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# From Bali to Copenhagen: Towards a Shared Vision for a Post-2012 Climate Regime?

JUTTA BRUNNÉE<sup>†</sup>

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## I. INTRODUCTION

In December 2009, the eyes of the world were on the Danish capital Copenhagen. “Copenhagen” was to set the world on course to forestall dangerous climate change. To that end, Copenhagen was to yield at least the contours of a global regime that would commit all major economies to a long-term curbing of their greenhouse gas emissions. But Copenhagen did not go as planned. In the end, it produced a slim document dubbed the Copenhagen Accord, negotiated at the eleventh hour by only five countries (Brazil, China, India, South Africa, and the United States) and later “taken note of” by the 194 parties to the United Nations Framework Convention on Climate Change (UNFCCC) just before their meeting was gavelled to a close.<sup>1</sup> U.S. President Barack Obama, who had brokered the Copenhagen Accord, called it a “meaningful and unprecedented

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1. See Conference of the Parties to the United Nations Framework Convention on Climate Change, Fifteenth Sess., Dec. 7–18, 2009, Copenhagen, Den., *Draft Decision -/CP 15: Proposal by the President, Copenhagen Accord*, U.N. Doc. FCCC/CP/2009/L.7 (Dec. 18, 2009) [hereinafter Copenhagen Accord], available at <http://unfccc.int/resource/docs/2009/cop15/eng/107.pdf>; PEW CTR. ON GLOBAL CLIMATE CHANGE, SUMMARY OF COP 15 AND CMP 5 (2009), <http://www.pewclimate.org/docUploads/copenhagen-cop15-summary.pdf>.

breakthrough . . . .”<sup>2</sup> But for many others the outcome spells failure, both in the world’s fight against climate change and in the UN climate change regime.<sup>3</sup>

Climate change may well be the single most important public policy challenge of our time.<sup>4</sup> It is planetary in scope and inter-generational in its implications. Even more importantly, because climate change implicates virtually all production and consumption processes, addressing it is about nothing less than changing the way we do everything that we do everywhere in the world. Climate change, then, is also a classic collective action problem. It can be solved only if all states, or at least the major greenhouse gas emitters, cooperate.

In addition, climate change raises a series of difficult questions of equity and, some say, global environmental justice.<sup>5</sup> Historically, emissions of greenhouse gases have been far greater in the industrialized world. The emissions of industrialized countries still significantly exceed those of developing countries,<sup>6</sup> although the emissions of some large developing countries are projected to rise sharply over the next two decades.<sup>7</sup> In 2006, China surpassed the United States as the largest national emitter of greenhouse gases.<sup>8</sup>

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2. President Barack Obama, Remarks by the President During Press Availability in Copenhagen (Dec. 18, 2009) (transcript available at <http://www.whitehouse.gov/the-press-office/remarks-president-during-press-availability-copenhagen>).

3. See, e.g., James Kanter, *E.U. Blames Others for ‘Great Failure’ on Climate*, N.Y. TIMES, Dec. 23, 2009, available at <http://www.nytimes.com/2009/12/23/world/europe/23iht-climate.html>; Donna Bryson, *South Africa Blasts Copenhagen Failure*, ASSOCIATED PRESS, Dec. 22, 2009, <http://abcnews.go.com/Business/wireStory?id=9399596>.

4. See, e.g., David A. King, *Climate Change Science: Adapt, Mitigate or Ignore?*, 303 SCI. 176, 176 (2004).

5. For an extensive, interdisciplinary literature review, see Stephen M. Gardiner, *Ethics and Global Climate Change*, 114 ETHICS 555 (2004).

6. This is true for total, per capita, and especially historic global emissions. See, e.g., KEVIN BAUMERT & JONATHAN PERSHING, PEW CTR. ON GLOBAL CLIMATE CHANGE, CLIMATE DATA: INSIGHTS AND OBSERVATIONS 4, 11, 13 (2004), [http://www.pewclimate.org/global-warming-in-depth/all\\_reports/](http://www.pewclimate.org/global-warming-in-depth/all_reports/).

7. *Id.* at 15–16.

8. See UNION OF CONCERNED SCIENTISTS, EACH COUNTRY’S SHARE OF CO<sub>2</sub> EMISSIONS (2006), <http://www.ucsusa.org/globalwarming/scienceandimpacts/science/each-countrys-share-of-co2.html>; John Vidal & David Adam, *China Overtakes US as World’s Biggest CO<sub>2</sub> Emitter*, GUARDIAN, June 19, 2007, <http://www.guardian.co.uk/environment/2007/jun/19/china.usnews>.

However, Chinese per capita emissions remain far lower than those of the United States or the European Union.<sup>9</sup>

The effects of climate change are likely to disproportionately impact developing countries, many of which are especially vulnerable to such effects.<sup>10</sup> Industrialized countries have vastly larger economic and technological capacity not only to mitigate greenhouse gas emissions but also to adapt to its consequences.<sup>11</sup>

The gulf between radically different perceptions of the problem is not easily bridged. Many developing countries see climate politics as part of a larger pattern of historical and economic injustices and so demand that industrialized countries bear the primary burden of combating climate change. In turn, many industrialized countries insist on developing country participation as a matter of pragmatic problem solving or even “fairness.”<sup>12</sup>

The UNFCCC was adopted in 1992<sup>13</sup> and supplemented by the Kyoto Protocol in 1997.<sup>14</sup> However, the Kyoto Protocol imposes emission reduction commitments on only some of the major emitters and does so only for the period from 2008 to 2012. Negotiations for a more comprehensive set of mid- and long-term commitments were meant to lead to an agreement by the end of 2009, but the outcome of the December meeting leaves uncertain whether and when the Copenhagen Accord will be turned into a formal legal instrument.

Much attention has been paid to the back-and-forth between China (and India) and the United States. I want to suggest that the climate

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9. Steve Howard & Changhua Wu, *Foreword* to THE CLIMATE GROUP, CHINA'S CLEAN REVOLUTION (2008),

[http://www.theclimategroup.org/\\_assets/files/Chinas\\_Clean\\_Revolution.pdf](http://www.theclimategroup.org/_assets/files/Chinas_Clean_Revolution.pdf) (noting that, “[i]n 2007, China reached a per capita level of 5.1 metric tons compared to the European Union’s 8.6 metric tons and the USA’s 19.4 metric tons”) (citation omitted).

10. BAUMERT & PERSHING, *supra* note 6, at 17–18.

11. *See id.* at 17–20.

12. *See* J. TIMMONS ROBERTS & BRADLEY C. PARKS, A CLIMATE OF INJUSTICE: GLOBAL INEQUALITY, NORTH-SOUTH POLITICS, AND CLIMATE POLICY 136 (2007).

13. United Nations Framework Convention on Climate Change, May 9, 1992, S. TREATY DOC. NO. 102–38, 1771 U.N.T.S. 107 [hereinafter UNFCCC].

