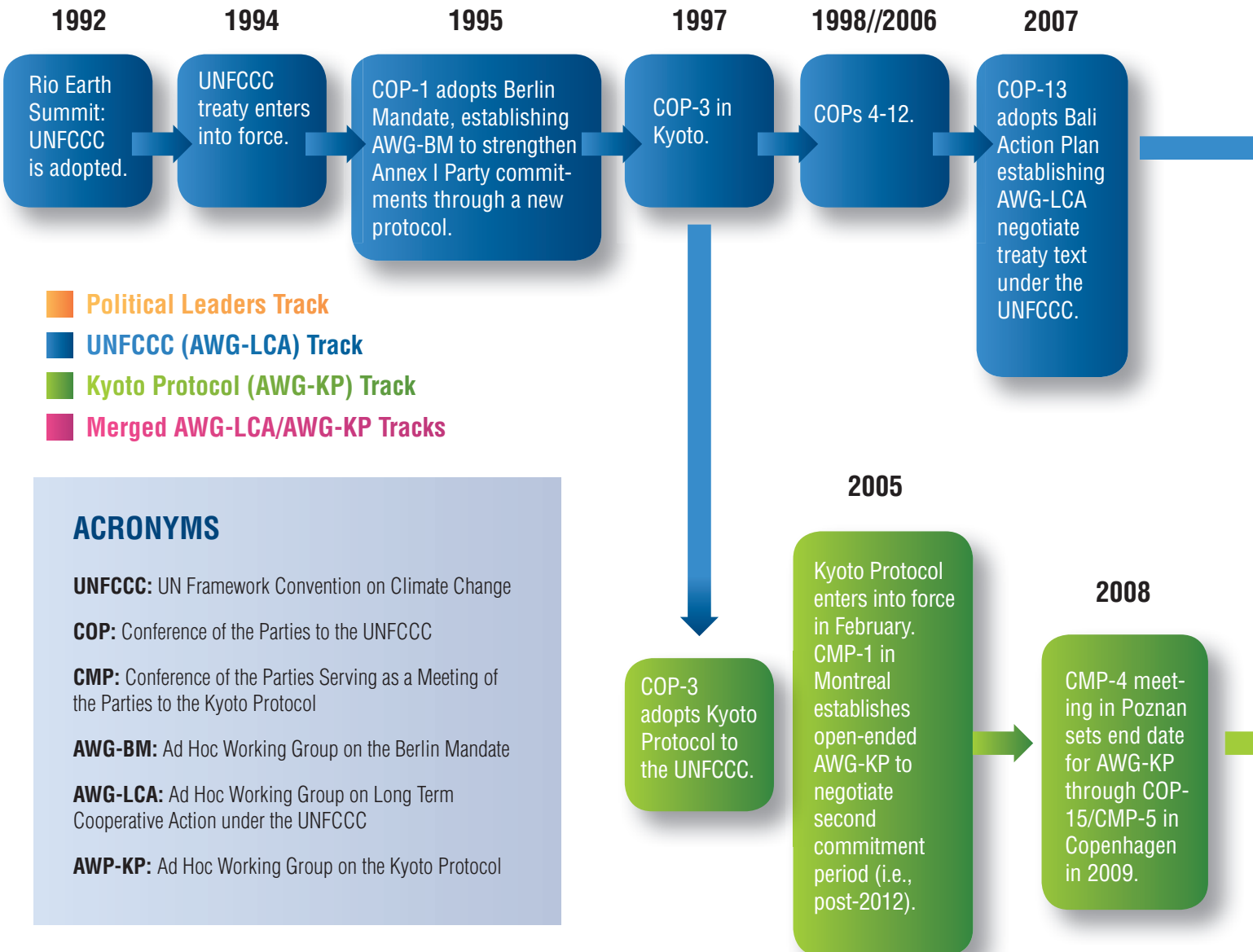
One possible option for bringing the Accord within the UNFCCC is Article 7.2.c, which states that the COP may “Facilitate, at the request of two or more Parties, the coordination of measures adopted by them to address climate change and its effects, taking into account the differing circumstances, responsibilities and capabilities of the Parties and their respective commitments under the Convention.” There are aspects of the Accord that require actions under the Framework Convention (e.g., the High Level Panel on finance), and this could be a way to accomplish these tasks. Nonetheless, this sub-article has not been exercised before by the COP, and it is not obvious how this coordination mechanism would work and what that would mean for the status of the Accord within the COP.

