The Glue That Binds or the Straw That Broke the Camel's Back?: Exploring the Implications of U.S. Reengagement in Global Climate Change Negotiations

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I. INTRODUCTION

For many years the roles of the main state players in climate politics were well-defined, if not desirable. The United States was the rogue state; the European Union was the vocal champion; the rapidly developing economies were the understandably absent but essential missing links; and the small island states and the least developed countries were the indignant victims. Recent global climate negotiations, however, reveal the extent to which political roles and relationships are in flux and a new, more complex political alignment is emerging.

Leading up to 2009, the global community had long pressed the United States to reengage in international climate policy and to implement progressive domestic action on climate change. The United States had been viewed as "the indispensable nation"[1] whose presence or

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1. This framing was made infamous by U.S. Secretary of State, Madeline Albright. *See, e.g.*, ADVISORY COMM. ON CULTURAL DIPLOMACY, U.S. DEP'T OF STATE, CULTURAL DIPLOMACY: THE LINCHPIN OF PUBLIC DIPLOMACY 3 (Sept. 2005).

absence from international climate negotiations controlled the ability of the international community to build a meaningful global climate regime. Heeding these calls, and led by President Barack Obama, the United States actively reengaged in international climate negotiations leading up to, and during, the 2009 Copenhagen Climate Change Conference. The rapid reengagement of the United States in international climate politics in 2009, however, failed to offer the panacea needed to facilitate global consensus and action on climate change. Instead, U.S. efforts to renew global climate leadership revealed the extent to which global power is now shared among key nation-states. In this way, negotiations at the Copenhagen Climate Conference began to reveal the parameters of a new political order. The United States, China, and India are at the center of that political order, with China increasingly demonstrating the extent to which it can control global negotiations.

Following this realignment, a central question confronting the global community is whether the reordering advances efforts to create a global framework for addressing climate change or, in fact, prompts devolution of power to a smaller group of political players. That is, has the United States unwittingly ceded—or began to share—its position as the "indispensable nation"[2] to China and, if so, what are the consequences not only for the United Nations Framework Convention on Climate Change (UNFCCC)[3] process but also for alternative or parallel efforts to structure an effective and equitable global climate change regime?

To begin to unpack these questions, Part II of this Article examines the evolution of climate politics from 1997 to 2010. This Part begins by considering the value of the popular narrative of global climate change politics, which focuses on singling out political leaders and laggards, before looking individually at the evolving roles of the United States and China in global climate politics. Part II continues by discussing how 2009 turned out to be an eventful year for global climate politics, beginning with great optimism but ultimately ending amongst dissolution and divergence. Part III examines, in more detail, the events of the Copenhagen Climate Change Conference to reveal the extent to which global climate politics have undergone significant reordering since the 1997 negotiations for the Kyoto Protocol. Finally, Part IV explores the implications of the emergent political order for future climate change

2. *Id.*

3. United Nations Framework Convention on Climate Change, May 9, 1992, 1771 U.N.T.S. 107, S. Treaty Doc. No. 102-38, U.N. Doc. A/AC.237/18 (Part II)/Add.1, 31 I.L.M. 849 (1992) [hereinafter UNFCCC].

negotiations and argues for renewed efforts to support multilateralism moving forward into a post-Kyoto world.

II. THE EVOLUTION OF CLIMATE POLITICS: 1997 TO 2009

A. Unpacking the Narrative

In the contemporary climate change narrative, the United States is portrayed as the great global laggard whose reluctance to engage in the international global climate change regime has not only hamstrung the functioning of the UNFCCC process but has also allowed steady increases in greenhouse gas emissions from both the developed and developing worlds.[4] In contrast, the European Union (EU) has long been heralded as the savior of the climate change negotiation process. During the first two decades of international climate negotiations, the EU emerged as the driver of momentum for progressive policymaking. The United States, in contrast, was perceived not merely to be lagging but also impeding the international regime-building process. Within this overriding narrative of transatlantic divergences, the rapidly developing economies—here, with particular reference to China, India, and Brazil—managed to avoid becoming the focal point for global critique.

The popularity of this narrative ultimately helped generate the international pressure necessary to compel U.S. reengagement in the international climate change process, but it also disguised important underlying facts and shifted attention away from those parts of the world where greenhouse gas emissions were growing at an unparalleled rate. First, the narrative mischaracterized the roles of the EU and the United States in early climate negotiations. Despite early successes in developing a unified regional policy, the EU did not play a prominent role in shaping the form and substance of the UNFCCC and the Kyoto

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4. *E.g.*, ZhongXiang Zhang, *Copenhagen and Beyond: Reflections on China's Stances and Responses* 17 (East-West Center, Working Paper No. 111, 2010), *available at* http://www.eastwestcenter.org/fileadmin/stored/pdfs//econwp111.pdf (noting that prior to the U.S. decision to abstain from the Kyoto Protocol, China had felt great diplomatic and political pressure to engage more fully in domestic and international efforts to reduce greenhouse gas emissions).

> This situation changed once the U.S. withdrew from the Kyoto Protocol. The U.S. withdrawal from the Kyoto Protocol in 2001 not only led current U.S. emissions to be well above their 1990 levels and the world [to lose] eight years of concerted efforts towards climate change mitigation and adaptation, [but] also removed international pressure on China to take climate change mitigation actions at a time when the Chinese economy [is] growing rapidly.

Id. at 6-7.

Protocol.[5] The United States, in fact, wielded significant amounts of power during early climate negotiations and served as a primary architect of both the UNFCCC and the Kyoto Protocol.[6] The EU's primary influence on climate negotiations only truly began following the Bush Administration's secession from the Kyoto Protocol in 2001.[7] Thus, while the EU has been widely heralded as an international climate leader and the United States as an international climate laggard, the United States played a more dominant role in constructing the existing international legal regime. This fact is particularly important when juxtaposed against the role that the United States played twelve years later during the Copenhagen Climate Conference, as will be discussed further in Part III below.

The political power and indispensability of the United States in early climate negotiations is best illustrated by the role that the United States played in developing the Kyoto Protocol. The United States was the institutional architect for the Kyoto Protocol. Its role in this regard was due in large part to the presence of former Vice President Al Gore at the 1997 negotiations for the Protocol.[8] Despite facing staunch domestic resistance to the ratification of a legally binding protocol to the UNFCCC,[9] Vice President Gore succeeded in shaping the parameters of the Protocol. Aggressive negotiations by the United States prompted the inclusion of the flexibility mechanisms, which have become the backbone of climate initiatives globally, including EU strategies.[10] Vice President Gore negotiated from a position of weakness. He knew that the United States was unlikely to ratify the Protocol he helped negotiate; he knew that even among the Clinton Administration his position was weakly supported. Despite this knowledge, he worked until the end to structure the Protocol along lines favoured by his negotiating team. His

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5. Kyoto Protocol to the United Nations Framework Convention on Climate Change, U.N. Doc. FCCC/CP/1997/7/Add.1, Dec. 10, 1997 (1998) [hereinafter Kyoto Protocol], *available at* http://unfccc.int/resource/docs/convkp/kpeng.pdf.

6. Steinar Andresen & Shardul Agrawala, *Leaders, Pushers and Laggards in the Making of the Climate Regime*, 12 GLOBAL ENVTL. CHANGE 41, 46 (2002).

7. CINNAMON PIÑON CARLARNE, CLIMATE CHANGE LAW AND POLICY: EU AND US APPROACHES 9 (2010).

8. Andresen & Agrawala, *supra* note 6, at 48.

9. *Id.* In response to the U.S. executive branch's apparent disregard for congressional priorities, on July 25, 1997, the U.S. Senate passed the Byrd-Hagel Resolution by a margin of 95-0. *Id.*; Byrd-Hagel Resolution, S. Res. 98, 105th Cong. (1997). This Resolution expressed the view of the Senate that the United States should not be a signatory to *any* protocol that exempted developing countries from legally binding obligations. S. Res. 98. The passage of the Byrd-Hagel Resolution virtually precluded the possibility that the United States subsequently would ratify the drafted Kyoto Protocol. Andresen & Agrawala, *supra* note 6, at 48 n.13.

10. Andresen & Agrawala, *supra* note 6, at 48.

ability to influence climate negotiations was profound; the existing international framework is, in large part, a by-product of a United States'—more specifically, Vice President Gore's—vision. In this way, the United States was indeed a profound early climate leader in terms of its actual ability to shape climate negotiations.[11] The power that the United States so deftly wielded in Kyoto in 1997 stands in stark contrast to the U.S. presence during the 2009 Copenhagen negotiations where, as described below, the United States found itself one of many players in an open political field.

The transatlantic-focused narrative of leaders and laggards not only glossed over the very critical and influential role the United States played in negotiating the framework for the international climate change regime, but it also focused attention on the United States in a way that allowed the rapidly developing economies to evade close scrutiny during the formative years of the climate regime. Following the United States' show of power during the negotiations for the Kyoto Protocol, the Clinton Administration declined to submit the Kyoto Protocol to the U.S. Senate for ratification due to fear of failure; subsequently, President George W. Bush ultimately chose to rescind the U.S. signature to the Protocol.[12] The U.S. decision to abscond from the international climate regime lifted pressure off the rapidly developing economies and allowed emissions to grow unabated in both the United States and in the large economies of China and India, among others. Had the United States followed up its negotiating skills with a commitment to the Protocol, the growing emissions from the rapidly developing economies would likely have come under closer scrutiny at a much earlier point in time.

Instead, the United States' abstention from the international regime was perceived by the global community as an egregious nose-thumbing of the international process that enabled the rapidly developing economies to displace attention and outrage at the grievous omissions of the developed world. When the United States chose not to undertake international *or* domestic emissions reduction efforts, the large economies in the East heaved a great sigh of relief as—based upon the foundation principle of common but differentiated responsibility (CBDR)—the developed world could not claim any credible leverage over the developing economies in the absence of consensus and

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11. *See, e.g.*, CARLARNE, *supra* note 7, at 7-9.

12. *See, e.g.*, DANA R. FISHER, NATIONAL GOVERNANCE AND THE GLOBAL CLIMATE CHANGE REGIME 127-31 (2004); Michael Lisowski, *Playing the Two-Level Game: US President Bush's Decision To Repudiate the Kyoto Protocol*, ENVTL. POL., Winter 2002, at 101, 101-03.

concerted action on the part of the developed world.[13] Consequently, when the global community met in Copenhagen twelve years later, both the United States and the rapidly developing economies arrived at the meeting with greenhouse gas emissions records; only, instead of emissions reduction records they brought record emissions increases.

B. The United States and Beyond: China Emerges

1. The United States and Beyond: The Narrative

Between 1997 and 2009, the United States did not actively engage in international climate negotiations, and it did not pass domestic legislation intended to limit greenhouse gas emissions.[14] Yet, despite these obvious omissions, climate politics did evolve in the United States. Due in large part to a flurry of activity on the part of the states, regional coalitions, and civil society, a body of law applicable to climate change began to emerge from the ground up.[15] Looking beyond the common categorization of the United States as the absentee player in climate politics, a more nuanced analysis of climate change policy making in the United States reveals a complicated picture of pushes and pulls—of stagnation and resistance to change in the highest levels of the federal administration, meeting innovation and pressure for progress from virtually every corner of the public and private sectors.

For example, despite credible concerns about the economic irrationality of state actions to regulate the global commons in the absence of federal coordination and oversight, the United States has witnessed a flurry of legal and political activity at the subfederal level.