14. Kyoto Protocol to the United Nations Framework Convention on Climate Change, Dec. 11, 1997, 2303 U.N.T.S. 148, 37 I.L.M. 22 [hereinafter Kyoto Protocol].

negotiations are not just about who cuts or pays how much and who drives the hardest bargain. They are also about “principle.” In other words, agreement on the principles that frame the climate regime is key to its evolution. My argument is that it is crucial to arrive at both a genuinely shared understanding of the regime’s framing principle, common but differentiated responsibilities (CBDR), and a post-2012 agreement that is consonant with that understanding. It is equally crucial to agree on the stated objective of the climate regime, namely to avert dangerous climate change.

Both the regime’s objective and CBDR are enshrined in the Climate Convention, but the treaty text left the underlying scientific and normative controversies unresolved. The efforts to develop a “shared vision for long-term cooperative action,”<sup>15</sup> launched at a meeting of the parties in Bali in 2007, ran into various stumbling blocks in Copenhagen. Nevertheless, these continued efforts provide an opportunity to explore how the objective and CBDR have shaped parties’ positions and, in turn, how regime participants have sought to clarify and shift the meaning of these norms.

In this brief Article, I first offer an overview of the CBDR principle as it has evolved in the regime and develop my argument that CBDR, in turn, has been the climate regime’s anchor principle, shaping its evolution and accounting at least in part for its resilience. I then evaluate the outcome of the Copenhagen negotiations in light of the regime objective and the CBDR principle.

## II. CBDR AND THE CLIMATE REGIME

Before turning to an assessment of the role of CBDR, it is important to consider another element of the treaty, which might at first glance seem to play merely a perfunctory role—namely the provision outlining its objective. As will become apparent, the objective and CBDR together provide the parameters for action under the climate regime. Global measures to combat climate change must not only be capable of meeting the regime’s objective; they must also do so in accordance with the CBDR principle. Similarly, it would not be enough for climate action under the regime to be in keeping with

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15. Conference of the Parties to the United Nations Framework Convention on Climate Change, Thirteenth Sess., Bali, Indon., Dec. 3–15, 2007, *Decision 1/CP.13, Bali Action Plan*, U.N. 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>.

parties' common but differentiated responsibilities, as the parties' actions must also measure up to the treaty objective. In the following discussion, I focus less on the formal legal requirements that may flow from the objective and the CBDR principle than on the influence that they in fact exert on the evolution of the climate regime.

A. *The Role of the Objective*

The "ultimate objective of [the Climate] Convention and any related legal instruments . . . is to achieve . . . [the] stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system."<sup>16</sup>

Among the parties to the Climate Convention, this objective has achieved a taken-for-granted quality. It underpins the Kyoto Protocol and has framed the negotiations for post-2012 commitments.<sup>17</sup> But only relatively recently has a stronger shared understanding emerged around the meaning of the regime's objective.<sup>18</sup> The release in 2007 of the Fourth Assessment Report by the Intergovernmental Panel on Climate Change (IPCC) injected a new sense of urgency into the discussions<sup>19</sup> and provided unequivocal evidence of human induced

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16. UNFCCC, *supra* note 13, art. 2.

17. States, intergovernmental organizations, and nongovernmental observers routinely invoke the objective in submission to the Ad Hoc Working Group on Long-Term Cooperative Action (AWG-LCA). For access to submissions made since the AWG-LCA's first session in March 2008, see United Nations, Documents of the Ad Hoc Working Group on Long-Term Cooperative Action Under the Convention, [http://unfccc.int/meetings/ad\\_hoc\\_working\\_groups/lca/items/4918.php](http://unfccc.int/meetings/ad_hoc_working_groups/lca/items/4918.php) (last visited Mar. 4, 2010). *E.g.*, United Nations Framework Convention on Climate Change Ad Hoc Working Group on Long-Term Cooperative Action Under the Convention, Fourth Sess., Poznan, Pol., Dec. 1–10, 2008, *Ideas and Proposals on Paragraph 1 of the Bali Action Plan*, U.N. Doc. FCCC/AWGLCA/2008/16/Rev.1 (Jan. 15, 2009), available at <http://unfccc.int/resource/docs/2008/awglca4/eng/16r01.pdf>.

18. See Malte Meinshausen et al., *Greenhouse-Gas Emission Targets for Limiting Global Warming to 2° C*, 458 NATURE 1158, 1158 (2009) (noting that "[m]ore than 100 countries have adopted a global warming limit of 2° C or below (relative to pre-industrial levels) as a guiding principle for mitigation efforts to reduce climate change risks, impacts and damages") (citation omitted).

19. See Richard B. Alley et al., *IPCC 2007: Summary for Policymakers*, in CLIMATE CHANGE 2007: THE PHYSICAL SCIENCE BASIS. CONTRIBUTION OF WORKING GROUP I TO THE FOURTH ASSESSMENT REPORT OF THE

climate change.<sup>20</sup> Perhaps most importantly, the IPCC drove home the point that global greenhouse gas emissions would have to peak around 2020 and would have to be dramatically reduced by 2050 if there was to be a reasonable chance of averting dangerous warming.<sup>21</sup>

However, it was not until 2009 that the major emitting states were finally willing to quantify that objective, agreeing that global temperature increases should not exceed two degrees Celsius above pre-industrial levels. This agreement was reflected first in declarations of the 2009 G8 Summit and the Major Economies Forum (MEF) on Energy and Climate convened by U.S. President Obama to engage the seventeen states that account for roughly eighty percent of global carbon emissions.<sup>22</sup> The two-degree Celsius benchmark was also confirmed in the Copenhagen Accord.<sup>23</sup> African and small island states had been pushing especially hard for recognition of a more ambitious temperature limit of 1.5 degrees Celsius,<sup>24</sup> but in this respect the Copenhagen Accord calls only for an assessment of its implementation by 2015 in light of, among other things, the Convention's ultimate objective.<sup>25</sup>

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INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE I (Susan Solomon et al. eds., 2007). A growing chorus of voices warns that even the IPCC's worst-case scenarios are in fact too conservative and that global climate change is occurring at a much faster rate than expected, in part due to various feedback effects. See PEW CTR. ON GLOBAL CLIMATE CHANGE, KEY SCIENTIFIC DEVELOPMENTS SINCE THE IPCC FOURTH ASSESSMENT REPORT: SCIENCE BRIEF 2 (2009), <http://www.pewclimate.org/brief/science-developments/June2009>.

20. See Alley et al., *supra* note 19, at 2–3 (considering it to be “very likely,” i.e., more than ninety percent certain, that anthropogenic factors account for these increases).

21. See Terry Barker et al., *Technical Summary*, in CLIMATE CHANGE 2007: MITIGATION. CONTRIBUTION OF WORKING GROUP III TO THE FOURTH ASSESSMENT REPORT OF THE INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE 25, 39, 90 (B. Metz et al. eds., 2007).

