

Comments on the Copenhagen Accord: Summary

I. Introduction

On 19 December 2009, the 15th session of the UNFCCC Conference of the Parties (COP15) adopted a decision that “takes note of the Copenhagen Accord of 18 December 2009.” This means that, in accordance with the practice of the United Nations, the COP was neutral and neither approved nor disapproved the Copenhagen Accord.¹ The Copenhagen Accord therefore is not an official outcome of COP15 but rather is an external document whose existence is only “noted” by the COP.

In late December 2009, the Danish Presidency circulated a note verbale to UN Member States’ missions in New York inviting UNFCCC Parties “to inform the UNFCCC Secretariat in a written form at their earliest convenience of their willingness to be associated with the Copenhagen Accord.” The note verbale also indicated that “in completing the report of COP15, the UNFCCC Secretariat will list the Parties to the Convention that have expressed their willingness to be associated with this Accord.” The legal authority of Denmark as COP15 President to invite UNFCCC Parties to “associate” themselves with the Copenhagen Accord is questionable as nowhere in the COP’s Rules of Procedure does it allow the COP Presidency to invite Parties to undertake any proactive actions in relation to any document or instrument that is external to the COP process.

The Copenhagen Accord has been billed by developed countries as a politically binding agreement among those countries that are part of it that is intended to shape how these countries act in terms of addressing climate change. But the heads of state/government-level nature of the negotiation process for the Copenhagen Accord, its actual final status vis-à-vis COP15 and its work, and especially the subsequent “association” process for it triggered by the Danish Presidency’s invitation, all create a situation in which the Copenhagen Accord becomes an instrument that creates certain international law obligations for the countries that associate themselves with it.

In essence, association with the Copenhagen Accord in writing, as requested by the Danish Presidency, would essentially be a unilateral declaration on the part of the associating Party of its willingness to be bound – in both political and international law terms – to the provisions of the Copenhagen Accord.

As an international instrument to which UNFCCC Parties would unilaterally declare their association with, the Copenhagen Accord would create international law obligations for such associating Parties. At the very least, the Copenhagen Accord can (and most likely will) be seen, especially by the associating Parties, as an international political commitment that would be the basis for their political negotiating positions for any further international policymaking relating to climate change in other forums, including in the UNFCCC.

¹ In the annex to its Decision 55/488, adopted on 7 September 2001, the General Assembly reiterated “that the terms ‘take note of’ and ‘notes’ are neutral terms that constitute neither approval nor disapproval”. This decision and interpretation has been reiterated by the General Assembly on many occasions since then.

That no deadline was included in the Danish note verbale by when Parties should indicate in writing their willingness to be associated with the Copenhagen Accord and no date was also stated for when the UNFCCC secretariat is to finish its COP15 report would seem to indicate that the period for associating with the Copenhagen Accord is open-ended. This would imply that through this open-ended “association” process, the Danish Presidency and other developed countries that have invested in the Copenhagen Accord could seek to add more Parties to the Copenhagen Accord. They can thereby present it later on in the context of the negotiations for the outcome of COP16 as an official instrument that binds – at least at the political level – those countries that have so associated themselves with the Copenhagen Accord. They would then seek to promote it as the basis for the COP16 outcome.

Whether as a politically binding agreement, or as an instrument to which various UNFCCC Parties would unilaterally declare themselves to be associated with, the Copenhagen Accord could very well change the basic international policy regime governing global action on climate change. This is because it could become the blueprint for a new international regime of rights and obligations that both developed and developing countries take on in the place of the UNFCCC and its Kyoto Protocol. Such a new regime of rights and obligations, if based on the Copenhagen Accord, would have the potential to drastically curtail the development prospects of developing countries.

II. Implications of the Copenhagen Accord as to its Substance

In substantive terms, the Copenhagen Accord has the following implications and effects.

First, it lays the foundation for weakening the Kyoto Protocol as the multilateral treaty instrument for developed countries’ binding emission reduction commitments. Under the Kyoto Protocol, developed countries have to collectively achieve an aggregate emissions reductions target (a “top-down” approach) and this target should be based on what is scientifically required; there is an arrangement among developed countries regarding their respective shares for meeting this aggregate figure; and there is a compliance system, all within a legally binding framework.