> States have adopted a variety of legal, regulatory, and policy measures to address climate change, to include: 46 states have greenhouse gas inventories; 33 states have adopted climate action plans; 20 states have public benefit funds; 20 states have adopted greenhouse gas emission targets; 28 states have renewable energy portfolio standards; 16 states are in

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13. For excellent discussions of the principle of Common but Differentiated Responsibility, see Christopher D. Stone, *Common but Differentiated Responsibilities in International Law*, 98 AM. J. INT'L L. 276, 278 (2004), and Paul G. Harris, *Common but Differentiated Responsibility: The Kyoto Protocol and United States Policy*, 7 N.Y.U. ENVTL. L.J. 27, 38-40 (1999). *See also* 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, 120-22 (2000).

14. Jonathan B. Wieher, *Radiative Forcing: Climate Policy To Break the Logjam in Environmental Law*, 17 N.Y.U. ENVTL. L.J. 210, 211, 216-17 (2008).

15. *See, e.g.*, Cinnamon Carlarne, *Notes from a Climate Change Pressure-Cooker: Sub-Federal Attempts at Transformation Meet National Resistance in the USA*, 40 CONN. L. REV. 1351 (2008).

> the process of adopting greenhouse gas emission standards for automobiles; 18 states have mandatory [carbon dioxide (CO_2)] reporting programs; 24 states have formed climate change advisory boards; [and] 33 states are participating in one or more of eight existing regional climate change initiatives.[16]

This level of state and regional environmental activism is unheralded in the United States in the absence of federal mandate.

Complementing state and regional programs, climate-based litigation has also emerged as a popular and effective avenue for effecting more widespread and immediate change in the context of climate change policy. More than two dozen lawsuits related to global climate change "currently sit on the dockets of our federal and state courts,"[17] and the seminal Supreme Court of the United States case of *Massachusetts v. EPA* permanently redefined the face of climate change law and policy in the United States in 2007.[18] The phenomenon of grassroots pressure driving environmental change in the United States is not new. In the case of climate change, however, the profile and ingenuity of these inaptly named "grassroots" efforts to influence policymaking in the United States reflect both the novel social and political challenges posed by climate change and the internal conflict characterizing U.S. climate

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16. CARLARNE, *supra* note 7, at 61-62. Currently one of the most popular ways that states seek to engage with the climate change debate is through greenhouse gas inventories. *Id.* at 62 n.4.

17. JUSTIN R. PIDOT, GEO. UNIV. L. CTR., GLOBAL WARMING IN THE COURTS: AN OVERVIEW OF CURRENT LITIGATION AND COMMON LEGAL ISSUES 1 (2006), http://www.law.georgetown.edu/gelpi/current_research/documents/GlobalWarmingLit_CourtsReport.pdf; *see also* Michael B. Gerrard & J. Cullen Howe, *Climate Change Litigation in the U.S.*, http://www.climatecasechart.com/ (last visited June 18, 2010).

18. 549 U.S. 497 (2007). *Massachusetts v. EPA* involved a challenge to the EPA's denial of a petition to regulate carbon dioxide and other greenhouse gases from new automobiles under § 202(a)(1) of the Clean Air Act (CAA), and an EPA general counsel memorandum claiming that the EPA lacks authority to regulate greenhouse gases under the CAA. *Id.* at 510-12. After four months of deliberation, on April 2, 2007, the Supreme Court issued one of the most important decisions in modern U.S. environmental law. In a 5-4 split decision, the Court overturned the D.C. Circuit and held that Massachusetts had standing to challenge the EPA's denial of their rulemaking petition, that the Court has the authority to review the EPA's decisions, that the EPA has the authority to regulate greenhouse gases from new motor vehicles under the Clean Air Act § 202(a)(1), and that neither policy grounds nor scientific uncertainty provided permissible considerations for the EPA's decision to avoid regulating greenhouse gases under § 202(a)(1). *Id.* at 526, 532-35. The Court had "little trouble concluding" that the CAA "authorizes EPA to regulate greenhouse gas emissions from new motor vehicles" and then concluded that EPA's decision not to regulate greenhouse gases based on scientific or policy grounds was "arbitrary, capricious, . . . or otherwise not in accordance with law." *Id.* at 528, 534 (internal quotation marks omitted). The Court remanded the case, directing the EPA that in reevaluating its decision whether to regulate greenhouse gases under the CAA, it "must ground its reasons for action or inaction in the statute." *Id.* at 535.

politics. There is a growing body of literature exploring subfederal efforts to influence U.S. climate policy[19] that reveals the extent to which the United States has offered a vibrant backdrop for creative and progressive efforts to address climate change while simultaneously revealing the depths of inaction on the part of the federal government.

Just as the dominant climate narrative overlooks the role that the United States played in shaping the international climate regime, so does it overlook the diversity of efforts within the United States to respond to climate change. These shortcomings aside, however, the global climate narrative accurately portrays the United States as offering little in the way of substantive emissions reductions or symbolic legal or political gestures to an international negotiating process that hinges on meaningful cooperative action. Thus, despite an upwelling of domestic action, the United States had very little to offer the international community in terms of measurable actions and virtually no meaningful leverage to wield as the global community prepped for the next round of global climate negotiations in late 2009.

2. U.S. Doctrine and the Emergence of China

During this pivotal time for global climate policy, the United States rationalized its abstention from active participation in the international climate regime primarily based upon scientific uncertainty and, perhaps more importantly, the perceived economic hardships associated with addressing climate change. With regard to climate science, until 2009, the United States adopted a "sound science" approach to climate change[20]—that stood in contrast to the more pervasively favoured precautionary approach—in demanding sound science on climate change before legal action would be justified. Since climate negotiations began in the early 1990s, for example, the EU has pushed for a climate regime based on the precautionary principle,[21] as opposed to the U.S.-advocated

19. *E.g.*, *id.*; Kirsten H. Engel & Scott R. Saleska, *Subglobal Regulation of the Global Commons: The Case of Climate Change*, 32 ECOLOGY L.Q. 183, 219 (2005); Kirsten H. Engel, *Mitigating Global Climate Change in the United States: A Regional Approach*, 14 N.Y.U. ENVTL. L.J. 54, 64 (2005); Barry G. Rabe et al., *State Competition as a Source Driving Climate Change Mitigation*, 14 N.Y.U. ENVTL. L.J. 1, 17 (2005).

20. George W. Bush, President of the United States, Speech at the National Oceanic and Atmospheric Administration, Silver Spring, Maryland (Feb. 14, 2002), http://www.guardian.co.uk/environment/2002/feb/14/usnews.globalwarming (stating that decisions about climate change should be made "on sound science; not what sounds good, but what is real" and suggesting that current research does not "justify" curtailing greenhouse emissions).

21. *Communication from the Commission on the Precautionary Principle*, at 2, COM (2000) 1 final (Feb. 2, 2000).

"sound science" approach.[22] A precautionary approach to climate change would dictate that "[w]here there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation."[23] In contrast, the term "sound science," while possessing no technical meaning, was adopted by climate change skeptics as an alternative framework to the precautionary principle for guiding climate decision making.[24] The term "sound science" first became a popular catchphrase during transatlantic trade debates over the use of genetically modified organisms[25] and later spilled over into the climate change debate. Typically, advocates of a sound science approach demand higher standards of proof and greater levels of certainty as well as more rigorous cost-benefit analyses as prerequisites for responsive regulatory actions.[26] Calls for a sound science approach became synonymous with U.S. resistance to early actions to reduce greenhouse gas emissions. The United States relied on a perceived lack of scientific certainty—for example, the absence of sound science—as one of the primary reasons for failing to adopt domestic or international emissions reduction obligations.

Economic competitiveness concerns offered the second, and arguably more influential, factor underpinning the United States' long-standing hesitancy to commit to legally binding emissions reduction commitments. Drawing upon concerns initially expressed by a bipartisan U.S. Senate in the 2007 Byrd-Hagel Resolution,[27] during his two terms in office President George W. Bush consistently represented legally enforceable emissions reduction obligations—at the domestic or

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22. PETER H. SAND, TRANSNATIONAL ENVIRONMENTAL LAW: LESSONS IN GLOBAL CHANGE 134 (1999); *see also* Joseph Murphy et al., *Regulatory Standards for Environmental Risks: Understanding the US-European Union Conflict over Genetically Modified Crops*, 36 SOC. STUD. SCI. 133, 133 (2006).

23. United Nations Conference on Environment and Development, Rio de Janiero, Braz., June 3-14, 1992, *Rio Declaration on Environment and Development*, princ. 15, U.N. Doc. A/CONF.151/26/Rev.1 (Aug. 12, 1992) [hereinafter *Rio Declaration*].

24. "Sound science" has been interpreted by one environmental law scholar as meaning "[w]e will not act until the science is conclusive, i.e., *a cold day in hell*." Oliver Houck, *How Industry Hijacked "Sound Science,"* TIMES-PICAYUNE (New Orleans), Jan. 29, 2004, at 7 (emphasis added); *see also* Patrick Parenteau, *Anything Industry Wants: Environmental Policy Under Bush II*, 14 DUKE ENVTL. L. & POL'Y F. 363, 364 (2004); Chris Mooney, *Beware "Sound Science." It's Doublespeak for Trouble*, WASH. POST, Feb. 29, 2004, at B2.

25. *See* Cinnamon Carlarne, *From the USA with Love: Sharing Home-Grown Hormones, GMOs, and Clones with a Reluctant Europe*, 37 LEWIS & CLARK L. SCH. ENVTL. L. 301, 309 (2007).

26. *See* Myanna Lahsen, *Technocracy, Democracy, and U.S. Climate Politics: The Need for Demarcations*, 30 SCI. TECH. & HUM. VALUES 137 (2005).

27. Byrd-Hagel Resolution, S. Res. 98, 105th Cong. (1997).

international level—as a threat to U.S. economic well-being and as placing the United States at a global economic disadvantage in relation to the fast-developing economies of China, India, and Brazil.[28] Economic growth and global competitiveness concerns have dominated U.S. and global climate debates since the early 1990s, but in the United States, global competitiveness concerns effectively barred any possibility of the United States' participating in the Kyoto Protocol or any other similarly fashioned international agreement.

Primary amongst its economic concerns was how the United States would fare against China, its most important global competitor, if the two countries were subject to different emissions reduction requirements. And, just as the United States' decision to abstain from the Kyoto Protocol created moral and legal space for the rapidly developing economies to object to limits on growth in their greenhouse gas emissions, so too did the United States' reliance on scientific uncertainties and economic rationality as justifications for delaying action on climate change provide ample opportunities for these same emerging economies to adopt U.S. reasoning to justify not only inaction but also emissions growth. Nowhere was this truer than in China, the country now positioned to challenge U.S. global hegemony.[29]

During the formative period for global climate politics, China was undergoing unheralded levels of economic industrialization. Following the period of economic reform initiated in 1978,[30] in what is possibly the greatest testament to the processes of economic globalization initiated by the Bretton Woods System and expanded by the creation of the World Trade Organization (WTO), China underwent a remarkable transition from a closed economy to a global economy capable of accomplishing surprising levels of growth performance. Since the 1980s, China has recorded increases in gross domestic product (GDP) in excess of 8% to 9% a year, on average, with the World Bank projecting China's long-term average annual growth at 5.5% for the period of 2011 to 2020.[31] By

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28. *See* Lisowski, *supra* note 12, at 106-07, 111.

29. *See* Eric A. Posner & John Yoo, *International Law and the Rise of China* (Univ. of Chi. Law Sch., Public Law & Legal Theory Working Paper No. 127, May 2006); Matthew Paterson, *Post-Hegemonic Climate Politics?*, 11 BRIT. J. POL. & INT'L REL. 140 (2009); *see also* Barry Buzan, *A Leader Without Followers? The United States in World Politics After Bush*, 45 INT'L POL. 554, 560-62 (2008).