Ad Hoc Working Group on Long-Term Cooperative Action (AWG-LCA)

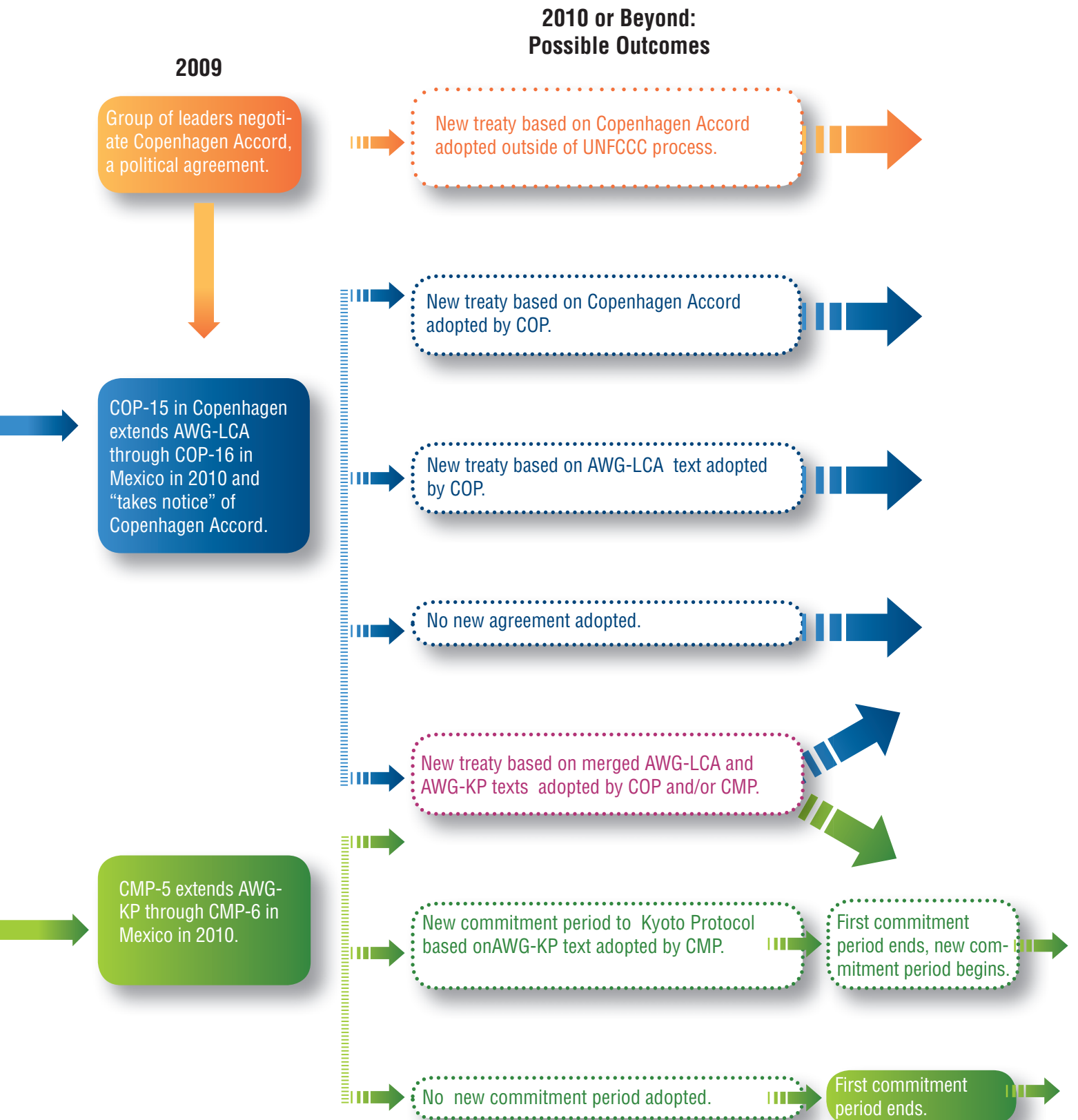
The LCA is one of two negotiating tracks to a new international treaty. There are 10 different LCA texts covering the shared vision, adaptation, mitigation, forestry, finance, technology, capacity building, and other topics that taken as a whole would form the basis of a new binding international agreement.