The Copenhagen Accord would do away with this framework by replacing it with a “bottom-up” and voluntary pledge-based regime. Under this regime, developed countries would be able to do whatever they want in terms of emission reduction targets.

In particular, the Accord merely requests Annex I Parties to submit the national emission reduction target that they are prepared to take on, in order to fill the table in its Appendix I. The adverse consequences of this new system include:

1. There is no aggregate mid-term (e.g. 2020) emission reduction commitment for developed countries that is commensurate to the science and the development needs of developing countries (i.e. at least 40% below 1990 levels) as the basis and reference point that Annex I Parties’ individual mitigation targets should collectively achieve;
2. Each country is free to submit its own national emission reduction target, without such target being subjected to agreement by all Convention Parties, irrespective of

- the adequacy of such a target. Thus the conditions are encouraged for low levels of national and aggregate mitigation ambition on the part of Annex I Parties;
3. The comparability obligation in paragraph 1(b)(i) of the Bali Action Plan is lost in essentially omitting any obligation on the part of developed countries to ensure that their individual national mitigation targets are comparable with each other in terms of figures, legal nature, and timeframes;
 4. The foundation for the creation of market-based mechanisms similar to but outside of the Kyoto Protocol's flexibility mechanisms is established;
 5. Annex I Parties' mitigation commitments take place outside of the framework of a legally binding treaty instrument that is consistent with the provisions of the UNFCCC.

Second, it creates the potential for changing the balance of obligations under the UNFCCC by laying the basis for a new set of mitigation and MRV obligations for developing countries that weakens or even does away with the principle of common but differentiated responsibilities and respective capabilities in the UNFCCC. This includes, for example, more frequent reporting by developing countries de-linked from the UNFCCC obligation of developed countries to provide financial support for such reporting; country-focused (rather than aggregate) and more in-depth review procedures for developing country national communications that could be similar to or even more stringent than how developed country national communications are treated

Third, the Copenhagen Accord re-interprets the commitments of developed countries to provide or mobilize climate financing to support developing countries' climate change-related mitigation and adaptation actions in ways that are conditional and highly ambiguous and uncertain as to quantum, source, modality, institutional architecture, and channel of delivery and access

Fourth, it creates a parallel framework of climate change-related "commitments" and actions, thereby laying the foundation for a shift away from the UNFCCC per se as the primary multilateral treaty instrument for global long-term cooperative action on climate change or for amendments to the UNFCCC that could change the current balance of obligations in the UNFCCC. In fact, many aspects of the Accord are inconsistent with the UNFCCC's provisions and principles.

Fifth, it recognizes the science relating to a 2 degrees Celsius global temperature increase but does not elaborate on how this would be achieved. It also talks about equity but does not define clearly how equity considerations are to be addressed, what it means, and the modalities for achieving equity.

As such, notwithstanding that the Accord is not formally per se an agreed outcome of COP15, its contents could very well shape and influence the discourse and negotiations under the AWG-LCA and the AWG-KP leading up to COP16 in Mexico in December 2010. UNFCCC Parties that associate themselves with the Copenhagen Accord are likely to use it as the basis or the blueprint for proposals on how to draft a new treaty instrument under the UNFCCC as an outcome of COP16.

III. Legal Status of the Copenhagen Accord

A. *“Takes Note Of”*

The Danish Presidency of COP15 had, in the early hours of 19 December 2009, brought forward the text of the Copenhagen Accord and asked the COP to consider its contents for adoption as a COP decision. However, many Parties that were not part of the group that negotiated the Copenhagen Accord objected with respect to both the procedural aspects and the substantive content of the Copenhagen Accord, eventually resulting in the “takes note” decision by the COP.

This means that, in accordance with the practice of the United Nations, the COP was neutral and neither approved nor disapproved the Copenhagen Accord.² It also means that the Copenhagen Accord per se is not an official outcome of COP15 and was produced external to COP procedures, since the COP only notes its existence and did not take any decision to incorporate it into the body of COP decisions or other documents coming out of COP15 as a document that is officially agreed to by the COP.