30. *See, e.g.*, Yan Wang & Yudong Yao, *Sources of China's Economic Growth, 1952-99: Incorporating Human Capital Accumulation* (World Bank Policy Research, Working Paper No. 2650, July 2001).

31. Arnaldo M. Gonçalves, *China's Swing from a Planned Soviet-Type Economy to an Ingenious Socialist Market Economy: An Account of 50 Years* 1 (Centro Argentino de Estudios Internacionales, Working Paper No. 019, 2006); *see also* VIKRAM NEHRU ET AL., WORLD BANK,

2005, China had become the world's second-largest economy, second only to the United States.[32] As one of the largest and most populous nation in the world, China's economic growth—coupled with massive levels of spending on its growing military[33]—transitioned the country from a significant but secondary actor in international politics to one of the most dominant economic and political players in modern times.

As China's economy grew, so too did its environmental footprint. Coal fed China's growing energy demands and allowed China to accommodate increasing export demands from the global community. By 2004, China was an export-driven economy, with a reported 23% of total carbon dioxide emissions accrued by export goods.[34] A report released by the U.S. Energy Information Administration (EIA) in that same year estimated that "[i]n 2001, China and India together accounted for 17 percent of total world carbon dioxide emissions, as compared" to the United States, which accounted for 24% of global emissions,[35] and projected carbon dioxide emissions from the developing world (here, lumping together China and India) would exceed carbon dioxide emissions from the industrialized world by 2020.[36] Three years later, the 2007 EIA report projected that "by 2030, carbon dioxide emissions from China and India combined are projected to account for 31 percent of total world emissions, with China alone responsible for 26 percent of the world total,"[37] further noting that China was experiencing the largest annual global growth in energy-related carbon dioxide emissions and that China and India together accounted for 72% of the projected world increment in coal-related carbon dioxide emissions.[38]

These staggering numbers, however, proved to be inaccurate. By the end of 2007, China had reportedly outpaced the United States to become the world's largest carbon emitter,[39] with the EIA projecting that

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CHINA 2020: DEVELOPMENT CHALLENGES IN THE NEW CENTURY 1 (Sept. 1997); WORLD BANK, GLOBAL ECONOMIC PROSPECTS AND THE DEVELOPING COUNTRIES (Sept. 1997); *Country Briefings: China*, ECONOMIST, Jan. 16, 2010, http://www.economist.com/countries/China/.

32. *See* Posner & Yoo, *supra* note 29, at 4.

33. Gonçalves, *supra* note 31, at 1.

34. *See* Tao Wang & Jim Watson, *Who Owns China's Carbon Emissions?*, TYNDALL BRIEFING NOTE, Oct. 2007, at 1, 1; *see also* Tan Kai Liang, *From Kyoto to Post-2012: The Implications of Engaging China for Environmental Norms and Justice*, 17 U. BALT. J. ENVTL. L. 33, 39 (2009).

35. ENERGY INFO. ADMIN., INTERNATIONAL ENERGY OUTLOOK 2004, at 15 (Apr. 2004), http://tonto.eia.doe.gov/ftproot/forecasting/0484(2004).pdf.

36. *Id.* at 15-17.

37. ENERGY INFO. ADMIN., INTERNATIONAL ENERGY OUTLOOK 2007, at 74-86 (May 2007), http://tonto.eia.doe.gov/ftproot/forecasting/0484(2007).pdf.

38. *Id.* at 76.

39. Zhang, *supra* note 4.

China's energy-related carbon emissions would exceed U.S. emissions by almost 15% in 2010 and by 75% in 2030.[40] Putting these figures in perspective, the 2008 EIA report notes, "In 1980, China and India together accounted for less than 8 percent of the world's total energy consumption [but that, by] 2005[,] their share had grown to 18 percent"[41] and that over the next twenty-five years, India and China's combined energy use is expected to more than double, in contrast to the United States whose share of total world energy consumption is projected to contract from 22% in 2005 to about 17% in 2030.[42]

China's rapid rise to become the top global climate emitter had the dual effect of jeopardizing global efforts to stabilize greenhouse gas emissions in the near term and empowering China in global climate negotiations. China's massive carbon footprint makes it imperative that China be a full and willing participant in global efforts to address climate change. Absent China's active participation in the climate regime, global carbon emissions will continue to rise at dangerous rates even if the rest of the world is able to curb emissions growth. As one scholar characterizes the situation, "China's and other developing countries' GHG emissions are growing so fast that they will push global atmospheric GHG concentrations beyond 450 parts per million (ppm) by the year 2070 . . . even if all emissions from industrialized countries such as the United States and Europe were reduced to zero today."[43] Further, if China were to remain outside of the global climate regime, the international community would be faced with daunting problems of international emissions leakage, that is, a global race to the bottom, whereby energy intensive operations would be outsourced from areas subject to emissions regulation to areas, such as China, where no such regulations apply.[44] China, thus, now rivalled the United States for the role of the indispensable actor in climate politics.

In essence, by 2009, the global climate change regime could neither survive nor evolve without the participation of both the United States and China. Yet leading into the 2009 negotiations, while both the United States and China made politically positive overtures, the two countries appeared to be locked in a deadly prisoner's dilemma, with neither state willing to put its economic future on the line. In this game playing, the

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40. ENERGY INFO. ADMIN., INTERNATIONAL ENERGY OUTLOOK 2008, at 94 (Sept. 2008), http://www.eia.doe.gov/oiaf/ieo/pdf/0484(2008).pdf.

41. *Id.* at 7.

42. *Id.* at 7-8.

43. Jonathan B. Wiener, *Climate Change Policy and Policy Change in China*, 55 UCLA L. REV. 1805, 1808 (2008).

44. *Id.* at 1808-09.

United States and China were similarly positioned as big polluters and key economic and political actors, and they converged in their reluctance to jeopardize economic growth and prosperity by becoming subject to legally binding emissions reduction obligations.[45] These similarities aside, however, the countries diverged on fundamental questions of ethics and responsibility. In particular, China and the United States disagreed over the application and meaning of CBDR, as expressed by the UNFCCC.[46]

The UNFCCC was the first multilateral environmental agreement to explicitly embed CBDR as a guiding principle of the agreement.[47] In the UNFCCC, the term is used to suggest that the international community shares a common responsibility for protecting the global atmosphere and that the responsibility for addressing global climate change should be differentiated among the countries of the world based on past contribution to the problem as well as present capacity to respond.[48] Inclusion of the principle of CBDR in the UNFCCC divided the international community in 1992 and it continues to divide the international community today. During the UNFCCC negotiations, many developed countries, including the United States, opposed the inclusion of CBDR fearing that it created legal obligations additional to the primary obligations set out in the Convention. When it became evident that inclusion of CBDR was vital to the continuing participation of developing countries—including China—the United States modified its approach and instead of opposing inclusion of the principle, it sought to limit the scope of its usage. To limit the reach of the principle, the United States introduced amendments to add a *chapeau* specifying that principles were to "guide" parties only, to replace the term "states" with the term "Parties," to add the term "*inter alia*" to the *chapeau* to clarify that Parties are free to consider principles other than those specifically listed in article 3.[49] In seeking these modifications, the United States sought to preempt suggestions that the principles in article 3 constitute part of customary international law and, thus, take on greater normative status.[50] The United States succeeded in curtailing the language of article 3. Despite these modifications, however, over time CBDR emerged as

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45. *Id.* at 1810.
46. CARLARNE, *supra* note 7, at 338-39.
47. UNFCCC, *supra* note 3, art. 3(1).
48. Rajamani, *supra* note 13, at 121.
49. *Id.* at 124; Daniel Bodansky, *The United Nations Framework Convention on Climate Change: A Commentary*, 18 YALE J. INT'L L. 451, 502 (1993).
50. Bodansky, *supra* note 49, at 502.

the "overall principle guiding the future development of the climate regime."[51]

Despite widespread recognition that CBDR is a guiding principle for the climate regime, entrenched disagreements continue to exist over its meaning. While the United States has never openly rejected the notion of CBDR, it has long advocated an interpretation of the term that differs from the interpretation suggested by the G77/China. The United States advocates an interpretation of CBDR that allows for differentiation of commitments between developed and developing countries while still expecting meaningful participation by developing countries in the climate regime differentiated based upon levels of development and capacity to act.[52] In contrast, the G77/China has traditionally advocated an interpretation of CBDR that explicitly rejects the notion that developing countries should undertake any legally binding commitments and, instead, suggests that developing countries responsibilities under the climate change regime are limited to efforts to promote sustainable development, adaptation, and domestic reporting.[53]

As will be discussed below, the relative roles and responsibilities of the industrialized world and the developing world divided the delegates present at the Copenhagen Conference. In key part, the United States pushed more aggressively than ever for meaningful, transparent, and verifiable action on the part of the rapidly developing economies while the alliance among the G77/China began to show signs of division as the needs and interests of China were increasingly seen as diverging from those of the larger group. Despite signs of disagreement over the relative roles and responsibilities of differently situated developing countries, the G77/China managed to avoid coming apart at the seams in large part due to a recognized mutual dependency among the parties.

China and the larger G77 continue to need each other; China relies on its alliance with the G77 so as not to stand in isolation against the rest of the world, while the larger G77 clings to its alliance with China despite significant discrepancies in position due to its desire to align itself with a country that now possesses unprecedented levels of economic and political power.[54] However, the alliance between China and the G77 shows signs of fragility over China's continuing desire to

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51. Rajamani, *supra* note 13, at 124.

52. *See* CARLARNE, *supra* note 7, at 337-38.

53. *Id.* at 339.

54. Antto Vihma, *Elephant in the Room: The New G77 and China Dynamics in Climate Talks* 1, 9 (Finnish Inst. of Int'l Affairs, Briefing Paper No. 6, May 26, 2010), http://www.upi-fiia.fi/assets/publications/UPI_Briefing_Paper_62_2010.pdf.

utilize this partnership as a way to avoid taking on a more meaningful role in the global climate regime. Increasingly, other members of the G77 view China's actions as depriving CBDR of meaning in a way that impairs the rights of a majority of the developing countries. Yet the alliance holds.

Although internal divisions plague G77/China relations over the interpretation of CBDR, one issue on which China stands firm is its opposition to the U.S. interpretation of CBDR and to U.S. demands for China to begin making deep cuts to its greenhouse gas emissions.[55] Citing the United States' role as the largest historical contributor to global greenhouse gas emissions and its failure to adopt international or domestic greenhouse gas emissions reduction obligations, the inadequate emissions reduction programs implemented in the rest of the industrialized world since the entry into force of the Kyoto Protocol, the inequitable use of a 1990 baseline,[56] the slow pace of technology transfer, inadequate levels of financial assistance, and the continuing need to raise standards of living and per capita income, China continues to oppose U.S. demands that China adopt deep emissions cuts.

In resisting mounting calls for it to take on binding commitments of some form, China relies on norms of noninterference, sovereignty, and the right to development to defend its position.[57] Fundamentally, though, in common agreement with the larger G77, China emphasizes that industrialized countries must make significant inroads into reducing domestic greenhouse gas emissions and provide significantly improved levels of technological and financial assistance to developing countries for their own mitigation efforts before calling for a new binding system of international commitments that includes the rapidly developing economies. To this end, China's official position on the Copenhagen Climate Change Conference affirms its understanding of the principle of CBDR, stating:

> Developed countries shall take responsibility for their historical cumulative emissions and current high per capita emissions to change their unsustainable way of life and to substantially reduce their emissions and, at

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55. *Climate Change: Proposal To Require Developing Countries To Reduce Emissions Rebuffed by China*, 29 Env't Rep. (BNA) 1337-38 (Nov. 6, 1998).