Despite setting up open-ended drafting groups to resolve outstanding issues, intensive negotiations were unable to bridge substantive disagreements on a range of contentious issues. Large sections of the draft texts still contain a lot of “bracketed” language subject to dispute. While the texts

Making Sense of the International Negotiating Processes: Mapping the Possible Roads to Mexico



COPENHAGEN ACCORD AND DISCORD: COP-15 AND THE MANY ROADS TO MEXICO



have been drafted separately, the entire package would have to be accepted. In other words, nothing is agreed until everything is agreed. Because COP-15 did not make a decision on any of the LCA texts, these documents presumably would be the starting points for the discussions going forward, though any issue could be reopened at any time along the way.

There are a couple of things to note in the various LCA texts of particular interest to business. In the technology transfer paper, there remain two broad options on intellectual property rights (IPR) protections. Option 1 provides for no mention of IPR in the text (which is the best option, in our view). Option 2 provides for a section covering IPR, with about a half dozen choices, all of which are seriously flawed—compulsory licensing, technology pools to buy down IP, expropriation, and the like—and opposed by the business community.

Without IPR protections, there is precious little incentive for companies to invest in advanced technologies if, after years of research and development and millions or even billions of dollars invested, their inventions could be expropriated outright by companies in developing countries and manufactured and sold around the world at reduced cost. A weakened IPR regime in any new agreement would simply drive some of the most innovative companies in the developed world to abandon the development of clean energy technologies. At COP-15, U.S. negotiators were joined by their colleagues from Europe, Japan, and other developed countries, and by business groups, in a strong defense of IPR.

The LCA draft decision text has bracketed language on trade: “[To be elaborated; provision on trade measures (reference to Art. 3, paragraph 5 of the Convention);]” For those of you not steeped in the Convention, Article 3, paragraph 5 contains the following language: “Measures taken to combat climate change, including unilateral ones, should not constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade.” This provision in the LCA draft is a direct response to the proposals by the Congress for border adjustments (e.g., carbon tariffs) on goods coming from countries without comparable greenhouse gas restrictions. We have said all along that border adjustments would inevitably invite retaliation, and because no one wins a trade war, the threat of carbon tariffs has little value as a bargaining chip.

This new bracketed language seems to confirm that interpretation, and we would welcome further “elaboration” to preserve free trade. From our perspective, instead of raising barriers, governments should be pursuing the elimination of tariff and nontariff barriers to environmental goods and services to lower their costs and increase global access of clean energy technologies.

Others issues to watch include: the use of sector-based approaches to engage developing nations in carbon markets; methods to measure, report and verify funding and technology transfer from developed countries and national actions by developing countries; and the creation of new institutions for finance, technology, adaptation, and the possible role of business in these.

Given the deadlock, the COP decided to extend the mandate (which would have expired in Copenhagen) of the AWG-LCA so that it could to continue its work with an eye towards Mexico and COP-16.