22. See G8 Leaders Declaration, *Responsible Leadership for a Sustainable Future*, para. 65 (July 9, 2009), [http://www.g8italia2009.it/static/G8\\_Allegato/G8\\_Declaration\\_08\\_07\\_09\\_final,0.pdf](http://www.g8italia2009.it/static/G8_Allegato/G8_Declaration_08_07_09_final,0.pdf); Press Release, The White House, Declaration of the Leaders: The Major Economies Forum on Energy and Climate (July 9, 2009), available at [http://www.whitehouse.gov/the\\_press\\_office/Declaration-of-the-Leaders-the-Major-Economies-Forum-on-Energy-and-Climate/](http://www.whitehouse.gov/the_press_office/Declaration-of-the-Leaders-the-Major-Economies-Forum-on-Energy-and-Climate/).

23. See Copenhagen Accord, *supra* note 1, para. 1.

24. David Doniger, *The Copenhagen Accord: A Big Step Forward*, CLIMATE PROGRESS, Dec. 28, 2009, <http://climateprogress.org/2009/12/28/the-copenhagen-accord-a-big-step-forward/>.

25. Copenhagen Accord, *supra* note 1, para. 12.

This might all seem like small progress, but the ramifications are potentially significant. The temperature target of two degrees Celsius permits extrapolations regarding maximum allowable concentrations of greenhouse gases in the atmosphere, which in turn permit conclusions about the timing and extent of the emission reductions required to achieve those concentrations.<sup>26</sup> IPCC findings, confirmed by later analyses, suggest that robust action is urgently required.<sup>27</sup> To have a reasonable chance of meeting the objective, greenhouse gas emissions must peak within the next six years, followed by significant medium- and long-term emission reductions.<sup>28</sup> By 2020, developed country emissions would have to be cut by twenty-five to forty percent; by 2050, they would have to be reduced by eighty to ninety-five percent.<sup>29</sup> In other words, its central concept now having been defined, the Article 2 objective not only provides general direction to states' efforts but sets a bar against which the credibility of emission reduction commitments can be measured.

### B. *The Role of CBDR*

The Climate Convention calls upon parties to protect the climate system “on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities.”<sup>30</sup> The repeated references to CBDR in the climate regime, including most recently in the Copenhagen Accord, confirm that CBDR is the most

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26. The negotiating position of the European Union is constructed precisely in this fashion. See *Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions: Limiting Global Climate Change to 2 Degrees Celsius—the Way Ahead for 2020 and Beyond*, at 2, 9, COM (2007) 2 final (Oct. 1, 2007) [hereinafter EU Commission Communication on Limiting Global Change to 2 Degrees Celsius], available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2007:0002:FIN:EN:PDF>.

27. See Meinshausen et al., *supra* note 18, at 1160.

28. See KATHERINE RICHARDSON ET AL., UNIV. OF COPENHAGEN, CLIMATE CHANGE: GLOBAL RISKS, CHALLENGES & DECISIONS COPENHAGEN 2009, 10–12 MARCH, at 18–20 (2009), available at [http://climatecongress.ku.dk/pdf/synthesi\\_sreport/](http://climatecongress.ku.dk/pdf/synthesi_sreport/); Barker et al., *supra*, note 21, at 90.

29. This is the range of required reductions that was established in the IPCC's 2007 Report. See INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE 2007: SYNTHESIS REPORT 66–67 (Rajendra K. Pachauri et al. eds., 2007), available at [http://www.ipcc.ch/pdf/assessment-report/ar4/syr/ar4\\_syr.pdf](http://www.ipcc.ch/pdf/assessment-report/ar4/syr/ar4_syr.pdf).

30. UNFCCC, *supra* note 13, art. 3(1).

important among the principles that frame the climate regime.<sup>31</sup> However, it is one thing to enshrine a principle in a treaty and quite another for that principle to have an agreed-upon meaning. A closer look at the UNFCCC, related sources, and relevant practice reveals that, while some elements of CBDR are generally agreed upon, others are still subject to debate.

Based on the submissions by states under the auspices of the Bali Action Plan, it seems fair to say that there is broad consensus that states have a common responsibility to address climate change,<sup>32</sup> that their resulting individual responsibilities should be differentiated,<sup>33</sup> and that industrialized countries should take the lead in combating climate change.<sup>34</sup> Much less common ground exists with respect to the criteria for differentiation of individual state responsibilities. For instance, disagreements remain on whether historical and per capita emissions are appropriate criteria for differentiation<sup>35</sup> and whether CBDR requires industrialized states to provide financial and technical assistance to developing countries.<sup>36</sup>

Meanwhile, it is generally accepted that capacity differentials, especially between developing and industrialized states, are relevant.<sup>37</sup> More recently, there has also been growing support for

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31. See Copenhagen Accord, *supra* note 1, para. 1.

32. United Nations Framework Convention on Climate Change Ad Hoc Working Group on Long-Term Cooperative Action Under the Convention, First Sess., Bangkok, Thailand, Mar. 1–Apr. 8, 2008, *Views Regarding the Work Programme of the Ad Hoc Working Group on Long-Term Cooperative Action Under the Convention*, U.N. Doc. FCCC/AWGLCA/2008/MISC.1 (Mar. 3, 2008) [hereinafter UNFCCC Ad Hoc Working Group Views (1st Sess.)], available at <http://unfccc.int/resource/docs/2008/awglca1/eng/misc01.pdf>. See, e.g., *id.* at 66 (stating Singapore's view that “[a]ll countries, both developed and developing, have a part to play to address climate change . . .”).

33. See Lavanya Rajamani, *From Stockholm to Johannesburg: The Anatomy of Dissonance in the International Environmental Dialogue*, 12 REV. EUR. COMMUNITY & INT'L ENVTL. L. 23, 31 (2003).

34. See United Nations Framework Convention on Climate Change Ad Hoc Working Group on Long-Term Cooperative Action Under the Convention, Fifth Sess., Bonn, F.R.G., Mar. 29–Apr. 8, 2009, *Fulfillment of the Bali Action Plan and Components of the Agreed Outcome: Note by the Chair*, para. 30, U.N. Doc. FCCC/AWGLCA/2009/4 (Part II) (Mar. 18, 2009), available at <http://unfccc.int/resource/docs/2009/awglca5/eng/04p02.pdf>.

35. See Jutta Brunnée, *Climate Change, Global Environmental Justice and International Environmental Law*, in ENVIRONMENTAL LAW AND JUSTICE IN CONTEXT 316, 326–27 (Jonas Ebbesson & Phoebe Okowa eds., 2009).

36. See Rajamani, *supra* note 33, at 31.

37. See, e.g., Tuula Honkonen, *The Principle of Common But Differentiated*

differentiation among industrialized and developing countries.<sup>38</sup> The latter trend is of particular interest and is well illustrated by the shared vision negotiations. They reveal that states' understandings of the CBDR principle are evolving in this respect. To be sure, some states remained staunchly opposed to differentiation among developing countries. For example, according to China, "[t]he principle of 'common but differentiated responsibilities' between developed and developing countries is the keystone of the Convention . . . . Any further sub-categorization of developing countries runs against the Convention . . . ."<sup>39</sup> But the view that the CBDR principle, as reflected in the climate regime, does not preclude and may even require differentiation within groups appeared to be shared by a growing number of parties, both developed and developing.<sup>40</sup> For example, Australia argued:

There has to be yet further differentiation of responsibilities and capabilities other than highlighting the vulnerability and lack of capacity of some Parties to respond to the impacts of climate change.