56. China and other developing economies view the use of a 1990 baseline as inequitable because per capita and total greenhouse gas emissions in the developing world were still comparatively very low in 1990 and, thus, using a 1990 baseline as a determinant for "good" levels of emissions essentially freezes levels of development at 1990 levels, with dramatically different effects for industrialized and developing countries. *See, e.g.*, Liang, *supra* note 34, at 41-42.

57. Wiener, *supra* note 43, at 1812-13.

> the same time, to provide financial support and transfer technology to developing countries. Developing countries will, in pursuing economic development and poverty eradication, take proactive measures to adapt to and mitigate climate change.[58]

After the statement confirms that "China remains determined to take unrelenting efforts to address climate change," the statement goes on to define its understanding of the objectives of the Conference to be:

> 1. To set deeper quantified emission reduction targets for developed countries for the second commitment period under the *Kyoto Protocol*, and to ensure comparability of quantified emission reduction commitments by developed countries that are Parties to the *Kyoto Protocol* and that are not;
> 2. To establish effective institutional arrangements to ensure that developed countries are fulfilling their commitments to provide technology, financing and capacity building support to developing countries; [and]
> 3. To enable developing countries to take nationally appropriate mitigation and adaptation actions, in the context of sustainable development, supported by technology, financing and capacity building from developed countries.[59]

Finally, in concluding its position statement, China emphasizes that "[g]iven their historical responsibility and development level and based on the principle of equality, developed countries shall reduce their GHG emissions in aggregate by at least 40% below their 1990 levels by 2020 and take corresponding policies, measures and actions."[60] This, in China's opinion, is the only way to avoid the perpetuation of an unjust world order.[61]

China's tough international posture reflects a desire to ward off externally imposed obligations. At the domestic level, however, there are increasing indications that China is taking small steps to rethink its approach to climate change. China's evolving environmental regime has received substantial consideration elsewhere,[62] but here it is worth noting

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58. *Implementation of the Bali Roadmap: China's Position on the Copenhagen Climate Change Conference*, EMBASSY OF THE PEOPLE'S REPUBLIC OF CHINA IN THE REPUBLIC OF BOTSWANA (May 20, 2009), http://bw.china-embassy.org/eng/xwdt/t566992.htm.

59. *Id.*

60. *Id.*

61. *See* Vihma, *supra* note 54, at 8-9.

62. *See, e.g.*, Stephen Tsang & Ans Kolk, *The Evolution of Chinese Policies and Governance Structures on Environment, Energy and Climate*, 20 ENVTL. POL'Y & GOVERNANCE 180 (2010); Stefanie Beyer, *Environmental Law and Policy in the People's Republic of China*, 5 CHINESE J. INT'L L. 185 (2006); Pamela Howlett, *Striking the Right Balance: The Contrasting Ways in Which the United States and China Implement National Projects Affecting the*

that there is reason to believe that domestic pressure may be a critical factor in persuading China to adopt a more proactive approach to climate change—much as it has been in the United States. While the international community lacks effective leverage to induce China to take on meaningful emissions reduction commitments in the near term, there are increasing indications that the Chinese government is experiencing growing levels of pressure from its domestic constituency to address environmental problems generally, and energy security and climate change specifically.[63]

Prompted both by international and domestic concerns, beginning in the late 1970s, China began the gradual process of building an extensive system of environmental law.[64] In China, the legislature—the National People's Congress (NPC)—is the primary unit of national governmental power. The NPC consists of roughly 3000 members and only meets one time each year, making it difficult for the NPC to effectively legislate on anything but primary state concerns.[65] Thus, much of the day-to-day legislative decision making in China is done by the NPC's Standing Committee.[66] In the realm of environmental law, the primary Standing Committee is China's lawmaking body. Because Chinese lawmaking is top-heavy, the laws—including environmental laws—are often drafted by the Standing Committee using very ambiguous language, thus providing local agencies with considerable breadth in how they interpret and implement the laws.[67] As a result, there is considerable variation in how environmental law is interpreted and applied at the sub-national level; there are also comparable difficulties in accessing and interpreting these laws.

While the Chinese system of environmental law is fragmented and implementation differs significantly among the provinces, it offers the basic tools necessary to develop an effective climate and energy

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Environment, 12 MO. ENVTL. L. & POL'Y REV. 17 (2004); Meixian Li, *China's Compliance with WTO Requirements Will Improve the Efficiency and Effective Implementation of Environmental Laws in China*, 18 TEMP. INT'L & COMP. L.J. 155 (2004); Richard J. Ferris Jr. & Hongjun Zhang, *The Challenges of Reforming an Environmental Legal Culture: Assessing the Status Quo and Looking at Post-WTO Admission Challenges for the People's Republic of China*, 14 GEO. INT'L ENVTL. L. REV. 429 (2002).

63. Tsang & Kolk, *supra* note 62, at 180-96.

64. China's environmental law heyday took place between the mid-1980s and the 1990s, when it enacted in excess of twenty environmental laws addressing specific environmental problems, for example, water and air pollution. *See* Howlett, *supra* note 62, at 26.

65. *Id.* at 32-33.

66. "[T]he NPC's Standing Committee [is] a permanent sitting body comprised of the highest-ranking members of the NPC." *Id.* at 33.

67. *See id.* at 34; *see also* Li, *supra* note 62, at 165.

framework. To begin, "[t]he Chinese Constitution specifically provides for environmental protection," standing in direct contrast to the United States Constitution, which is silent on the environment.[68] In addition, energy policy is a priority area for China due to growing energy demands and frequent energy shortages.[69] Beginning in 1980, China began taking steps to promote energy efficiency and to reduce energy use per unit of GDP; these efforts continue today, and while Chinese energy policy remains fragmented, it also remains a priority area for the Chinese government due, in large part, to social demand for stable energy supplies.[70] Further, in 2008, due to publicly perceived inadequacies and inequities, China upgraded its State Environmental Protection Administration to the Ministry of Environmental Protection,[71] affording it more prominent status within the hierarchy of the national government.

With specific reference to climate change, as early as the late 1980s, China began taking steps to craft a national response strategy, beginning with the creation, in 1998, of a National Coordination Committee on Climate Change (1988) and culminating with the release of the Chinese National Climate Change Programme (NCCP)—China's first climate policy initiative—in 2007.[72] In the NCCP, the Chinese government acknow-ledges that "[c]limate change is a major global issue of common concern to the international community," characterizing it as "an issue involving both environment and development, but . . . ultimately an issue of development."[73] The NCCP continues by stating that "[a]s a developing country of responsibility, China attaches great importance to the issue of climate change" and that

> [g]uided by the Scientific Approach of Development, China will sincerely carry out all the tasks in the CNCCP, strive to build a resource conservative and environmentally friendly society, enhance national capacity to mitigate and adapt to climate change, and make further contribution to the protection of the global climate system.[74]

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68. Howlett, *supra* note 62, at 26.

69. *See* Tsang & Kolk, *supra* note 62, at 189.

70. *Id.* at 190-93.

71. Prior to this most recent upgrading, 1998, the former National Environmental Protection Bureau was rechristened the State Environmental Protection Administration and given full ministerial rank; the rise to become the MEP has thus been gradual. *See* Howlett, *supra* note 62, at 26.

72. *See National Climate Change Program*, CHINA.ORG.CN (June 4, 2007), http://www.china.org.cn/english/environment/213624.htm.

73. *Id.*

74. *Id.*

The NCCP then outlines five areas in which the government will need to adopt policy measures: greenhouse gas mitigation, adaptation, climate change science and technology, public awareness on climate change, and institutions and mechanisms.[75] The NCCP does not contain any measure-able or enforceable commitments, but it creates a roadmap for addressing climate change, focusing on "energy production and transformation, energy efficiency improvement and energy conservation, industrial processes, agriculture, forestry and municipal waste."[76]

Although the NCCP does not compel immediate governmental action to reduce greenhouse gas emissions, it reflects a shift in the government's willingness to acknowledge the problems associated with climate change and it increases the accountability of the government to its own citizenry. And this is an important shift because, in common with the United States, China is coming under increasing pressure from domestic civil society to address climate change due to rampant concerns about health, livelihood, and security.[77] As it currently exists, Chinese environmental law is fundamentally nonparticipatory. That is, citizen participation is neither included in the law-making process nor welcome in the implementation or enforcement stages. As a result, Chinese environmental law is largely nonresponsive to citizens' wishes and complaints.[78] However, this is slowly changing as social unrest is increasingly seen as tied to climate-related threats.

In China, the government is extremely attentive to social unrest, and social unrest is very often tied to natural disasters, public health, and economic well-being, all of which will be negatively affected by climate change.[79] As one scholar notes, "Historically, an important factor in domestic politics and stability in China has been the role of environmental crises in political protest."[80] Consequently, as climate change increases the incidences of environmental crises, it becomes more likely that the Chinese government will take steps to preempt future crises and, thus, head off political unrest. From the perspective of the Chinese government, while climate change continues to be a secondary

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75. *Id.*; *see also* Tsang & Kolk, *supra* note 62, at 192.

76. *See* Tsang & Kolk, *supra* note 62, at 192.

77. *See, e.g.*, *Snowbound China: Megaphone Apology*, ECONOMIST, Feb. 9, 2008, at 12; Wiener, *supra* note 43, at 1816-22; *see also* Elizabeth C. Economy, *The Great Leap Backward?: The Cost of China's Environmental Crisis*, FOREIGN AFF., Sept./Oct. 2007, at 38, 47 (2007).

78. *See* Li, *supra* note 62, at 163-64. For example, China's desire to become a member of the World Trade Organization and the World Trade Organization's insistence that China improve its environmental legislation has influenced the development of environmental law in China far more than any internal pressures from citizens or NGOs.

79. *See* Weiner, *supra* note 43, at 1819.

80. *Id.*

concern, social stability is a primary governmental concern and growing levels of civil unrest reveal that the two are closely related.[81] The indirect effects of climate change, thus, could prove to be the trigger for change.[82] In this way, the evolution of climate policy in the United States and China follows a similar track; in both contexts, the most significant prospects for change rest not in appeals to science or morality but in appeals to pragmatic concerns, for example, economic well-being, energy security, national security, and human health.

Underlying similarities between U.S. and Chinese climate policy drivers suggested that despite a conflict-riddled relationship, there was reason to hope that either or both nations, could serve as a catalyst for overcoming collective action problems during the 2009 Copenhagen Conference. This hope proved unfounded.

C. Climate Politics in 2009

By 2009, as it continued to amass political and economic power, there was little question that China was rivaling the United States for the title of the "indispensable" nation both in global economic affairs and in global climate change negotiations. The upcoming round of global climate negotiations, thus, was juxtaposed against this emergent political order—one in which there was no longer a single dominant superpower and in which problems of collective action loomed large.

In this way, the first decade of the twenty-first century proved to be a critical time for international relations. So, too, did it prove to be a critical time for the physical and political analyses of climate change.[83] As a result of warnings from the Intergovernmental Panel on Climate Change (IPCC) that warming of the global climate system is accelerating rapidly and that global average temperatures have increased,[84] and repeated statements from the United Nations Development Programme that climate change poses "a massive threat to human development,"[85] climate activism boomed. Climate change became a *cause célèbre* amongst not only traditional environmental activists but also amongst mainstream civil society, business, and political organizations. Guided by the growing scientific consensus on the threats posed by

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81. *Id.*

82. *See id.*

83. *See* CARLARNE, *supra* note 7, at 349-52.