Ad Hoc Working Group on the Kyoto Protocol (AWG-KP)

Developed nations have sought a single, comprehensive treaty involving all nations rather than separate agreements under Kyoto and the Convention as called for under Bali Action Plan. A single treaty would most likely ring the death knell of the Kyoto Protocol.

The fate of Kyoto and the implications for ending it were perhaps the biggest political and substantive issue facing negotiators, and the biggest source of inaction. Simply put, developing countries would not allow any action on the LCA to go forward ahead of action on the Kyoto Protocol. For them, it was Kyoto first and foremost. It is not too strong to say that developing countries held the LCA discussions hostage to movement on the Kyoto Protocol discussions.

Developing countries have many reasons for wanting to see the Kyoto Protocol survive. The Protocol guarantees that Annex I Parties take on binding emission reduction targets without similar requirements being visited on Non-Annex I Parties (which goes to developing country concerns that developed countries address their “historical responsibility” for the rise in greenhouse gas concentrations). Moreover, the financial mechanisms of the Protocol, primarily the Clean Development Mechanism, direct billions of dollars

COPENHAGEN ACCORD AND DISCORD: COP-15 AND THE MANY ROADS TO MEXICO

in wealth transfers from developed to developing countries. All-in-all, developing countries have a pretty sweet deal under the Protocol, so it is completely understandable that they do not want to see a change in the rules.

Issues under discussion in the AWG-KP talks revolved largely around: new developed-country commitments for the second post-2012 commitment period (with developing countries pushing for ambitious reduction goals of 25% to 40% by 2020); base year for targets; duration of next commitment period; reform of Clean Development Mechanism (CDM); the acceptability of carbon capture and storage and nuclear power in the CDM; addition of new gases; and emissions from international aviation and shipping.

Under pressure from developing countries, most of the discussion in CMP-5 revolved around fixing new emission reduction commitments for Annex I Parties under the Kyoto Protocol, a topic that received considerable attention over the previous two years under the AWG-KP. Because the AWG-KP was unable to reach agreement on amendments to the Kyoto Protocol for Annex I emission reduction targets, all other issues were put on hold.

In its report to the CMP, the AWP-KP chair,⁹ in an almost perfect example of bureaucratic understatement, “agreed that the draft text would benefit from additional work on the unresolved issues.” Like the AWG-LCA, the AWG-KP talks were scheduled to conclude in Copenhagen, but the COP also extended its mandate to the COP-16 meeting planned in Mexico from November 29 through December 10, 2010 (though reportedly these dates may get pushed back).

Since Bali, there were always the questions of if and how the products of the AWG-KP and the AWG-LCA negotiating tracks might merge. Even after Copenhagen, those questions linger.

Conclusions

At the end of a rancorous two weeks, virtually no progress was made in the formal negotiations towards a new treaty. While the Copenhagen Accord has status as a political deal at the highest level, it still has no formal standing in UNFCCC process.

The awkward procedural issues coming out of COP-15 are very real if not necessarily insurmountable. A process that relies on a group of leaders to negotiate text is not tenable

over the long run. COP-15 was unique, and it is unlikely that the circumstances that existed in Copenhagen will be repeated, at least anytime soon.

The meeting also may have been a watershed in that it provided confirmation for many that the UNFCCC may not be the best instrument to cobble an agreement among nearly 200 countries—which should come as no surprise for those of you who read our pre-Copenhagen report. While the Kyoto Protocol comes in for well-deserved criticism, it is in fact a fair reflection of the principles embodied in the UNFCCC. And in the hands of skilled negotiators, the UNFCCC can be used, and was used in Copenhagen, to stymie progress.

As we have seen, there are fundamental questions about what the ultimate product of the various negotiating tracks and processes will be. There are at least six possible outcomes:

- (1) the Copenhagen Accord as a stand-alone political agreement;

or adoption of UN treaty text based on—

- (2) the Copenhagen Accord (if it can be brought into the UNFCCC process);
- (3) the AWG-LCA;
- (4) the AGW-KP; or
- (5) a combination of the AWG-LCA the AGW-KP;

or—

- (6) no agreement in the COP on AGW-LCA text and/or in the CMP on AWG-KP text, in which case the UNFCCC and Kyoto Protocol continue as is.