There is considerable variation in the circumstances of the

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*Responsibility in Post-2012 Climate Negotiations*, 18 REV. EUR. COMMUNITY & INT'L ENVTL. L. 257, 259 (2009) (commenting on the fact that both the UNFCCC and the Kyoto Protocol are explicitly based on the distinction between Annex I (industrialized countries and countries with economies in transition) and non-Annex I (developing) countries).

38. See, e.g., United Nations Framework Convention on Climate Change Ad Hoc Working Group on Long-Term Cooperative Action Under the Convention, Fourth Sess., Poznan, Pol., Dec. 1–10, 2008, *Ideas and Proposals on the Elements Contained in Paragraph 1 of the Bali Action Plan: Submissions from Parties—Addendum*, at 14, U.N. Doc. FCCC/AWGLCA/2008/MISC.5/Add.1 (Nov. 21, 2008) (stating France's view, available at <http://unfccc.int/resource/docs/2008/awglca4/eng/misc05a01.pdf> (on behalf of the European Community) of enhanced national and international action on the mitigation of climate change).

39. United Nations Framework Convention on Climate Change Ad Hoc Working Group on Long-Term Cooperative Action Under the Convention, Fourth Sess., Poznan, Pol., Dec. 1–10, 2008, *Ideas and Proposals on the Elements Contained in Paragraph 1 of the Bali Action Plan: Submissions from Parties*, at 34, U.N. Doc. FCCC/AWGLCA/2008/MISC.5 (Oct. 27, 2008), available at <http://unfccc.int/resource/docs/2008/awglca4/eng/misc05.pdf> (stating China's views on implementation of the Climate Convention through long-term cooperative action).

40. But see Lavanya Rajamani, *Differentiation in the Post-2012 Climate Regime*, 4 POL'Y Q. 48, 49 (2008) (noting that most developing countries oppose efforts to differentiate between them).

191 countries in the UNFCCC. Accordingly, there can be many different approaches to differentiating and grouping countries according to such circumstances.<sup>41</sup>

Similarly, France submitted on behalf of the European Community that “a key issue to explore . . . is what the principle of common but differentiated responsibilities and respective capabilities means *for national appropriate mitigation action between and within groupings . . .*”<sup>42</sup> Developing countries, in turn, focused their remarks primarily on differentiation within their group. For example, the task of the negotiations for Bangladesh was to “[d]etermine global mitigation targets for post Kyoto climate regime based on common but differentiated responsibility (regarding but not limited to the time paths, peaking years and allowable limits of emission) between the developed and developing countries and within developing countries, between the LDCs and the rest of them.”<sup>43</sup> Egypt maintained that “responsibilities should be seen against the fact that there are different levels of development within developing countries. We therefore call for the inclusion of criterion of income level and growth in the issue of climate change . . . .”<sup>44</sup> Finally, the Maldives observed that, “while the differing national circumstances between developed and developing countries have been acknowledged in Article 1(b)(v) [of the Bali Action Plan], vast differences also exist between many of the developing countries,

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41. United Nations Framework Convention on Climate Change Ad Hoc Working Group on Long-Term Cooperative Action Under the Convention, First Sess., Bangkok, Thai., Mar. 31–Apr. 4, 2008, *Views Regarding the Work Programme of the Ad Hoc Working Group on Long-Term Cooperative Action Under the Convention: Submissions from Parties—Addendum*, at 7–8, U.N. Doc. FCCC/AWGLCA/2008/MISC.1/Add.2 (Mar. 20, 2008), available at [http://unfccc.org/unfccc/images/document/Action\\_Under\\_Convention.pdf](http://unfccc.org/unfccc/images/document/Action_Under_Convention.pdf) (stating Australia’s view on a long-term global goal for emission reductions).

42. United Nations Framework Convention on Climate Change Ad Hoc Working Group on Long-Term Cooperative Action Under the Convention, Third Sess., Accra, Ghana, Aug. 21–27, 2008, *Ideas and Proposals on the Elements Contained in Paragraph 1 of the Bali Action Plan: Submissions from Parties*, at 5, U.N. Doc. FCCC/AWGLCA/2008/MISC.2 (Aug. 14, 2008), available at <http://unfccc.int/resource/docs/2008/awglca3/eng/misc02.pdf> (stating France’s view (on behalf of the European Community) on mitigation, including by technology and finance).

43. UNFCCC Ad Hoc Working Group Views (1st Sess.), *supra* note 32, at 10 (Bangladesh’s submission on the Bali Action Plan). LDCs refer to least developed countries.

44. *Id.* at 23 (Egypt’s submission on long-term cooperative action).

particularly the large ones and the LDC[s].”<sup>45</sup>

Notwithstanding lingering debates about its meaning, CBDR has been a crucial factor in stabilizing and directing the climate regime to date. The power of the principle is illustrated, for example, by the inability of the Bush Administration to extricate itself from the UN regime. Arguably, the United States’ attitude towards the Kyoto Protocol antagonized others at least in part because it appeared to challenge head on the basic ideas that animate CBDR. As we have seen, the notion that addressing climate change is a common responsibility is a strongly shared understanding.<sup>46</sup> Against this normative backdrop, the United States’ refusal to join the Kyoto Protocol was widely read as unilateralism and thus struck a particularly negative chord with other nations.<sup>47</sup> Similarly, it may well be sensible to suggest that all major emitters, including developing countries, must participate for a climate regime to be effective. But the flat refusal by one of the wealthiest states in the world—and one of its major carbon emitters—to take on emission reduction commitments clashed with a generally shared sense that developed countries should take the lead in combating climate change.<sup>48</sup>

Interestingly, under the new Administration, a re-articulation of the U.S. position is discernible. While the United States still insists on developing country participation in an emissions regime, its proposals are now expressed in terms that are compatible with CBDR. Thus, the argument is no longer a bald statement that the United States will not take on commitments unless major developing countries do the same. Instead, the argument is that CBDR actually

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45. *Id.* at 32 (Maldives’ submission on Bali Action Plan).

46. See Honkonen, *supra* note 37, at 265.

47. See *Anger at US Climate Retreat*, BBC, Mar. 28, 2001, <http://news.bbc.co.uk/2/hi/science/nature/1248278.stm>.

48. Indeed, rarely have states so openly expressed their resentment of U.S. climate policy as did Papua New Guinea’s ambassador for climate change when, reacting to the outgoing Bush Administration’s initial refusal to support the Bali Action Plan on long-term cooperative action, the ambassador stated that, “if for some reason you’re not willing to lead, leave it to the rest of us. Please get out of the way.” Andrew C. Revkin, *Issuing a Bold Challenge to the U.S. Over Climate*, N.Y. TIMES, Jan. 22, 2008, at F2, available at <http://www.nytimes.com/2008/01/22/science/earth/22conv.html> (quoting Kevin Conrad).

demands, or at least accommodates, differentiation among developing countries,<sup>49</sup> suggesting that major developing economies with large emissions must accept some emissions commitments. In other words, the United States has stopped arguing against the basic understandings that underpin the regime and has begun to work with the CBDR concept.