84. *See* INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE (IPCC), CLIMATE CHANGE 2007: SYNTHESIS REPORT (Rajendra K. Pachauri et al. eds., 2008).

85. U.N. DEV. PROGRAMME, HUMAN DEVELOPMENT REPORT 2007/2008, FIGHTING CLIMATE CHANGE: HUMAN SOLIDARITY IN A DIVIDED WORLD, at v (2007).

anthropogenic climate change, activists and politicians worldwide began approaching climate change as a new type of environmental problem—one that threatened primary state interests.[86] As the profile of climate change grew, however, the politics became ever more complex. State, regional, and multilateral efforts to address climate change proliferated, but initiatives differed widely in scope, focus, and style. Varying notions of uncertainty, risk, ethics, and equity[87] presented daunting stumbling blocks to local, regional, and international efforts to develop consensus on the appropriate response to climate change.

Within this framework, two dominant themes emerged as central to the agendas of key state players: economic well-being and security. Economics and security—the twin pillars of foreign policy—increasingly provided the foundations for the development of climate policy worldwide.[88] The intertwining of climate change with economic well-being and security simultaneously redefined climate change as an issue of primary concern to national sovereignty while also increasing the complexity of international negotiations, since the manner in which these notions are defined and incorporated into law raises fundamental questions of equity.[89]

Even with the political boost given to climate politics via its marriage to more traditional state concerns and even accounting for the dramatic rise in social and political activism in countries as disparate as the United States and China, the global community continued to be divided over the question of climate change.[90]

During 2008, the opening year of the Kyoto Protocol's first compliance period, political rifts appeared insurmountable. The United States remained firmly outside the international arena, leaving little room to woo China and India into a new obligatory framework. Even the European Union struggled to reach regional consensus on a way

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86. *See, e.g.*, Cinnamon Carlarne, *Risky Business: The Ups and Downs of Mixing Economics, Security and Climate Change*, 10 MELB. J. INT'L L. 439, 439-41 (2009).

87. *See, e.g.*, Karin Mickelson, *Beyond a Politics of the Possible? South-North Relations and Climate Justice*, 10 MELB. J. INT'L L. 411 (2009).

88. *See* Carlarne, *supra* note 86, at 440. For evidence of these inter-linkages, one need only look to U.S. President Barack Obama's handling of climate policy, which he intimately intertwines with energy policy. *E.g.*, *Energy & Environment*, WHITE HOUSE, www.whitehouse.gov/issues/energy_and_environment/ (last visited Aug. 30, 2010).

89. *See, e.g.*, Press Release, Security Council, Security Council Holds First-Ever Debate on Impact of Climate Change on Peace, Security, Hearing over 50 Speakers, U.N. Press Release SC/9000 (Apr. 17, 2007).

90. *E.g.*, Mickelson, *supra* note 87, at 418-22.

forward.[91] In the ebb and flow of climate policy, 2008 brought about a new low only to then usher in one of the most dramatic and eventful years yet in global climate politics.

Beginning with the election of Barack Obama to the U.S. presidency and culminating with the U.N. Climate Change Conference in Copenhagen, 2009 proved to be a capstone year in efforts to elevate climate change to the forefront of international law and policy. In early 2009, President Obama took office on a platform that promised to prioritize domestic efforts to address climate change.[92] Shortly thereafter, he began taking small steps to advance the creation of a legal framework for addressing climate change.[93] President Obama's actions, in turn, prompted the United States Congress to ramp up efforts to pass a piece of primary climate change legislation.[94]

Given the perceived indispensability of the United States to the global political process, even these small steps at the domestic level equated to significant indicators of progress for the 2009 international negotiations. The global significance of the shift in U.S. politics was made evident by the decision to award the 2009 Nobel Peace Prize to President Obama, in part due to Obama's role in encouraging the United States to "play[] a more constructive role in meeting the great climatic challenges the world is confronting."[95] The Nobel Peace Prize Committee's decision to award Obama the prize and, in so doing, to highlight his efforts to address climate change, simultaneously rewarded Obama's early efforts while also pushing him to be an enduring catalyst for change.

Despite these momentous events, by late 2009, the glow of the new U.S. Administration and the momentum of the international community began to fade. The global economy continued to struggle, social and scientific debate on the certainty of human-induced climate change was

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91. *See* Simon Tilford, *The EU's Climate Agenda Hangs in the Balance*, CENTRE FOR EUROPEAN REFORM BULL., Dec. 2008, www.cer.org.uk/articles/63_tilford.html; Press Release, ENDS Europe, Italy Threatens To Veto EU Climate Package (Nov. 26, 2008), www.endseurope.com/17172.

92. *Barack Obama & Joe Biden: New Energy for America*, BARACKOBAMA.COM, http://www.barackobama.com/pdf/factsheet_energy_speech_080308.pdf (last visited June 17, 2010).

93. *See, e.g.*, Macon Phillips, *From Peril to Progress (Update 1: Full Remarks)*, WHITE HOUSE BLOG (Jan. 26, 2009, 04:35 PM), http://www.whitehouse.gov/blog_post/Fromperilto progress.

94. *See* Carlarne, *supra* note 86, at 460.

95. Press Release, Nobel Web AB, The Nobel Peace Prize for 2009 (Oct. 9, 2009), http://nobelprize.org/nobel_prizes/peace/laureates/2009/press.html.

at an all-time high,[96] and key global negotiators warned that the international community would be unable to negotiate a new legally binding framework at the December Conference. Partially combating this slump, on November 24, 2009, President Obama announced that he would attend the Copenhagen Conference in person and that the United States was offering a goal of reducing domestic greenhouse gas emissions by 17% as against 2005 levels by 2020.[97] Spurred on by this development, the following day, the Chinese Premier, Wen Jiabao, announced that he would also attend the Conference.[98]

In the announcement, China offered the global community a clearer indication of what it would be willing to do to reduce its domestic emissions, stating that it would take voluntary measures to cut domestic emissions of carbon relative to economic growth by 40% to 45% by 2020 compared with 2005 levels.[99] This announcement stopped far short of suggesting that China would be willing to commit to any type of legally binding emissions reduction commitment, but it represented one of China's most transparent communications to date.

Driven by the Chinese and U.S. pledges, and by heightened international attention, on December 2, 2009, India revealed its own voluntary target to cut domestic carbon intensity by 24% by 2020 as against 2005 levels.[100] Rounding out these new commitments was an earlier announcement by Brazil that it sought to reduce the anticipated level of its greenhouse gas emissions in 2020 by 36% to 39%.[101] The

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96. Social and scientific strife was fueled by the so-called "Climategate" scandal, wherein the e-mails of numerous climate scientists were hacked and made public in an effort to undermine the reliability of scientific consensus on climate change and, subsequently, by the revelation that the IPCC had made several errors in the Fourth Assessment Report. *E.g.*, Andrew C. Revkin, *Hacked E-Mail Is New Fodder for Climate Dispute*, N.Y. TIMES, Nov. 21, 2009, http://www.nytimes.com/2009/11/21/science/earth/21climate.html; Bidisha Banerjee & George Collins, *Undoing 'The Curse' of a Chain of Errors: Anatomy of IPCC's Mistake on Himalayan Glaciers and Year 2035*, YALE F. ON CLIMATE & MEDIA, Feb. 4, 2010, http://www.yaleclimatemediaforum.org/2010/02/anatomy-of-ipccs-himalayan-glacier-year-2035-mess/.

97. Press Release, White House, President To Attend Copenhagen Climate Talks (Nov. 25, 2009), http://www.whitehouse.gov/the-press-office/president-attend-copenhagen-climate-talks.

98. Press Release, Permanent Mission of the People's Republic of China to the U.N. Office at Geneva & Other Int'l Orgs. in Switz., Premier Wen Jiabao To Attend the Copenhagen Conference on Climate Change (Nov. 26, 2009), http://www.china-un.ch/eng/xwdt/t629500.htm.

99. Jonathan Watts, *China Sets First Targets To Curb World's Largest Carbon Footprint*, GUARDIAN, Nov. 26, 2009, http://www.guardian.co.uk/environment/2009/nov/26/china-targets-cut-carbon-footprint.

100. Randeep Ramesh, *India Reveals Carbon Emission Targets*, GUARDIAN, Dec. 2, 2009, http://www.guardian.co.uk/environment/2009/dec/02/india-reveal-carbon-emission-target.

101. Gary Duffy, *Brazil Proposes Carbon Cut Target*, BBC NEWS, Nov. 14, 2009, http://news.bbc.co.uk/2/hi/8360072.stm.

decision by the rapidly developing economies to utilize carbon intensity standards continued a pattern first advocated by the United States under the Bush Administration[102] and came as no surprise given the reluctance of the developing economies to sacrifice economic growth or freeze emissions at existing per capita levels.

The collection of new national targets issued in late 2009 existed alongside the comparatively long-standing EU commitment to reduce greenhouse gas emissions by 20% by 2020 using a 1990 baseline.[103] Leading into the Copenhagen Conference, the juxtaposition of the new U.S., Chinese, Indian, and Brazilian targets with the EU target created a bewildering patchwork of targets, none of which aligned. The EU target, using a 1990 baseline, was by far the most ambitious. The U.S. target appeared attractive, but its reliance on a 2005 baseline meant that it was committing to reducing U.S. emissions to roughly 3 to 4% below 1990 levels by 2020, a figure considerably below the EU target and below levels necessary to stabilize atmospheric greenhouse gases at a level deemed "safe" by many of the world's leading climate scientists.[104] Meanwhile, the developing country targets were significant symbolic steps yet failed to offer mechanisms for curbing rapidly escalating emissions growth from three of the top ten global emitters. According to a confidential U.N. report that was leaked to the media, even assuming that all of the big polluters met their stated targets, global temperatures would still rise by an average of 3 degrees Celsius, a level that the IPCC predicted would mean disaster for millions of people.[105]

Following the outpouring of international expressions of intent, on December 7, 2009, the U.S. EPA released its long-awaited endangerment

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102. *See* CARLARNE, *supra* note 7, at 1861.

103. *Limiting Global Climate Change to 2 Degrees Celsius: The Way Ahead for 2020 and Beyond*, COM (2007) 2 final (Jan. 10, 2007).

104. *See* UNFCCC, COP 15, Press Conference, Delegation of the United States (UNFCCC Web Cast, Dec. 15, 2009), http://www8.cop15.meta-fusion.com/kongresse/cop15/templ/play.php?id_kongressmain=1&theme=unfccc&id_kongresssession=2585; *see also* Warwick McKibbin, Adele Morris & Peter J. Wilcoxen, *Commitments: A Model-Based Analysis of the Copenhagen Accord: The Harvard Project on International Climate Agreements* (The Harvard Project of Int'l Climate Agreements, Discussion Paper 10-35, 2010) (discussing what the commitments of the United States and other key states mean in practice). For discussions of "safe" levels of greenhouse gas concentrations in the atmosphere, see Johan Rockström et al., *A Safe Operating Space for Humanity*, NATURE, Sept. 24, 2009, at 472-75; James Hansen et al., *Target Atmospheric CO2: Where Should Humanity Aim?*, 2 OPEN & ATMOSPHERIC SCI. J. 217-31 (2008). *See also* David Biello, *What Is the Right Number To Combat Climate Change*, SCI. AM., Nov. 30, 2009, http://www.scientificamerican.com/article.dfm?id=right-number-to-combat-climate-change.