Although the Accord is contained or attached to a decision of the COP15, it is legally an external document that the COP notes exists but which it has no opinion of. That is, the Copenhagen Accord is not, per se, an official outcome document of COP15 but rather is an external document whose existence is only “noted” by the COP. During the final plenary of COP15, the external nature of the Accord vis-à-vis the UNFCCC process was made clear by various countries that insisted that the Accord should not bear the logo of the UNFCCC so as not to give it a veneer of legitimacy as a UNFCCC document.

B. *The Meaning of “Association” with the Copenhagen Accord*

1. Authority of the Danish Presidency to Invite “Association”

On 30 December 2009, Denmark “in its capacity as COP15 Presidency” circulated a note verbale to the permanent missions of United Nations Member States in New York inviting UNFCCC Parties “to inform the UNFCCC Secretariat in a written form at their earliest convenience of their willingness to be associated with the Copenhagen Accord.” The note verbale also indicated that “in completing the report of COP15, the UNFCCC Secretariat will list the Parties to the Convention that have expressed their willingness to be associated with this Accord.”

The legal authority of Denmark as COP15 President on its own to invite UNFCCC Parties to “associate” themselves with the Copenhagen Accord is questionable. Under the COP’s 1996 Rules of Procedure, the COP President’s powers and functions are as follows:

- to invite observers to the COP (Rules 6.2 and 7.2)
- agree with the secretariat on the provisional agenda of each session (Rule 9)

² In the annex to its Decision 55/488, adopted on 7 September 2001, the General Assembly reiterated “that the terms ‘take note of’ and ‘notes’ are neutral terms that constitute neither approval nor disapproval”. This decision and interpretation has been reiterated by the General Assembly on many occasions since then.

- agree with the secretariat on the inclusion into the agenda of items proposed by Parties (Rule 12)
- serve as President until election of its successor (Rule 22)
- have control over the proceedings of the COP, subject to the authority of the COP (Rule 23 in relation to Rules 31, 32, 34, 42.3, 50)
- designate an acting President if temporarily absent (Rule 24)
- preside at the first meeting of an ordinary session until its successor for that session is elected (Rule 26)

Nowhere in the COP's Rules of Procedure does it allow the COP Presidency to invite Parties to undertake any proactive actions in relation to any document or instrument that is external to the COP process.³

2. The International Law Effect of "Association"

The Copenhagen Accord has been billed by developed countries as a politically binding agreement among those countries that are part of it that is intended to shape how these countries act in terms of addressing climate change. But the heads of state/government-level nature of the negotiation process for the Copenhagen Accord, its actual final status vis-à-vis COP15 and its work, and especially the subsequent "association" process for it triggered by the Danish Presidency's invitation, all create a situation in which the Copenhagen Accord becomes an instrument that creates certain international law obligations for the countries that associate themselves with it.

In essence, association with the Copenhagen Accord in writing, as requested by the Danish Presidency, would essentially be a unilateral declaration⁴ on the part of the associating Party of its willingness to be bound – in both political and international law terms – to the provisions of the Copenhagen Accord.

As an international instrument to which UNFCCC Parties would unilateral declare their association with, the Copenhagen Accord would create international law obligations for such associating Parties. At the very least, the Copenhagen Accord can (and most likely will be) seen, especially by the associating Parties, as an international political commitment that would be the basis for their political negotiating positions for any

³ The only possible exception to this could be if the COP Presidency is explicitly mandated by the COP to undertake such action. However, during COP15's final plenary session in the afternoon of 19 December 2009, no consensus was reached at the COP as to how the Copenhagen Accord would be further acted upon by the Parties.