Major developing countries like China and India have always sought to draw rhetorical power from the convention principles. They worked hard during the negotiations of the UNFCCC to enshrine principles such as equity and CBDR in the convention and have consistently raised these concepts in the negotiations for a post-2012 regime.<sup>50</sup> As noted, in the past, China and India refused to contemplate any emission reduction commitments whatsoever. The argument was that pursuant to CBDR only industrialized countries should take on such commitments and, at any rate, they should take the lead in cutting emissions. While the latter point resonates with the shared understandings of CBDR, the former fell increasingly out of step with the basic thrust of the principle. Once China and India emerged as major carbon emitters—with China displacing the United States as the single largest emitter—the CBDR principle began to work against insistence on complete exemption from emission reductions.<sup>51</sup> Instead, the notion of common responsibility actually calls for some action by all major emitters. The most widely shared rationale for CBDR, capacity differentials, suggests that salient

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49. See, e.g., UNFCCC Ad Hoc Working Group Ideas and Proposals, Fourth Sess., *supra* note 17, para. 22(h) (citing Australia, New Zealand, the Russian Federation, and the United States for the proposition that “[n]ew sight on the differentiation among Parties is required . . . based on recent advances in scientific knowledge and changing social and economic situation in the world . . .”).

50. See Daniel Bodansky, *The United Nations Framework Convention on Climate Change: A Commentary*, 18 YALE J. INT’L L. 451, 501–05 (1993); e.g., UNFCCC Ad Hoc Working Group Views (1st Sess.), *supra* note 32, at 18 (stating China’s view that “[i]n developing . . . [a shared] vision [for long-term cooperative action], it is important to take into account the principles of equity and common but differentiated responsibilities . . .”); *id.* at 31–32 (India’s submission on long-term cooperative action).

51. This point has not escaped the attention of the new U.S. Administration. See Glenn Kessler, *Clinton, Indian Minister Clash Over Emissions Reduction Pact*, WASH. POST, July 20, 2009, <http://www.washingtonpost.com/wp-dyn/content/article/2009/07/19/AR2009071900705.html> (noting that Secretary of State Hillary Rodham Clinton “‘completely’ understood Indian arguments about per capita emissions . . . but [nevertheless thought] that the per capita argument ‘loses force’ as developing countries rapidly become the biggest emitters”).

differences within the developing and developed country groupings of states should be taken into account. Indeed, even if “historical” contributions to climate change were generally seen to be a criterion for differentiation, CBDR does not completely insulate major developing country emitters from emissions-related commitments.<sup>52</sup> Both the UNFCCC and the Kyoto Protocol use 1990 as a reference year for emission reductions.<sup>53</sup> The emissions trajectory in major developed and developing emitters since 1990 militate in favour of the latter’s inclusion in a commitment regime, while reducing the exposure of developed countries with respect to their cumulative emissions.<sup>54</sup> As a result, it has become increasingly difficult for major developing economies with significant carbon emissions to refuse reduction commitments outright. This accounts at least in part for the redoubled efforts of China and India to ensure the continuation of the Kyoto Protocol while softening their stance on emission reductions.<sup>55</sup>

### III. THE COPENHAGEN ACCORD

#### A. CBDR

Arguably, to respect the CBDR principle, a post-2012 regime must see developed countries take the lead on emission reductions through credible mid-term targets as well as take on commitments that reflect their greater capacity and share of emissions. Major developing countries, by contrast, may initially commit to mitigation-related actions but not take on specific reduction targets. However, given developing countries’ rapidly rising share of global emissions, CBDR is compatible with, and even demands, credible reductions by the

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52. See Lavanya Rajamani, *The Principle of Common but Differentiated Responsibility and the Balance of Commitments Under the Climate Regime*, 9 REV. EUR. COMMUNITY & INT’L ENVTL. L. 120, 130 (2000).

53. See UNFCCC, *supra* note 13, art. 4(2); Kyoto Protocol, *supra* note 14, art. 3(1).

54. See, e.g., *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Towards a Comprehensive Climate Change Agreement in Copenhagen*, at 5, COM (2009) 39 final (Jan. 28, 2009), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2009:0039:FIN:EN:PDF> (submitting that “[t]he accepted Kyoto base year, 1990, should be used as the historical reference point . . . [for further emission reductions by developed countries] after 2012”).

55. See *infra* notes 63–73 and accompanying text.

main developing country emitters, at least in the longer term. Finally, differentiation according to capacity and emissions share suggests that poorer countries or countries with negligible emissions should be subject to considerably less onerous requirements.

Notwithstanding the difficulties in Copenhagen, the discernible trends in the climate discussions are broadly consonant with these parameters. The 2007 Bali Action Plan made only general reference to the urgency of the situation and the need for “deep cuts in global emissions . . . .”<sup>56</sup> At the time, only the Ad Hoc Working Group on Further Commitments for Annex I Parties under the Kyoto Protocol acknowledged that developed countries had to achieve a collective emissions cut of twenty-five to forty percent below 1990 levels by 2020.<sup>57</sup> Among the developed country parties, only the European Union was on record with a unilateral commitment to achieve a twenty percent reduction by 2020, offering a thirty percent cut if other states followed suit.<sup>58</sup> In the lead up to the Copenhagen meeting, other industrialized countries (and some industrializing states) announced reduction commitments that they were prepared to make.<sup>59</sup> The most significant movement undoubtedly came from the United States, which had, since abandoning the Kyoto Protocol in 2001, refused to take on international emission reduction commitments. In November 2009, President Barack Obama announced his Administration’s willingness to cut U.S. emissions by seventeen percent below 2005 levels by 2020.<sup>60</sup> This shift prompted China to come forward with a pledge to reduce the carbon intensity

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56. Bali Action Plan, *supra* note 15, pmb1.

57. See United Nations Framework Convention on Climate Change Ad Hoc Working Group on Further Commitments for Annex I Parties Under the Kyoto Protocol, Bali, Indon., Dec. 3–15, 2007, *Report of the Ad Hoc Working Group on Further Commitments for Annex I Parties Under the Kyoto Protocol on its Resumed Fourth Session, Held in Bali from 3 to 15 December 2007*, para. 16, U.N. Doc. FCCC/KP/AWG/2007/5 (Feb. 5, 2008), available at <http://unfccc.int/resouce/docs/2007/awg4/eng/05.pdf>.

58. See EU Commission Communication on Limiting Global Change to 2 Degrees Celsius, *supra* note 26, at 2; *Climate control: The European Union Thinks It Can Be a Model for the World on Climate Change. Can it?*, ECONOMIST, Mar. 15, 2007, at 59, available at EBSCOhost Academic Search Premier, AN 24406423.

59. See Elisabeth Rosenthal & Neil MacFarquhar, *Industrialized Nations Unveil Plans to Rein in Emissions*, N.Y. TIMES, Nov. 20, 2009, at A10, available at <http://www.nytimes.com/2009/11/20/science/earth/20climate.html>.