Each option presents different challenges and opportunities. The chart on page 4 provides a graphic representation of key meetings in the UNFCCC and different permutations for new treaty text going forward.

Negotiations among a much smaller grouping of countries that account for a large portion of global emissions patterned after the major economies process started by President Bush and carried forward by President Obama is one approach that might be a more fruitful avenue to a new agreement.

The current roster of countries would have to be expanded to include representatives of Africa, small islands, and perhaps other country groupings to get a greater cross-section of interests and concerns. While certainly more manageable, such an approach raises many issues of process as well as substance, and it is not clear at this point how far some of the major developing countries would be willing to stray from the UNFCCC where they have many advantages and are under no binding obligation to cut emissions. Nor is it clear how or such a process could yield a binding international agreement.

COP-15 and CMP-5 continued the mandates of the AWG-LCA and the AWG-KP, respectively, with a view to making decisions on a new treaty in Mexico later this year. However, the COP/CMP curiously failed to schedule negotiating sessions in advance of Mexico and provide a budget for them. The only UNFCCC meetings now scheduled before then are the Subsidiary Body meetings in Bonn in May and

June, at which time more meetings could be added to the schedule. Given the fact that Parties remain far apart on many substantive issues, it is not unreasonable to ask if the schedule is adequate to the task.

Business seeks clarity on an international framework so it can plan and invest with some reasonable level of confidence, and despite some progress, COP-15 did little to provide it. There was no resolution of many issues, including those of special interest to the business community, such as trade, intellectual property, finance, offsets, or carbon markets. Fundamental questions about the basic architecture of a new treaty or treaties, which many thought would emerge from Copenhagen, still remain unanswered, as does the fate of the Kyoto Protocol. And in the absence of a clear path forward to Mexico, there remains a lot of uncertainty the prospects of an international agreement.



COPENHAGEN ACCORD AND DISCORD: COP-15 AND THE MANY ROADS TO MEXICO

ENDNOTES

- 1 For more on the dynamics of developed and developing countries within the UNFCCC, see our report *The Prospects for Copenhagen* on our Web site www.energyxxi.org.
- 2 Bolivia, Cuba, Nicaragua, Sudan, and Venezuela were the main countries objecting to adoption of the Accord by the COP.
- 3 Under the UNFCCC, Annex I Parties include countries that made up the Organization for Economic Co-operation and Development (OECD) in 1992, Malta, and countries with “economies in transition” (Russia, the Baltic states, and most Central and Eastern Europe states). All other Parties—almost all of which can be viewed as developing countries with a few notable exceptions (e.g., Singapore, South Korea)—are designated Non-Annex I.
- 4 The July MEF declaration envisaged that developing countries would undertake actions “whose projected effects on emissions represent a meaningful deviation from business as usual.” The Accord’s mitigation language, however, does not require meaningful deviation as an outcome of Non-Annex I Party actions. This is noteworthy because emissions reduction goals announced by some large developing countries at Copenhagen (e.g., China and India) were little different from historical performance or business as usual projections.
- 5 Countries also can opt to associate themselves with the Accord without signing up for action in the Appendices.
- 6 It is interesting to note that in the financing text, the taxonomy of “Annex I and Non-Annex I Parties” give way to “developed and developing countries,” which suggests a more fluid set-up on finance than might be formed under the UNFCCC.
- 7 Forestry and adaptation were two additional areas where significant progress was made and for which agreements may be within reach.
- 8 Something the Framework Convention does not require.
- 9 The AWG-KP and the AWG-LCA are co-chaired by Annex I and Non-Annex I countries. The AWG-KP is chaired by representatives from Antigua-Barbados and Norway; the AWG-LCA is chaired by representatives from Malta and Brazil.



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