



JNU Inter-disciplinary Roundtable on Climate Change

21 December 2009

Legal Status and Legitimacy of the Copenhagen Accord

By Professor Dr. Bharat H. Desai*

As the world waited with bated breath, the 13 day climate show came to bizarre end after just “taking note of” the three-page five nation [US, Brazil, South Africa, India and China] document in the wee hours of extended Copenhagen conference on 19 December 2009. The final end-of-the conference statement – mischievously called an “Accord” – contains reference to limiting temperature rise to 2 degrees Celsius above the pre-industrial levels, peaking of global and national emissions as soon as possible, factoring in overriding priorities of poverty for developing nations without any greenhouse gas (GHG) emission ceiling and time table.

Sensing strident opposition from a large number of developing countries including Sudan, chair of the G77/China, the Danish Prime Minister Lars Rasmussen, abruptly announced the decision to “take note of” the agreement instead of formally approving it. “If we strictly stick to the principle of consensus, this (the US-BASIC accord) cannot be adopted. I really regret it for this reason that we can not adopt this document. It is true that this document cannot be put into operational effect. It is true but it is a reality”, an apologetic Rasmussen said.

The Copenhagen Accord will serve as a face saver not only to the Danish Presidency but also provide boost to the leadership claim of the US President Barack Obama under the glow of the ‘promise’ of his just awarded Nobel Peace Prize. He in fact went uninvited to the parleys of the BASIC countries to clinch the mysterious deal. However, it dealt a major blow to the long-standing position of the developing countries as it omits any reference to the main pillar of the climate debate on “historical contribution” of the industrialized countries and the need for them to take the “lead”.

Political Statement

In spite of the fact that the Copenhagen conference statement carries misleading nomenclature of an “Accord”, in essence it remains merely a political document. It came up through various twists and turns to save the COP15 from being a disaster and was produced as a result of confabulations initially among just select band of some two dozen countries. It ended up jettisoning the established COP procedure to work out consensus. It is bound to serve as a very bad precedent and example of high-handedness of COP President who desperately needed to save his own credibility.

Prima facie the Accord itself has no legal sanctity especially since the negotiating states did not have an intention to do so and the language of the instrument has been kept vague and ‘soft’. In any case, it cannot be termed as an agreement or an accord as per the 1969 Vienna Convention on Law of Treaties. Probably, the usage of the word “Accord” has been deliberate in order to create confusion as it could not convince a vast majority of the contracting parties to the 1992 UN Framework Convention on Climate

* Jawaharlal Nehru Chair in International Environmental Law and Chairman, Centre for International Legal Studies, SIS, Jawaharlal Nehru University, New Delhi 110067; E-mail: desai@mail.jnu.ac.in

Change (UNFCCC). However, in a clever way a one line decision [still unnumbered] of the COP on “taking note of the Copenhagen Accord of 18 December 2009” injected it as a part of the formal COP process – in the same way as the COP 2 noted the political declaration of leaders regarding climate science. It seems a short COP decision was necessary linkage because the Accord envisages setting up a Fund and a High Level Panel to fast track funding. If the Accord remained purely in the political realm then it might have been legally difficult to provide financing which the Accord envisages as being under the guidance of the COP. The “taking note of” the Accord is intended to list all those countries that want to be part of this decision so that they could receive funding that results from it. It could not be defer move to divide the ranks of the developing countries and pave the way for formal burial of the 1997 Kyoto Protocol in due course that singled out only the industrialized countries to reduce GHG emissions by aggregate 5.2% at 1990 levels during 2008 to 2012.

The event left worst carbon footprint in the history of global conferencing through a nail-baiting ordeal in the two-week long Copenhagen jamboree. The event witnessed an unusual atmospherics, posturing and large scale street protests in the wake of 15th meeting of the Conference of the Parties of oft eh UNFCCC that took place during 7 to 19 December 2009.

The COP meeting [a routine annual affair] witnessed an unprecedented media coverage, heightened expectations, scare mongering, more than 45, 000 conference participants including civil society representatives, huge number of representatives of corporations eyeing for multi-billion dollar business as well as delegations of 193 sovereign states and 'glamorous' attendance of almost 125 heads of state/governments. The event was marred by dramatic incidents such as role of Tuvalu as a 'Trojan horse' within the ranks of the Group of 77 and China as well as leakage of the original version of the so-called 'Copenhagen Agreement'. In fact siege of the Bella Centre by the protesters did put huge psychological pressure on the representatives of the 193 states. It created such a pressure that even the heads of state and governments had to stay put for one more day just to craft a minimal political declaration amidst widespread feelings of dissatisfaction and betrayal.