60. John M. Broder, *Obama to Go to Copenhagen with Emissions Target*, N.Y. TIMES, Nov. 26, 2009, at A1, available at <http://www.nytimes.com/2009/11/26/us/politics/26climate.html>.

of its economy by forty to forty-five percent from 2005 levels by 2020.<sup>61</sup> India followed suit with an intensity-based proposal of its own.<sup>62</sup>

The submissions by parties pursuant to the Bali Action Plan foreshadowed some of the dynamics that played out during the Copenhagen meetings. Since Copenhagen was to yield commitments on concrete emission reductions or, for developing countries, other “actions” on climate change,<sup>63</sup> it is perhaps not surprising that matters came to a head. It became apparent that many developing countries saw a continuation of the Kyoto Protocol as essential to the further development of the climate regime. For some developing states, notably small island states, this position reflected their desire to maintain the only instrument that contained legally binding emission reduction commitments by industrialized countries.<sup>64</sup> For others, led by China and India, Kyoto enshrined the only acceptable model of differentiation—the distinction between industrialized states that had binding emission reduction commitments and developing countries that did not.<sup>65</sup> By contrast, most industrialized countries wished to see

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61. Edward Wong & Keith Bradsher, *China Joins U.S. in Pledge of Hard Targets on Emissions*, N.Y. TIMES, Nov. 27, 2009, at A1, available at <http://www.nytimes.com/2009/11/27/science/earth/27climate.html>.

62. See Rama Lakshmi, *Moves by U.S., China Induce India to Do Its Bit on Climate*, WASH. POST, Dec. 2, 2009, <http://www.washingtonpost.com/wp-dyn/content/article/2009/12/01/AR2009120102591.html>.

63. For industrialized states, the Bali Action Plan contemplates “[n]ationally appropriate mitigation commitments or actions, including quantified emission limitation and reduction objectives, . . .” whereas for developing countries it envisages only “[n]ationally appropriate mitigation actions . . . .” See Bali Action Plan, *supra* note 15, para. 1(b)(i)–(ii).

64. See, e.g., United Nations Framework Convention on Climate Change Ad Hoc Working Group on Long-Term Cooperative Action Under the Convention, Eighth Sess., Copenhagen, Den., Dec. 7–15, 2009, *Ideas and Proposals on the Elements Contained in Paragraph 1 of the Bali Action Plan: Submissions from Parties*, at 15, U.N. Doc. FCCC/AWGLCA/2009/MISC.8 (Dec. 18, 2009), available at <http://unfccc.int/resource/docs/2009/awglca8/eng/misc08.pdf> (proposal by Alliance of Small Island States for the survival of the Kyoto Protocol); LAVANYA RAJAMANI, CTR. FOR POL’Y RESEARCH, THE COPENHAGEN AGREED OUTCOME: FORM, SHAPE & INFLUENCE 1–2 (2009), available at <http://www.cprindia.org/policyupload/1259569856-CPR%20Polic%20Brief2.pdf>.

65. See, e.g., “Kyoto Principles” Crucial in Climate Talks: China, REUTERS, Nov. 14, 2009, <http://www.reuters.com/article/idUSTRE5AD0NV20091114>; *Big Developing Countries Form Climate Change Front*, REUTERS, Nov. 29, 2009, <http://www.reuters.com/article/idUSPEK20047>.

the Kyoto Protocol replaced by a single, comprehensive instrument with appropriately differentiated commitments for all countries, including emission-related commitments for the major developing economies.<sup>66</sup>

In other words, the fate of the Kyoto Protocol became one of the battle grounds for the underlying questions of principle. After all, the stark distinction drawn in the UNFCCC between Annex I parties (industrialized states and countries with economies in transition) and non-Annex I parties (developing countries) to the Climate Convention and the Kyoto Protocol—which applied this distinction to emission reduction commitments—was seen by some developing countries as a bulwark against efforts to single out some developing countries on account of their growing greenhouse gas emissions. The Bali Action Plan had begun to weaken the bulwark, replacing the distinction between Annex I and non-Annex I states with a more open-ended distinction between developed and developing countries.<sup>67</sup> Still, for many developing countries, the Bali Action Plan maintained at least a “firewall” against further differentiation and, hence, against emission reduction commitments for developing countries.<sup>68</sup>

At the time of this writing, the ultimate fate of the Kyoto Protocol is uncertain. A Danish proposal that would have set the post-2012 climate regime on a single instrument track was leaked to the press shortly after the beginning of the Copenhagen talks.<sup>69</sup> Developing countries, led by a small but determined group of states—which were widely seen to operate with at least the backing of China and India—resisted the formal introduction of the text into the negotiating

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66. See LAVANYA RAJAMANI, CTR. FOR POL’Y RESEARCH, THE “CLOUD” OVER THE CLIMATE NEGOTIATIONS: FROM BANGKOK TO COPENHAGEN AND BEYOND 1–3 (2009), available at <http://www.cprindia.org/policyupload/1256103508-CPR%20Polic%20Brief.pdf>.

67. See Bali Action Plan, *supra* note 15, para. 1(b)(i)–(ii); Chris Spence et al., *Great Expectations: Understanding Bali and the Climate Change Negotiation Process*, 17 REV. EUR. COMMUNITY & INT’L ENVTL. L. 142, 150 (2008) (commenting on the subtle but significant shift in the language of the Bali Action Plan).

68. See RAJAMANI, *supra* note 66, at 2.

69. See 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> (including link to the leaked “Danish text”).

process.<sup>70</sup> The fact that the proposal had apparently been developed in consultation with only the United States and the United Kingdom did not help matters, nor did the fact that many developing countries saw its content as skewed towards industrialized country preferences.<sup>71</sup> Whereas the Danish proposal appeared designed to lead to a replacement of the Kyoto Protocol, the last-minute Copenhagen Accord leaves the issue unmentioned.<sup>72</sup>

Nonetheless, the Copenhagen Accord suggests some softening in China and India's resistance to emission-related measures. Indeed, the document does contain some genuine breakthroughs. In addition to "quantified economy-wide emissions targets for 2020" by Annex I parties, it envisages "mitigation actions" by non-Annex I parties—a "first" in the climate regime.<sup>73</sup> Equally significant, however, is the fact that the Copenhagen Accord commits industrialized countries to providing "new and additional resources . . . approaching USD 30 billion for the period 2010–2012 . . . [and to mobilizing] USD 100 billion a year by 2020 to address the needs of developing countries."<sup>74</sup>

Broadly speaking, the Copenhagen Accord is consonant with the CBDR principle. At first glance, the fact that the Copenhagen Accord was negotiated by only a small number of states and only subsequently acknowledged by all parties to the climate regime may appear to undercut the notion of "common responsibility." Indeed, a "coalition of the willing" approach would seem to run counter to that notion. Many developing countries insisted on maintaining the consensus approach to decision making that had become the default practice in the climate regime and complained bitterly about the lack of access to and transparency of the negotiations that produced the

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70. See Dan Bodansky, *The Illegitimacy of "Legitimacy"*, OPINIO JURIS, Dec. 17, 2009, <http://opiniojuris.org/2009/12/17/the-illegitimacy-of-%e2%80%9clegitimacy%e2%80%9c>.