105. Suzanne Goldenberg et al., *Leaked UN Report Shows Cuts Offered at Copenhagen Would Lead to 3C Rise*, GUARDIAN, Dec. 17, 2009, www.guardian.co.uk/environment/2009/dec/17/un-leaked-report-copenhagen-3c.

finding, laying the groundwork for the EPA to regulate greenhouse gases under the U.S. Clean Air Act (CAA).[106] The publication of the endangerment finding marked a turning point for U.S. climate policy by creating the first legal mechanism for regulating domestic greenhouse gas emissions. This domestic measure, in turn, provided momentum to international negotiations by offering tangible evidence that the United States was making concerted efforts to restructure its climate policy. Three days later, on December 10, 2009, in his acceptance speech for the Nobel Peace Prize, President Obama reiterated his commitment to renew American leadership in international diplomacy, characterizing climate change as a threat to peace and security and pleading that "the world must come together to confront climate change."[107]

Despite these steps, the outcome of Copenhagen was still in doubt. Prenegotiations in Barcelona posed more questions than were answered, and there was little indication that the big polluters were nearing common ground. Yet diplomats and civil society alike held out hope; much of this hope hinged on the possibility that U.S. reengagement could help jump start the negotiating process.

Leading into the Copenhagen Conference, leaders from around the world looked to the United States to discern the parameters for the global climate change debate. The ever-pressing reality that participation by key developing countries, including China, and to a lesser degree India and Brazil, would be fundamental to global efforts to address climate change dominated pre-Copenhagen negotiations. Yet, even as the political and environmental role of the rapidly developing economies grew in importance so did the role of the United States. Despite the perceived diminishment of its hegemonic powers, the United States still held the key to the ultimate survival of a global climate change agreement—without its full participation neither China nor India was likely to participate in a legally binding agreement. In essence, if the United States opted out, once again global efforts to address climate change would fail. The United States was still perceived to be an indispensable political player; its participation could enable, if not guarantee, success. Hope hinged on the United States to abandon its long-standing history of political lethargy. As the international

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106. *Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act*, U.S. ENVTL. PROT. AGENCY, www.epa.gov/climatechange/endangerment.html (last updated July 29, 2010).

107. Barack Obama, President of the United States, Remarks by the President at the Acceptance of the Nobel Peace Prize (Dec. 10, 2009), http://www.whitehouse.gov/the-press-office/remarks-president-acceptance-nobel-peace-prize.

community gathered together to find a way forward in addressing global climate change, U.S. actions, past and present, served as indelible indicators of future possibilities.

Fully cognizant of global expectations, the United States charged into the debate with no firmly established diplomatic position, no preexisting political legitimacy, and no history of domestic progress on climate change yet with assumed authority. Everything that the United States had to offer rested on its promise of change. The Obama administration wielded its promise of change deftly, using it as a tool for recreating the image of the United States as a worthy, moral, and indispensable actor and for eliciting promises of participation from its global counterparts. The United States approached the Copenhagen Conference with confidence and authority belying its recent history of reticence and resistance. And it was in this charged atmosphere that the U.N. Climate Change Conference in Copenhagen meeting finally opened.

III. THE 2009 COPENHAGEN CLIMATE CHANGE CONFERENCE

The 2009 U.N. Climate Change Conference in Copenhagen represented the culmination of two years of intense global negotiations.[108] Even more importantly, it represented the culmination of almost two decades of international efforts to build and then strengthen an effective and sustainable global climate change regime. The meeting in Copenhagen was the fifteenth annual meeting of the Conference of the Parties to the UNFCCC and the Fifth Annual Meeting of the Member Parties to the Kyoto Protocol.[109] The objective of the meeting was to produce a global agreement that would compel countries to limit their greenhouse gas emissions so as to ensure that global mean temperatures do not rise significantly. The global community built up the Copenhagen meeting as the do or die point for international climate negotiations.

The great expectations of a global climate deal, however, crashed amongst the realities of global politics, revealing deep fissures both amongst and between industrialized and developing countries.[110] Political

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108. Radoslav S. Dimitrov, *Inside Copenhagen: The State of Climate Governance*, 10 GLOB. ENVTL. POL. 18, 19 (2010); *see, e.g.*, U.N. Framework Convention on Climate Change Conference of the Parties, Bali, Indon., Dec. 3-15, 2007, *Bali Action Plan (1/CP.13)*, U.N. Doc. FCCC/CP/2007/6/Add.1 (Mar. 14, 2008).

109. *See, e.g.*, Daniel Bodansky, *The Copenhagen Climate Change Conference—A Post-Mortem*, 104 AM. J. INT'L L. 230 (2010); Dimitrov, *supra* note 108; Meinhard Doelle, *The Legacy of the Climate Talks in Copenhagen: Hopenhagen or Brokenhagen?* (Working Paper, Jan. 12, 2010), *available at* http://ssrn.com/abstract=1535669.

110. *See, e.g.*, Bodansky, *supra* note 109; Dimitrov, *supra* note 108; Doelle, *supra* note 109.

alliances were complex, fragile, and shifting. Tempers and emotions ran high and efforts to agree upon a shared vision for responding to climate change proved elusive. Outside the doors of the Bella Center, the venue for the two-week Conference, thousands of NGO representatives spent hours in the cold waiting to enter only to be turned away, while inside, governments failed to reach consensus not only on the questions of who should do what, when, and how, but also on the ultimate objective of these disputed actions. It is no exaggeration to say that chaos reigned.

The Copenhagen Climate Change Conference finally opened on December 7, 2009, amidst growing social and political disorder.[111] From the opening hours of the meeting it was evident that no one state, or bloc of states, would be able to direct negotiations or ensure a unified outcome. The Copenhagen Conference revealed the degree to which power—whether political, symbolic, or merely procedural—was dispersed among the state participants. The Alliance of Small Island States, the African bloc, and the least-developed countries possessed virtually no economic or political power, yet vocally and effectively wielded great moral authority, supported in great part by a very active civil society contingent.[112] The rapidly developing economies, including China, India, Brazil, and South Africa, diverged on many points but banded together to negotiate terms of an agreement favorable to the developing countries.[113] China, individually, drew upon its status as the largest global greenhouse gas emitter and one of the most significant global economies to represent itself as the new indispensable nation.[114] The larger G77 initially presented a powerful negotiating bloc but gradually dissolved as irreconcilable differences emerged among the parties.[115] The EU pushed for aggressive targets but appeared divided as the Danish hosts faltered in their Conference leadership abilities, French President Nicolas Sarkozy drifted from the party line, Germany failed to make a powerful showing, the United Kingdom dominated headlines with rhetoric, and the EU bloc, as a whole, was sidelined in major negotiations.[116] The United States assembled a powerful showing at the Conference and offered moments of dazzling diplomacy but was

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111. *See* CARLARNE, *supra* note 7, at 352-59.
112. *See* Doelle, *supra* note 109.
113. *See id.*
114. *See id.*; Bodansky, *supra* note 109, at 240.
115. *See* Doelle, *supra* note 109.
116. Tobias Rapp et al., *How China and India Sabotaged the UN Climate Summit*, SPIEGEL ONLINE, May 5, 2010, www.spiegel.de/international/world/0,1518,druck-692861,00.html.

hampered by its rehabilitated-rogue status and its adoption of a political position that failed to align with any of the other big polluters.

During the nearly thirteen days of negotiations, the talks came to a standstill more than once as parties obstructed proceedings, delegates came to physical blows, and members of civil society staged round after round of protests.[117] Long-standing concerns over the relative roles and responsibilities of developed and developing countries remained at the heart of deliberations over whether it was possible within the UNFCCC framework to agree upon a common legal *or* political architecture.

Traditional questions of roles and responsibilities took on new dimensions as parties from developed and developing nations called for a more nuanced understanding of CBDR—one that would differentiate not just between developed and developing but amongst developing countries in reference to economic and environmental output. These calls came from the richest, poorest, and most vulnerable nations.[118] The United States called upon the rapidly developing economies to commit to meaningful actions to reduce greenhouse gas emissions, or at least the *growth* in greenhouse gas emissions.[119] U.S. and EU demands were motivated by science, but also by economic realities. In contrast, Tuvalu and other vulnerable nations demanded meaningful action on the part of all of the major polluters—regardless of economic standing—for reasons of basic survival.[120] Mitigation commitments divided delegates along diverging lines with no clear bridging path. Questions of mitigation were further compounded by interlinked negotiations over adaptation funding.[121]

On December 17, 2009, immediately preceding President Obama's planned arrival at the Conference, U.S. Secretary of State Hilary Clinton made minor inroads into the increasing impasse by pledging that the United States would help raise $100 billion per year through 2020 to help poor and vulnerable nations cope with the effects of climate change.[122] Secretary Clinton did not specify where the money would come from but suggested that it would come from public and private funds mobilized by the United States and other nations.[123] She cautioned, however, that the

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117. *See* Doelle, *supra* note 109.

118. *See* Bodansky, *supra* note 109, at 240.

119. *See id.* at 233, 235.

120. *See* Doelle, *supra* note 109.

121. *See, e.g.*, Doelle, *supra* note 109; Bodansky, *supra* note 109.

122. *See, e.g.*, Suzanne Goldenberg, *US Bids To Break Copenhagen Deadlock with Support for $100bn Climate Fund*, GUARDIAN, Dec. 17, 2009, http://www.guardian.co.uk/environment/2009/dec/17/us-copenhagen-100bn-climate-fund.

123. *Id.*

United States' offer of support was conditional on the major emitting developing countries agreeing to some form of binding, internationally verified emission targets. The United States' conditional offer stirred the stalemate, simultaneously generating hope and criticism.

On the heels of Secretary Clinton's speech, on what was supposed to be the last day of the Conference, President Obama arrived to find negotiations deadlocked. Delegates were split not just on one or two key issues but on questions ranging from mitigation, to funding, to technology transfer, to carbon sinks. At this final hour, it appeared unlikely that the delegates would be able to reach any type of agreement. Speaking to a packed room full of exhausted and frustrated delegates, President Obama emphasized the urgency of the issue and America's commitment to international negotiations. Warning that "there is no time to waste," he declared:

> America has made our choice. We have charted our course. We have made our commitments. We will do what we say. Now I believe it's the time for the nations and the people of the world to come together behind a common purpose. We are ready to get this done today—but there has to be movement on all sides to recognize that it is better for us to act than to talk; it's better for us to choose action over inaction; the future over the past—and with courage and faith, I believe that we can meet our responsibility to our people, and the future of our planet.[124]

Obama's eight-minute speech failed to motivate the delegates.[125] The President's decision to address the Conference and, in so doing, to confirm the United States' responsibility as one of the biggest polluters was an important symbolic gesture. Beyond its symbolic value, however, the speech offered no new advances to the negotiations. The President's speech marked the return of the United States to the center of high-level climate politics but it failed to break the stalemate. At the start of the last formal day of the Conference, the delegates remained firmly deadlocked.[126]

With the plenary sessions continually mired in conflict and the working groups hammering away at details in the absence of an overarching framework, there appeared to be little hope that the

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124. Barack Obama, President of the United States, Remarks by the President at the Morning Plenary Session of the United Nations Climate Change Conference (Dec. 18, 2009), http://www.whitehouse.gov/the-press-office/remarks-president-morning-plenary-session-united-nations-climate-change-conference.

125. *See* Suzanne Goldenberg & Allegra Stratton, *Barack Obama's Speech Disappoints and Fuels Frustration at Copenhagen*, GUARDIAN, Dec. 18, 2009, http://www.guardian.co.uk/environment/2009/dec/18/obama-speech-copenhagen.