⁴ For such a unilateral declaration to have binding legal effect on the declaratory Party and for other Parties to be able to rely on the binding nature of such a declaration under international legal effects, the declaration should be consistent with the "Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations" adopted by the UN General Assembly's International Law Commission in 2006. The Guiding Principles were reported by the ILC to the 61st session of the UN General Assembly (see Report of the International Law Commission, 58th Session, UN Doc. No. A/61/10 (2006)), which then took note of such Guiding Principles and commended their dissemination (see UN General Assembly Resolution No. A/RES/61/34, 18 December 2006, para. 3. For the text of these Guiding Principles, see http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/9_9_2006.pdf. These guidelines are based in part on the 1933 decision of the Permanent Court of International Justice in the case of Norway vs. Denmark and the 1974 Nuclear Test Cases decided by the International Court of Justice.

further international policymaking relating to climate change in other forums, including in the UNFCCC.

That no deadline was included in the Danish note verbale by when Parties should indicate in writing their willingness to be associated with the Copenhagen Accord and no date was also stated for when the UNFCCC secretariat is to finish its COP15 report would seem to indicate that the period for associating with the Copenhagen Accord could be for virtually the entire duration of the Danish COP15 Presidency – i.e. including any extraordinary sessions that may take place, any negotiating meetings, and up to the opening of COP16 in Mexico in late November 2010. This would allow for an open-ended virtually year-long “association” process in which the Danish Presidency and other developed countries that have invested in the Copenhagen Accord could seek to add more Parties to the Copenhagen Accord. They can then present it later on in the context of the negotiations for the outcome of COP16 as an official instrument that binds – at least at the political level – those countries that have so associated themselves with the Copenhagen Accord.

IV. Conclusion

Developing countries should be cautious when considering how to respond to the Copenhagen Accord. This caution is needed because of the following factors:

- (i) the controversial manner in which the Accord was presented to the COP plenary;
- (ii) that it was not adopted by the COP but merely “taken note of”;
- (iii) that its contents are imbalanced and in many ways have negative implications for developing countries, including that it is in many ways not consistent with the principles of the UNFCCC, especially of common but differentiated responsibilities and respective capabilities, and effectively denies the historical responsibility of developed countries for anthropogenic global warming;
- (iv) that a denial of historical responsibility for climate change could also imply a denial by developed countries of their obligation to provide financial resources, transfer of technology and meeting costs of adaptation to developing countries, altering the whole balance of differentiated responsibilities under Article 4.7; and
- (v) that “associating” with the Accord may have serious political and legal implications for developing countries. These include:
 - the taking on of international political commitments to undertake mitigation actions and be subject to more stringent MRV modalities without obtaining the corresponding benefits from it such as full and effective implementation of developed countries’ UNFCCC obligations to provide financing and technology;
 - seriously imposing constraints on one’s negotiating and policy space in the continuing negotiations in the AWG-LCA and AWG-KP, including undermining already previously-agreed G77 and China positions in these negotiations; and
 - association with the Accord would imply association with the inconsistencies to the principles and provisions of the UNFCCC and its Kyoto Protocol that the Accord contains, thereby also implying

agreement that such principles and provisions will not be fully and effectively implemented or may in fact be derogated from, especially by developed countries.

In this context, there are various options that can be logically considered, including:

- Unconditional acceptance or association with the Accord;
- Association subject to specified conditions, interpretations, reservations, and understandings on the extent, parameters and meaning of such association;
- A “wait and see” approach, especially to consider whether Annex I Parties fill in their table in Appendix I of the Accord by 31 January 2010 and what the contents are;
- Non-association with the Accord; and
- Explicit rejection of the Accord.

Given the analysis in this Note, it would not be wise for developing countries to take the first option of an unconditional association with the Accord.

At the least, developing countries should not be in any hurry to write in to associate with the accord. A “wait and see” approach should at least be taken. For example, in the event that the emission reduction figures to be submitted by Annex I Parties (to fill in Appendix I) are not adequate, this may play an important part in determining a judgment on the value of the Accord.

To agree to associate with the Accord before seeing its entire contents would be to grant a “blank cheque” to the proponents of the Accord, by accepting a document before some of its most important components are revealed.

Further, developing countries will also have to weigh the serious consequences of whether to associate with a document that in practical terms does away with the Kyoto Protocol and its most essential elements, and which contradicts and undermines key principles of the UNFCCC, including that of common but differentiated responsibilities, and which will disadvantage developing countries in many ways.