71. See Vidal, *supra* note 69.

72. Apparently, an earlier draft of the document was unacceptable to developing countries because of a preambular statement affirming parties' "firm resolve to adopt one or more legal instruments," thereby acknowledging the possible demise of the Kyoto Protocol. See Jonathan Watts, *What Was Agreed at Copenhagen—and What Was Left Out*, GUARDIAN, Dec. 19, 2009, <http://www.guardian.co.uk/environment/2009/dec/18/how-copenhagen-text-was-changed>.

73. Copenhagen Accord, *supra* note 1, paras. 4–5.

74. *Id.* para. 8.

Copenhagen Accord.<sup>75</sup> However, according to many observers, it was in fact a relatively small number of developing countries that blocked consensus decision making at a number of crucial junctures, while many other developing countries desperately wanted progress to be made.<sup>76</sup> What is more, while the Copenhagen Accord may have ruffled feathers in part because it was announced by the U.S. President before it had been released to, let alone sanctioned by, the parties to the Climate Convention,<sup>77</sup> it did appear to have had the support of the leaders of key industrialized and developing states from around the world.<sup>78</sup>

Even if, procedurally speaking, the Copenhagen Accord was squeezed out from between a rock and hard place, its substance is more in line with the idea of common responsibility. Developing countries did ultimately yield to a key demand of most industrialized states by agreeing to commit themselves internationally to the same instrument, albeit a nonbinding one.<sup>79</sup> Furthermore, notwithstanding the negotiation of the Copenhagen Accord by a small group of states, its aspiration is to operate in the context of the UNFCCC. It declares itself to be guided by the principles of the Climate Convention, including CBDR.<sup>80</sup> It also envisages drawing on the Climate Convention to implement a number of its key provisions. For example, the Conference of the Parties is to adopt guidelines for the measuring, reporting, and verification of Annex I emission reductions and financing, as well as for national communications by non-Annex I countries regarding their actions.<sup>81</sup> Similarly, in the context of the funding commitments by developed countries, the Copenhagen Accord envisages a Copenhagen Green Climate Fund to be

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75. See JOHN DREXHAGE & DEBORAH MURPHY, INT'L INST. FOR SUSTAINABLE DEV., COPENHAGEN: A MEMORABLE TIME FOR ALL THE WRONG REASONS?, INT'L INST. FOR SUSTAINABLE DEV. 2 (2009), [http://www.iisd.org/pdf/2009/cop\\_memo\\_rable\\_time\\_wrong\\_reasons.pdf](http://www.iisd.org/pdf/2009/cop_memo_rable_time_wrong_reasons.pdf).

76. See *id.*; Doniger, *supra* note 24; Bodansky, *supra* note 70; Dan Bodansky, *Sleepless in Copenhagen*, OPINIO JURIS, Dec. 19, 2009, <http://opiniojuris.org/2009/12/19/sleepless-in-copenhagen-2/> [hereinafter Bodansky, *Sleepless in Copenhagen*].

77. See DREXHAGE & MURPHY, *supra* note 75.

78. See Bodansky, *Sleepless in Copenhagen*, *supra* note 76; Doniger, *supra* note 24 (citing support by leaders of twenty-eight developed and developing countries).

79. See Doniger, *supra* note 24 (observing that such a development would have been unthinkable only a year earlier and that China and India would not have agreed to the accord had it been legally binding).

80. See Copenhagen Accord, *supra* note 1, pmb., para. 1.

81. *Id.* paras. 4–5.

“established as an operating entity of the financial mechanism of the [Climate] Convention . . . .”<sup>82</sup>

The ultimate relationship between the Copenhagen Accord and the climate regime is difficult to predict, and the Accord does not provide guidance on the matter. The Accord merely endorses two parallel decisions under the Climate Convention and the Kyoto Protocol, respectively, to extend by one year the formal negotiations towards an agreed-upon outcome on post-2012 climate action.<sup>83</sup> Many parties are still looking to bring the Accord more resolutely into the climate regime than was accomplished when parties decided only to take note of it.<sup>84</sup> Indeed, earlier drafts of the Accord had envisaged that it would be converted into a legally binding instrument within a year’s time. However, the relevant text was dropped (apparently) in the face of resistance by some states, including China, India, and Saudi Arabia.<sup>85</sup>

As for the idea of differentiated responsibilities, the Accord clearly distinguishes between industrialized and developing countries. As we have seen, it reverts to the rigid categorization of states as Annex I and non-Annex I and distinguishes the commitments of these two groups of parties. Furthermore, Annex I parties opt into the Copenhagen Accord by registering their target pledges in one appendix to the Accord, while developing countries register their emissions intensity pledges in another.<sup>86</sup> Finally, the Accord requires

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82. *Id.* paras. 8, 10.

83. See United Nations Framework Convention on Climate Change Ad Hoc Working Group on Long-Term Cooperative Action Under the Convention, *Draft Decision -/CP.15: Outcome of the Ad Hoc Working Group on Long-Term Cooperative Action Under the Convention*, para. 1, available at [http://unfccc.int/files/meetings/cop\\_15/application/pdf/cop15\\_lca\\_auv.pdf](http://unfccc.int/files/meetings/cop_15/application/pdf/cop15_lca_auv.pdf); United Nations Framework Convention on Climate Change Ad Hoc Working Group on Further Commitments for Annex I Parties Under the Kyoto Protocol, *Draft Decision -/CMP.5: Outcome of the Ad Hoc Working Group on Further Commitments for Annex I Parties Under the Kyoto Protocol*, para. 2, available at [http://unfccc.int/files/meetings/cop\\_15/application/pdf/cmp5\\_awg\\_auv.pdf](http://unfccc.int/files/meetings/cop_15/application/pdf/cmp5_awg_auv.pdf).

84. See, e.g., *UK’s Brown Says Climate Change Agreement Possible*, TIMES OF INDIA, Jan. 4, 2010, <http://timesofindia.indiatimes.com/home/environment/developmental-issues/UKs-Brown-says-climate-change-agreement-possible/articleshow/5409324.cms>.

85. See Bryson, *supra* note 3; PEW CTR. ON GLOBAL CLIMATE CHANGE, SUMMARY OF COP 15 AND CMP 5 (2009), <http://www.pewclimate.org/docUploads/copenhagen-cop15-summary.pdf>.