Even as there were bleak forecasts as regards the Kyoto targets in view of conscious efforts of the Annex I countries to bypass it, the basic architecture of the UNFCCC and the complicated negotiations following the 2007 Bali Action Plan for post-2012 period have been under tremendous stress. This is especially so due to insistence by the industrialized countries to push the major developing countries [like India and China] to undertake 'legally binding GHG reduction targets'. As it is seen in the past thirteen days of intense and noisy negotiations, often marred by leakage of the so-called 'Copenhagen Agreement', apparent partisan role of the Danish Presidency [as host of COP 15], divisions in the ranks of the Group of 77 and China as well as efforts of the Danish Prime Minister to 'design' and push own texts for the two tracks of Ad hoc Working Groups without consultations cumulatively did put question marks over any possibility of meaningful outcome at COP 15 in Copenhagen. In spite of the expected presence of more than 125 heads of state/governments in Copenhagen, the doubts raised over the prospects for crafting a 'political declaration' turned out to be prophetic. Only by a whisker the COP15 was saved from becoming a outright disaster like COP6 in 2000 at The Hague.

Since Bali COP 13, the climate change issue has figured at various political, scientific, economic, legal and human rights forums. The issue emerged on the global agenda two decades ago on the basis of dire scientific predictions about consequences of accumulation of greenhouse gas (GHG) emissions since the Industrial Revolution. After marathon regulatory process that witnessed crafting of two legal tools (1992 and 1997), creeping institutionalization through fourteen COPs, climate change regulatory process has now reached the crucial juncture.

Main Pillars

The main pillars on which UNFCCC rests have been put into jeopardy. These include two important principles: 'equity' and 'common but differentiated responsibility and respective capability'. The road

map almost bulldozed by the industrialized countries has now sought to equate both the sinner and the sinned as it is now widely perceived. The inclusion of these pillars played a pivotal role in ensuring participation of the developing countries in the climate change regime. They provided a unique framework to accommodate developmental priorities of the developing countries that are expected to be vulnerable to adverse effects of climate change. It appears that notwithstanding lack of sincerity of commitments and promised leadership of the Annex I countries; the developing countries have been forced to come on board by disregarding the original architecture.

Decade of Climate Inaction

More than a decade of intergovernmental climate change negotiations had produced a course of action that was strict in principle but ineffective and susceptible to vagaries of national interest of individual parties to the process. The 'hold-out' by the world largest emitter, the United States, has substantially diluted global action even further. Under the Kyoto Protocol to the UNFCCC, only industrialized developed country parties have a legally binding obligation to reduce the GHG emissions. Premised upon the principle of 'common but differentiated responsibility and respective capability' (CBDRRC), developing countries are not expected to take measures to reduce GHG emissions as the industrialized countries are required to take the 'lead' [UNFCCC Art. 3(1)]. Based on criteria of **differentiation**, the developing countries have declined to undertake any commitments for GHG reduction especially since the industrialized countries have been held to be **primarily** responsible for accumulated GHG emissions since the industrial revolution. The developing country parties' commitments have been restricted to *voluntary* participation in the Clean Development Mechanism (CDM) and to the general commitments under of the Kyoto Protocol.

Developing Countries' Concerns

In view of principle of **equity** as well as their **specific needs and special circumstances**, the emissions of the developing countries were expected to grow substantially along side growth of their industries. Thus rise in their emissions was specially factored into the framework convention and the climate change negotiations.

In view of this, an insistence by the industrialised countries for inclusion of major developing countries (such as China and India) into the Annex I of the Convention was so far summarily turned down on the basis of **per capita** entitlement of emission rights. Similarly, the **flexibility** (on the basis of economic and social conditions) principle brought forward by the industrialised countries, did help them to distract from the deliberations concerning GHG reduction commitments. China, India and other developing countries have argued for compliance with the primary obligation of the developed country parties on the basis of '**common but differentiated responsibility and respective capability**' (CBDR&RC) as a *condition precedent* for any discussion about their joining the GHG reduction targets in future. They had insisted that they were not irresponsible about the threat of global climate change. In fact countries like India were already serious about using domestic energy saving techniques as well as initiatives that have far reaching implications in reducing their curve of GHG emissions. The 2008 National Climate Action Plan was touted as a pointer in the direction of such voluntary domestic action.