126. *See id.*

Copenhagen Conference would produce anything more than an image of a world divided. At this point, however, the Conference diverged from the normal pattern of international environmental policymaking. Rather than leaving career diplomats and negotiators to finesse the terms of a deal to which the heads of state could give their stamp of approval, the heads of state present at the Conference engaged in a series of bilateral and multilateral meetings that proved pivotal to the ultimate ability of the Conference to produce any manner of agreement.

One such mini-summit with twenty-five heads of state took place on the afternoon of December 18th, hours before most of the attendees were due to depart. Unconfirmed recordings released from this pivotal meeting suggest that diplomatic relations broke down as European leaders expressed frustration over Chinese Premier, Wen Jiabao's decision not to attend the meeting and over Chinese efforts to stall and delay negotiations.[127] With failure appearing likely, tempers flared, with French President, Nicholas Sarkozy, reportedly accusing the Chinese of "hypocrisy" and India accusing German Chancellor, Angela Merkel, of "prejudging options" in reference to her allegation that India did not want to accept any type of legally binding obligations.[128] President Obama, in turn, is reported to have taken umbrage at Wen Jiabao's absence and also to have alienated his European colleagues by accepting the possibility of temporarily abandoning concrete emissions reduction targets and suggesting that progress could be reached in multilateral settings outside of the UNFCCC.[129] In the end, China reportedly refused to discuss or agree to any document containing numbers, for example, reducing greenhouse gas emissions by 50%, or limiting global warming to two degrees Celsius, and the meeting ended without the delegates reaching consensus on any manner of agreement.[130]

The mini-summit on the afternoon of the 18th involved heads of state from both the North and the South, but throughout the Copenhagen Conference, delegates and heads of government from the rapidly developing economies of China, India, and Brazil had been engaging in private meetings of their own over the terms of a possible climate change agreement. On the evening of December 18, 2009, following a full day of meetings with various heads of state, President Obama prepared to

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127. Rapp et al., *supra* note 116.

128. *Id.*

129. *See id.*

130. Rob Fowler, *An Initial Assessment of the Copenhagen Outcomes* 2 (Univ. of S. Austl. Law Sch., Working Paper 2010), *available at* http://www.law.uoregon.edu/academics/docs/first_S10/copenhagen.pdf.

leave Copenhagen having made no discernible inroads into the impasse. Prior to his departure, President Obama was reportedly scheduled to meet with the Chinese Premier, Wen Jiabao, only to learn that the Premier was in a meeting with the Indian Prime Minister, Manmohan Singh, the Brazilian President, Luiz Inacio Lula da Silva, and South African President Jacob Zuma. Unfazed, President Obama entered the meeting.[131] Less than an hour later, President Obama and his counterparts emerged with a nonbinding political accord that eventually became the centerpiece document of the Copenhagen Conference. This three-page agreement, the "Copenhagen Accord," contained nothing of the negotiating texts so meticulously negotiated by the Ad Hoc Working Groups, yet offered a path forward amidst the collapse of formal negotiations.[132]

In critical part, the Copenhagen Accord received the approval of the United States and China—the two most important yet historically reticent political actors in global climate change politics. The composition of the meeting was a historical coincidence but it reflected a reordering in the power of climate politics that had emerged during the Conference. Following the announcement that the five heads of state from the United States, China, India, Brazil, and South Africa had reached agreement, President Obama held a press conference heralding the agreement as "a meaningful and unprecedented breakthrough," noting that "[f]or the first time in history all major economies have come together to accept their responsibility to take action to confront the threat of climate change."[133]

His optimism proved premature however. President Obama and the other heads of state departed Copenhagen that evening leaving an exhausted group of delegates to decide what to do with the new agreement, which on its own had no recognized status within the

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131. Philip Sherwell, *Barack Obama Denies Accusations That He 'Crashed' Secret Chinese Climate Change Talks*, TELEGRAPH (London), Dec. 19, 2010, http://www.telegraph.co.uk/earth/copenhagen-climate-change-confe/6845952/Barack-Obama-denies-accusations-that-he-crashed-secret-Chinese-climate-change-talks.html. *But see High Drama in Copenhagen (per Administration Officials)*, ABC NEWS, Dec. 18, 2009, http://blogs.abcnews.com/politicalpunch/2009/12/high-drama-in-copenhagen-per-administration-officials.html (offering a different account of the incident).

132. United Nations Framework Convention on Climate Change Conference of the Parties, Copenhagen, Den., Dec. 7-18, 2009, *Copenhagen Accord*, U.N. Doc. FCCC/CP/2009/11/Add.1 (Dec. 18, 2009) [hereinafter *Copenhagen Accord*], *available at* http://unfccc.int/resource/docs/2009/cop15/eng/11201.pdf.

133. Barack Obama, President of the United States, Remarks by the President During Press Availability in Copenhagen (Dec. 18, 2009), http://www.whitehouse.gov/the-press-office/remarks-president-during-press-availability-copenhagen.

framework of the UNFCCC. During a debate that lasted throughout the night and into the next morning, the UNFCCC Conferences of the Parties (COP) was unable to secure the consensus vote necessary to adopt the Copenhagen Accord as an official UNFCCC decision. Overt objections on the part of 5 of the 193 countries represented, including Bolivia, Cuba, Nicaragua, Sudan, and Venezuela, blocked formal adoption of the Accord.[134] In a bid to recognize the Accord and to allow for implementation of certain of its provisions,[135] the COP voted to "take note" of the Accord and thereby to include it as part of a UNFCCC COP-15 decision.[136] Because the agreement itself was not formally adopted, the Copenhagen Accord remains a political document only.[137]

The general, three-page Copenhagen Accord stands in direct contrast to the legally binding, detailed twenty-page Kyoto Protocol that had been negotiated a dozen years earlier. The agreement reflects deepening collective action problems that have prevented parties from being able to agree upon any type of framework for legally binding emission reduction targets. The Copenhagen Accord was equally lauded as a solid framework for moving forward[138] and as a total failure.[139]

The Copenhagen Accord commits parties to providing "[s]caled up, new and additional, predictable and adequate funding[, including a] commitment by developed countries [to contribute funding approaching] USD30 billion" between 2010 and 2012 to support both mitigation and adaptation activities in developing countries, with adaptation funding to be prioritized for the most vulnerable developing countries; a commitment by "developed countries . . . to a goal of mobilizing jointly USD100 billion dollars a year by 2020" to help meet the needs of developing nations, conditional upon transparency with respect to the implementation of meaningful mitigation actions by developing countries;[140] the establishment of first, a High Level Panel "under the guidance of and accountable to the Conference of the Parties" to explore potential sources of revenue and second, the Copenhagen Green Climate

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134. *See* Bodansky, *supra* note 109, at 231.

135. Delegates argued that it was necessary for the COP to give it some status in the UNFCCC process. *See* Bodansky, *supra* note 109, at 238.

136. *Id.* at 231; *Copenhagen Accord*, *supra* note 132.

137. *See* Doelle, *supra* note 109; *see also* Fowler, *supra* note 130, at 1.

138. David Doniger, *The Copenhagen Accord: A Big Step Forward*, NATURAL RES. DEFENSE COUNCIL STAFF BLOG (Dec. 21, 2009), http://switchboard.nrdc.org/blogs/ddoniger/the_copenhagen_accord_a_big_st.html.

139. Bill McKibben, *Copenhagen: Things Fall Apart and an Uncertain Future Looms*, YALE ENV'T 360, Dec. 21, 2009, http://www.e360.yale.edu/content/feature.msp?id=2225.

140. *Copenhagen Accord*, *supra* note 132, ¶ 8.

Fund as the operational entity of the financial mechanism of the Convention.[141]

Beyond the provisions of the Copenhagen Accord, the Copenhagen Climate Change Conference produced a series of decisions, including two further decisions of note extending the mandates of the Ad Hoc Working Group on Long-Term Cooperative Action under the Convention (AWG-LCA)[142] and the Ad Hoc Working Group on Further Commitments for Annex I Parties under the Kyoto Protocol (AWG-KP)[143]—the two working groups created in 2007 as part of the Bali Action Plan to enhance implementation of the UNFCCC. The extension of the two Ad Hoc Working Groups permits the continuation of formal efforts to develop a consensus-based plan for future implementation of the UNFCCC and the Kyoto Protocol.

In key part, the Copenhagen Accord put new funding provisions on the table and continued the negotiating process, but it is questionable whether it managed to salvage the UNFCCC process or whether it, in fact, deepened divides and ceded power to a smaller group of political actors. In summing up the meeting and looking forward, then UNFCCC Executive Secretary Yvo de Boer stated: "The UN Climate Change Conference in Cancun must do what Copenhagen did not achieve: It must finalize a functioning architecture for implementation that launches global climate action, across the board, especially in developing nations."[144]

Leading into the Copenhagen Conference, there was great doubt over the ability of the parties to overcome the collective action problems inherent in the UN process. With a record 115 heads of state present, there was a brief window of opportunity for using the UNFCCC forum to reach global consensus, but this proved impossible. Instead, global

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141. *Id.* ¶¶ 9-10.

142. United Nations Framework Convention on Climate Change Conference of the Parties, Copenhagen, Den., Dec. 7-18, 2009, *Outcome of the Work of the Ad Hoc Working Group on Long-Term Cooperative Action Under the Convention (Decision 1/CP.15)*, U.N. Doc. FCCC/CP/2009/11/Add.1 (Mar. 30, 2010), *available at* http://unfccc.int/resource/docs/2009/cop15/eng/11a01.pdf.

143. United Nations Framework Convention on Climate Change Conference of the Parties, Copenhagen, Den., Dec. 7-18, 2009, *Outcome of the Work of the Ad Hoc Working Group on Further Commitments for Annex I Parties Under the Kyoto Protocol (Decision 1/CMP.5)*, U.N. Doc. FCCC/KP/CMP/2009/21/Add.1 (Mar. 30, 2010), *available at* http://unfccc.int/resource/docs/2009/cmp5/eng/21a01.pdf.

144. *UN Agrees To Host Two More Rounds of Climate Change Talks Before Summit in Mexico*, U.N. NEWS CENTRE, Apr. 12, 2010, http://www.un.org/apps/news/story.asp?NewsID=34339; *see also* John Vidal, *Climate Change Talks Yield Small Chance of Global Treaty*, GUARDIAN, Apr. 11, 2010, http://www.guardian.co.uk/environment/2010/apr/11/climate-change-talks-deal-treaty.

consensus proved more elusive than ever while the probability of a small group of actors determining the global course of action over the long-term became increasingly likely.

A new political order emerged during the Copenhagen Climate Conference. The United States and China are at the center of that political order[145] and the "fault lines" that have "imprisoned" international climate negotiations for years seem more cavernous than ever given the ongoing power struggle taking place between the old and the emergent superpower.[146] It remains to be seen how the European Union, India, Brazil, and the rest of the world fit within this new framework and whether the reordering can be used to advance the UNFCCC process or whether, as seems more likely, it increases the likelihood that key decisions will be devolved to a smaller group of political players—that is, the big polluters.

IV. A NEW CLIMATE ORDER

A. Copenhagen's Aftermath

In the immediate aftermath of the Copenhagen Conference, the media, as well as many politicians[147] and activists appeared to have found a new scapegoat. The United States still found itself the subject of criticism for its failure to bring to the table confirmed domestic emissions reduction commitments and its inability to offer the international community the commitments—whether for mitigation or financial assistance—necessary to break the stalemate.[148] The global community expressed disappointment that U.S. reengagement had not provided the magic bullet necessary to move negotiations forward. Yet, in contrast to past meetings,[149] the brunt of the anger and the blame was

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145. *See* Robin Lustig, *Copenhagen: The Dawn of a New Political Reality*, BBC RADIO BLOG (Dec. 21, 2009, 8:37 U.K. time), http://www.bbc.co.uk/blogs/worldtonight/2009/12/copenhagen_the_dawn_of_a_new_p.html.