86. Copenhagen Accord, *supra* note 1, paras. 4–5.

developed countries to provide significant resources to developing countries. While the Accord therefore reflects the insistence of key developing countries on the distinction between industrialized and developing countries, it also suggests that the idea of differentiation among developing countries is taking hold. Within the group of non-Annex I parties, the Accord singles out least developed countries and developing nations that are especially vulnerable to climate change. Notably, whereas non-Annex I states “will implement mitigation actions, . . . least developed and small island developing States may undertake actions voluntarily and on the basis of support.”<sup>87</sup> The Accord also identifies the most vulnerable developing countries, “especially least developed countries, small island developing States and Africa” as priority recipients of adaptation funding.<sup>88</sup>

#### B. *The Climate Convention Objective*

The Copenhagen Accord fares less well when measured against the objective of the climate regime. To be sure, it declares itself to be in pursuit of the objective and endorses the two-degree Celsius temperature goal.<sup>89</sup> However, collectively, the reduction pledges made by Annex I countries in the lead up to the Copenhagen meetings have been calculated to promise a reduction only thirteen to nineteen percent below 1990 emission levels.<sup>90</sup> Although significant, these pledges remain considerably below the reduction range said to be required to meet the Climate Convention objective. As a result, and assuming that parties’ pledges will track their previous announcements, the Copenhagen Accord will not live up to the demands of the UNFCCC’s objective. In fact, when the most ambitious emissions pledges for 2020 by developed countries are combined with those made by China and India, recent estimates suggest that these efforts would put the world on track for, at a minimum, a 3.2-degree Celsius temperature increase by 2100.<sup>91</sup>

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87. *Id.* para. 5.

88. *Id.* para. 3.

89. *Id.* pmb1., paras. 1–2.

90. Kelly Levin & Rob Bradley, *Comparability of Annex I Emission Reduction Pledges 2* (World Res. Inst., Working Paper, 2009), available at [http://pdf.wri.org/working\\_papers/comparability\\_of\\_annex1\\_emission\\_reduction\\_pledges\\_2009-12-04.pdf](http://pdf.wri.org/working_papers/comparability_of_annex1_emission_reduction_pledges_2009-12-04.pdf).

91. See NIKLAS HÖHNE ET AL., CLIMATE ACTION TRACKER, COPENHAGEN CLIMATE DEAL—HOW TO CLOSE THE GAP? 6 (2009), [http://www.climateactiontracker.org/briefing\\_paper.pdf](http://www.climateactiontracker.org/briefing_paper.pdf).

As for a long-term target, the G8 Declaration of 2009 indicates that major developed countries were prepared to accept an eighty percent emissions cut by 2050, so long as all countries commit to achieving a fifty percent reduction in global emissions.<sup>92</sup> A similar approach was to find expression in the MEF Declaration but was ultimately rejected by the developing country members of the forum, led by China and India.<sup>93</sup> Developing countries were not satisfied with the draft text on mid-term targets for developed countries, which merely declared that the latter would “undertake robust aggregate and individual mid-term reductions in the 2020 timeframe.”<sup>94</sup> Instead, developing countries insisted that industrialized states make commitments in the twenty-five to forty percent range indicated by the IPCC.<sup>95</sup> The issue remained unresolved in Copenhagen, given the far more modest range of industrialized country commitments. Indeed, an earlier draft of the Copenhagen Accord contained a global goal to reduce emissions by fifty percent by 2050, with an industrialized country pledge of eighty percent.<sup>96</sup> The relevant passages were apparently dropped because of developing country concerns about an implicit commitment to long-term emission cuts on their part.<sup>97</sup>

#### IV. CONCLUSION

It is easy to dismiss the Bali Action Plan’s notion of a “shared

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92. See G8 Leaders Declaration, *supra* note 22.

93. See Alister Doyle, *Major Economies Consider Halving World CO<sub>2</sub>*, REUTERS, June 25, 2009, <http://www.reuters.com/article/idUSTRE55O4EJ20090625> (reporting a draft text according to which the MEF supported “[a]n aspirational goal of reducing global emissions by 50 percent by 2050, with developed countries reducing emissions by at least 80 percent by 2050” and declared that developed states would “[u]ndertake robust aggregate and individual mid-term reductions in the 2020 timeframe”).

94. *Id.* (internal quotation marks omitted).

95. See Patrick Wintour, *Developing Countries Urge G8 to Impose 40% Emissions Cut by 2020*, GUARDIAN, July 10, 2009, <http://www.guardian.co.uk/world/2009/jul/10/developing-countries-emissions-cut-g8>.

96. See David Biello, *Draft Text of New “Copenhagen Accord”*, SCI. AM., Dec. 18, 2009, <http://www.scientificamerican.com/blog/post.cfm?id=draft-text-of-new-copenhagen-accord-2009-12-18>.

97. See Chris Holly, *Disappointed Climate Delegates ‘Take Note’ of Vague Greenhouse Accord*, ENERGY DAILY, Dec. 19, 2009, <http://www.theenergydaily.com/events/climateconf2009-12-19.html>; DREXHAGE & MURPHY, *supra* note 75, at 3.

vision” for long-term climate action as empty rhetoric. I argue that the success of the global climate regime is not guaranteed by a mere deal among key participants. To be sure, the difficulties of the Copenhagen meeting resulted in good part from the reluctance of parties to make ambitious emission-related commitments. But the difficulties also stemmed from continuing disagreements about important aspects of the principle of common but differentiated responsibilities. It stands to reason that a viable post-2012 agreement must be consonant with that principle as well as with the regime’s objective. Only then will the foundation exist for specific commitments that are legitimate and that can generate a sense of commitment among parties. Measured against this yardstick, the Copenhagen Accord represents important progress in some respects but also falls considerably short in others.

The Copenhagen Accord does reflect the core elements of the CBDR principle. Indeed, in relation to CBDR, the Accord represents a flawed but nonetheless important step towards a shared understanding of the meaning of the principle, especially as it relates to differentiation among developing countries. Given the deficiencies in the process that led to the Accord, it is crucial that parties now consider the vision of CBDR that it contains. If a shared understanding is to emerge, that vision must be genuinely embraced by industrialized and developing states rather than simply “noted.”

By contrast, in relation to the regime objective, there appears to exist a shared understanding that temperature increases must be held to two degrees Celsius or potentially less.<sup>98</sup> Given the emission-related pledges made by key states prior to the Copenhagen meeting, all indications are that the Copenhagen Accord will not live up to the requirements of the objective. The fact that over 100 heads of state and government attended the Copenhagen Summit attests to the importance that governments and people around the world now attach to climate change. It is perhaps for this reason that U.S. President Obama and others have described the Copenhagen Accord as a “first step”<sup>99</sup> and an “essential beginning.”<sup>100</sup>

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98. See *supra* notes 24–25 and accompanying text.

99. See President Barack Obama, Remarks by the President During Press Availability in Copenhagen, *supra* note 2.

100. See, e.g., *UN Says Copenhagen Deal ‘a Start’*, BBC, Dec. 19, 2009, <http://news.bbc.co.uk/2/hi/science/nature/8422133.stm>.

What, then, should we make of the Copenhagen Accord? As I hope to have shown, the contours of any future agreement on climate change are intertwined with the overall objective and core principle of the climate regime. Both have shaped the negotiations and the positions that parties have taken. In turn, parties have progressively fleshed out the meaning of the regime objective, and their interventions under the auspices of the Bali Action Plan reveal concerted efforts to maintain or shift the meaning of the CBDR principle. The Copenhagen Accord may be best understood not as a makeshift solution to climate change but as a barometer for the evolving normative understandings in the climate regime.