Taking the lead

UNFCCC, based upon precautionary approach, is still shrouded in uncertainties. There are 'calculated ambiguities' in the convention itself for the political convenience of the states. The 'in-built' law making mechanism is conditioned upon several factors: political, scientific, and economic. The notion of taking the lead (by developed country parties) on the part of only one group of parties to the Convention is unique in the treaty-making process. It has been the very soul of the UNFCCC in attaining the goals of combating climate change and the adverse effects thereof as well as provided a central basis for trade off between the developed country parties and developing country parties under the climate regime.

Article 3 paragraph 1 of the UNFCCC deals with the **leadership principle** or "taking the lead" principle. When speaking of the specific commitments of the developed countries relying on the Preamble to the Convention, it became necessary that the developed countries should make effort to solve the environmental problems they had caused by virtue of emitting the Ozone Depleting Substances (ODS), as per the Montreal Protocol's requirements. They had agreed to the programme of transferring new technology to make it possible for less developed countries to enjoy the benefits of the same. The issue raised during the Montreal Protocol's negotiations as to reducing the emissions of certain chemicals (which if restricted in less developed countries would result in abandoning the enjoyments in using the refrigerators and other industrial solvents) and agreement in taking the leadership in that issue had in fact set as a guiding factor for the application of the same principle in case of UNFCCC too. This principle raises the expectation of the less developed countries that the developed countries will make earlier arrangements for cutting short/reducing the greenhouse gas emissions and adopt measures and national policies with an aim of returning the greenhouse gas emissions to 1990 levels by the year 2000. The principle of CBDR&RC legitimises **asymmetry of commitments** under the Kyoto Protocol.

Sowing Discord?

Following COP 11 (Montreal) decision, two parallel processes of the *Ad Hoc Working Groups on Further Commitments for Annex I Parties* under the Kyoto Protocol and the *Convention Dialogue Process* have done good churning to set the stage for post-2012 GHG reduction targets. Apart from this, parallel series of high-level discussions on climate change have taken place at political forums such as the UN Security Council, G8 plus Five Summit, the UN Secretary-General' High-Level Event on Climate Change Assembly, Washington D.C. conference of high CO₂ emitter [fifteen plus the EU] countries, the General Assembly, the G20 meeting and the UN Human Rights Council.

It has been widely felt that the full realization of the principle of CBDR&RC holds the key to attain stabilization goals in the foreseeable future since three-fourths of the emissions are contributed by the developed countries. In view of this, any ill-conceived and short-term focus on developing country commitments could be politically expedient for those who intend to upset the Kyoto appellation. It may result in a scenario wherein **no one acts, and everyone loses**. This has turned out to be so true as the Copenhagen climate conference was gaveled to a close on 19 December.

It was almost certain that Copenhagen will not produce any fair and equitable outcome that could be legally translated into action under the multilateral process. The Developing countries launched a revolt in the opening of the Copenhagen high-level segment against an attempt by the Denmark government to introduce new texts of its own as the basis for negotiating the final outcome in the Climate Change Conference. Moreover, the mischief-laden effort to push for a single text containing legally binding commitments for all the parties caused an irreparable damage. Thus widening of the trust deficit between the developed and the developing countries, in spite of the promise of \$100 billion dollar funds, could derail the entire intergovernmental effort within the UNFCCC's multilateral framework. It is also ironic that the meeting could not resolve a core issue concerning the legal form or "architecture" for future arrangements.

It seems that the presence of a large number of heads of states and governments in Copenhagen went in vain since the end product was 'parachuted' through a non-transparent process to obtain 'consent' of a large number of reluctant sovereign states. The language in the political instrument (called 'Accord') remains quite 'soft'. However, it will not be irrelevant either being a COP decision. In fact serious questions arise as regards the not only the legal status but also legitimacy of a COP decision that defied consensus and pushed down the throats of a huge majority. It negates the basic principle of consensual decision in treaty-making as well as multilateral environmental negotiations. It could be a major impediment in addressing challenge of climate change as a "common concern of humankind".

[Done: 21 December 2009]