146. Obama, *supra* note 124.

147. *See* Sam Coates & Jane Macartney, *China To Blame for Failure of Copenhagen Climate Deal, Says Ed Miliband*, TIMES (London), Dec. 21, 2009, http://www.timesonline.co.uk/tol/news/environment/article6964106.ece.

148. *See* James Kanter, *EU Blames Others for 'Great Failure' on Climate*, N.Y. TIMES, Dec. 22, 2009, http://www.nytimes.com/2009/12/23/world/europe/23iht-climate.html; John Vidal, *Rich and Poor Countries Blame Each Other for Failure of Copenhagen Deal*, GUARDIAN, Dec. 19, 2009, http://www.guardian.co.uk/environment/2009/dec/19/copenhagen-blame-game.

149. *See, e.g.*, Markus Becker, *EU Threatens To Boycott US Climate Talks*, SPIEGEL ONLINE, Dec. 13, 2007, http://www.spiegel.de/international/world/0,1518,523211,00.html; Richard Lloyd Parry, *US Rejects Climate Guidelines at Bali Conference*, TIMES (London), Dec. 13, 2007, http://www.timesonline.co.uk/tol/news/environment/article3042430.ece.

directed at China.[150] With China being accused of hypocrisy, "hijacking" climate negotiations, and bringing U.S. and European leaders to exasperation, there is little doubt that China had brandished its newfound political power.[151] In expressing its power through its ability to hold-up and direct negotiations, China was able to secure an outcome that it found acceptable—that is, no new legally binding obligations for developing countries. However, the cost of China's political maneuvering was high. China's actions not only deepened divisions within the already fragile G77/China alliance but also stoked anti-Chinese sentiment across much of the industrialized world.[152]

In the end, while the Copenhagen Accord was the most discussed product of the Copenhagen Climate Change Conference, the more important outcome was the framing of the new political order in climate politics. Within this new political order, no clear leader emerged, leaving many to wonder how negotiations could move forward in 2010.

During the first two negotiating sessions of the UNFCCC subsidiary bodies following the Copenhagen meeting,[153] the delegates tried to regroup and make headway prior to the next full session of the COP. Although some headway was made during these two meetings, progress was incremental and procedural rather than substantive.[154] During the first negotiating session in Bonn, for example, the Chair of the AWG-LCA was given a mandate to prepare a new draft negotiating text.[155] Upon presentation of this new text during the second meeting in Bonn, however, delegates from key countries, including the United

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150. *E.g.*, Zhang, *supra* note 4, at 3; *see also* Jonathan Watts, *Copenhagen Summit: China's Quiet Satisfaction at Tough Tactics and Goalless Draw*, GUARDIAN, Dec. 20, 2009, http://www.guardian.co.uk/environment/2009/dec/20/copenhagen-climate-summit-china-reaction; Mark Lynas, *How Do I Know China Wrecked the Copenhagen Deal? I Was in the Room*, GUARDIAN, Dec. 22, 2009, http://www.guardian.co.uk/environment/2009/dec/22/copenhagen-climate-change-mark-lynas; Emma Graham-Harrison & Benjamin Kang Lim, *China's Wen Says Not To Blame for Copenhagen Problems*, REUTERS, Mar. 14, 2010, http://www.alertnet.org/thenews/newsdesk/TOE62D00X.htm.

151. *See* Coates & Macartney, *supra* note 147.

152. *See* Zhang, *supra* note 4, at 4.

153. Both meetings took place in Bonn, Germany, with the first held between April 9 and 11, 2010, and the second between May 31 and June 11, 2010. Two more meetings have been scheduled for the AWG-LCA and AWG-KP prior to the next U.N. Climate Change Conference (COP 16), which will be held between November 29 and December 10 in Cancún, Mexico. Int'l Inst. for Sustainable Dev. (IISD), *Summary of the Bonn Climate Change Talks: 9-11 April 2010*, EARTH NEGOTIATIONS BULL., Apr. 14, 2010, at 1.

154. *See, e.g.*, *Son of Copenhagen: The New Round of Negotiations Led to only Incremental Progress*, ECONOMIST, June 17, 2010, http://www.economist.com/node/16380970?story_id=16380970; IISD, *Summary of the Bonn Climate Change Talks: 31 May - 11 June 2010)*, EARTH NEGOTIATIONS BULL., Apr. 14, 2010, at 1, 1-2.

155. *See* IISD, *supra* note 154, at 2.

States, China, India, Brazil, and Pakistan rejected the text in a floor debate.[156]

At the midway point between the 2009 Copenhagen Conference and the 2010 Cancún Conference, key state players were no closer to reaching agreement on substantive emissions reductions pledges. In critical part, neither the United States nor China had yielded any new ground. Climate change legislation floundered in the United States Senate, and U.S. diplomats offered no new advances in international negotiations;[157] Chinese diplomats continued to emphasize the primacy of the UNFCCC principle of CBDR and the necessity of maintaining both the text and the bifurcated approach of the Kyoto Protocol;[158] and India's Minister for Forests and Environment, Jairam Ramesh, warned the global community to expect no climate deal this year, noting that "[t]he prospect of a breakthrough in 2010 is very, very remote."[159] In concluding that "[w]e have reached virtually a dead end," Ramesh attributed the stalemate to the reluctance by the big emitters—specifically, China and the United States—to offer any new commitments.[160]

Summing up the situation, outgoing UNFCCC Executive Secretary, Yvo De Boer, noted: "The fact remains industrial country pledges fall well short of the -25-40% range the IPCC has said gives a 50% chance to keep the global temperature rise below 2 degrees . . . . Take all current pledges and plans from all countries and we will still won't stop emissions growing in the next 10 years."[161] De Boer continued by stressing the need for the global community to act with urgency, stating that "more stringent actions cannot be much longer postponed. Other-

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156. *See* Associated Press, *Critics Slam New Climate Change Proposal in Bonn*, CBS NEWS, June 11, 2010, http://www.google.com/hostednews/ap/article/ALeqM5i9TuMrvrknh-ZXwqmZ2N-48kff3wD9G98TK01.

157. *See* John Vidal, *Confidential Document Reveals Obama's Hardline US Climate Talk Strategy*, GUARDIAN, Apr. 12, 2010, http://www.guardian.co.uk/environment/2010/apr/12/us-document-strategy-climate-talks.

158. *See, e.g.*, Richard Black, *Bonn's Obscured Climate Vision*, BBC NEWS, June 10, 2010, http://www.bbc.co.uk/blogs/thereporters/richardblack/2010/06/from_the_un_climate_talks.html; John Vidal, *Bonn Climate Talks Diary*, GUARDIAN, June 9, 2010, http://www.guardian.co.uk/environment/2010/jun/09/bonn-climate-talks-diary.

159. *Prospects of Breakthrough in Cancun Very Remote: Ramesh*, ZEENEWS, May 9, 2010, http://www.zeenews.com/news625432.html (internal quotation marks omitted).

160. *Id.*

161. Press Release, U.N. Framework Convention on Climate Change, Bonn Climate Talks Make Progress on Fleshing Out Specifics of Global Climate Change Regime, U.N. Press Release UNFCCC/CCNUCC (June 11, 2010), http://unfccc.int/files/press/news_room/press_releases_and_advisories/application/pdf/20101106_pr_closing_june.pdf (internal quotation marks omitted).

wise, the 2 degree world will be in danger, and the door to a 1.5 world will have slammed shut."[162]

B. Moving Forward

Since 1992, the UNFCCC has offered the global community a valuable roadmap for creating a flexible, equitable, and effective global climate regime. The UNFCCC enunciates a set of common principles and objectives around which the global community has been able to rally. Yet there are growing concerns about the ability of the international community to continue to work within the UNFCCC framework. With the 2009 Copenhagen Conference revealing the depths of conflict between and among the industrialized and developing countries, there are very real questions about whether or not the global community will be able to overcome collective action problems to agree upon a commonly agreed framework for addressing climate change in the post-Kyoto era.

The 2010 Cancún Climate Change Conference will be a determinative point for both a 2 degree world and the continuing validity of the UNFCCC process. The UNFCCC process offers the global community the best mechanism for negotiating an equitable climate change regime; it is the only international forum that brings together the industrialized countries with the rapidly developing economies with the least-developed countries and the small island states. It is the only forum that offers the possibility of a global, legal framework for addressing climate change. Yet it is this same characteristic of the forum—that is, its inclusiveness—that undermines its ability to succeed. With the Alliance of Small Island States and growing numbers of developing and least-developed countries demanding deep cuts from both industrialized and rapidly developing countries, and with political rhetoric[163] interfering with diplomatic negotiations, the UNFCCC forum has become a political quagmire.

During the 1997 negotiations for the Kyoto Protocol, similar collective action and political rhetoric problems existed. Yet, between 1997 and 2009, two critical differences emerged. First, in 1997, the political rhetoric did not prove as vitriolic as to impede negotiations. Second, and possibly more important, during the Kyoto negotiations, the United States still proved capable of wielding the political power necessary to push difficult negotiations forward along a path of its

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162. *Id.*

163. *See, e.g.*, Michelle, *Sudan Calls Obama's Climate Change Deal 'Genocide*,*'* HUMAN RIGHTS CHANGE.ORG BLOG (Dec. 20, 2009, 11:01 AM), http://humanrights.change.org/blog/view/sudan_calls_obamas_climate_change_deal_genocide; *Copenhagen: 'Imperial' Climate Deal Rejected by Poor-Country Delegates*, LINKS.ORG, Dec. 18, 2009, http://links.org.au/node/1418.

choosing. By 2009, both the tenor and the political realities of the climate debate had changed. With accusations of genocide and imperialism hurled at the industrialized world[164] and with China and the United States dueling for control of the climate regime from opposite sides of the negotiating table,[165] the 2009 negotiations stalled. Now, in 2010, global negotiations are taking place in a more heated atmosphere; the stakes have changed and so have the rules.

More than ever there is a need for multilateralism, but more than ever multilateralism appears evasive. In this critical era for climate policy, diplomats would do well to look to other areas where cooperation seemed unlikely yet multilateral efforts ultimately offered a route forward, for example, international arms control, nuclear nonproliferation, the Congress of Vienna, and the establishment of the United Nations. As these endeavors reveal, multilateralism is not a cure-all, but it is an essential starting point. Whether the international community succeeds in pushing forward with a Kyoto-style, legally binding agreement or chooses to follow an alternative route,[166] an emphasis on multilateralism must be maintained as a central tenant of the climate regime. A turn away from multilateralism would be a turn away from integrity; to turn away from multilateralism would be to deny both the realities of climate change and the realities of global change. The big polluters must be brought onboard and, to do so, might require multitrack multilateralism, but this process must not take place at the expense of alienating the rest of the global community.

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164. *See, e.g.*, *Copenhagen: 'Imperial' Climate Deal Rejected by Poor-Country Delegates*, *supra* note 163; Michelle, *supra* note 163.

165. *But see* Memorandum of Understanding To Enhance Cooperation on Climate Change, Energy and Env't, US-China, July 28, 2009, http:www.state.gov/documents/organization/126802.pdf (revealing that the foundations for cooperation exist and offer possibilities for moving forward).

166. Some examples include multitrack multilateralism, sector specific agreements, a pathway focused on technology development and transfer, and a politically binding agreement revolving around national commitments.