

# Neither fish nor fowl

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THOSE who had predicted in the lead up to the fifteenth Conference of Parties to the United Nations Framework Convention on Climate Change (FCCC) that ‘something rotten awaits us in the Kingdom of Denmark’ were vindicated on December 19 when the international community took note of the Copenhagen Accord. The Copenhagen Accord can plausibly be characterized as ‘rotten’ not just because

it is weak and will not contain climate change in its current form, but also because even in this weak form it faces considerable legal and procedural challenges to its operationalization. As a definitive answer to the climate challenge the accord leaves much to be desired.

The Copenhagen Accord was reached among 29 states, including all major emitters and economies, as well as those representing the most vulnerable and least developed.<sup>1</sup> The Conference of Parties (CoP) neither authorized the formation of this group to negotiate the accord, nor was it kept abreast of the negotiations as they

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evolved. As this occurred after ten days of repeated procedural irregularities and ill-considered initiatives by the Danish presidency, patience and confidence were wearing thin. Therefore, when the accord was presented to the CoP for adoption late on December 18, it was categorically rejected by, among others, Bolivia, Cuba, Nicaragua, Sudan, Venezuela and Tuvalu. They did so both because of the manifest procedural irregularities in the negotiation of this accord as well as the substantive weaknesses they perceived in it. As CoP decisions require consensus (not unanimity) for adoption, the Conference of Parties, in a night marked by unparalleled histrionics and presidential ineptitude, could only resolve to ‘take[s] note’ of the Copenhagen Accord.

Had the Copenhagen Accord been an independent plurilateral agreement among 29 nations representing the majority of emissions and populations of the world, it could have had considerable force. The accord, however, is far from it. The Copenhagen Accord was drafted on the operational presumption that it would be adopted as a CoP decision. This is evident from the clear terms of the accord which make numerous references to the CoP,<sup>2</sup> as well as the initially distributed draft which contained an FCCC document number. When it became clear that the Copenhagen Accord would not be adopted by the CoP, the accord could, at that juncture, have

been redrafted to ensure that it could be operationalized independently of the FCCC process.

This, however, was not done, presumably as those heads of state and government that had negotiated the accord were winging their way home, and because any redrafting exercise may have upset the delicate and hard-won balances struck between competing interests. Be that as it may, the perverse result of the back and forth between states on the night of December 18 is that the Copenhagen Accord is neither fish nor fowl. It is neither a CoP decision that can be operationalized through the FCCC institutional architecture and draw on the existing normative corpus, nor is it an independent plurilateral agreement with its own operational architecture and normative core. This situation will likely pose significant challenges as well as create a political drag in implementation.

First, since the accord was set adrift from its FCCC moorings in the early hours of December 19, some of the normative presumptions it was based on, no longer apply. To illustrate, the Copenhagen Accord requires non-Annex I states to submit their national communications, containing *inter alia* their mitigation actions, every two years.<sup>3</sup> Currently, non-Annex I states are required to submit their national communications every five years,<sup>4</sup> and the ‘full agreed costs’ of preparing and submitting their communications are to be provided by developed country parties.<sup>5</sup> The Copenhagen Accord, however, does not specify who will bear the costs of these more frequent national communications required of developing

states. Had it, as intended, taken the form of a CoP decision, it would have built on existing FCCC norms, and the costs would have been borne, as mandated by the FCCC, by developed states. However, this presumption no longer holds.<sup>6</sup>

Second, since some parts of the accord do not rely on CoP engagement whilst others do, some parts are readily operationalizable whilst others are not. This asymmetry will likely upset the balance between various elements of the political deal struck at Copenhagen. Some parts of the accord, as for instance relating to mitigation, rely on national governments to deliver. Developed states agreed to implement economy-wide emissions targets for 2020, and developing states agreed to implement mitigation actions. All states agreed to submit these targets and actions to the Secretariat by 31 January 2010 for them to be compiled in an information document. The requirements imposed on states by the Copenhagen Accord can thus, in theory, be readily operationalized as the primary locus of action is in the domestic rather than international sphere. The requirements – provision of information – at the international level are limited.

In contrast, provisions relating to financing require and indeed presume CoP involvement and, therefore, cannot be readily operationalized. One of the significant achievements of the Copenhagen Accord is that it prescribes quantified ambition levels for developed states to raise finances: USD 30 billion for the period 2010-2012 and USD 100 billion a year by 2020.<sup>7</sup> The accord requires a signifi-

1. This group included the BASIC states – Brazil, India, South Africa and India – as well as the EU, Australia, Bahamas, Canada, Colombia, Denmark, Ethiopia, Grenada, Indonesia, Japan, Korea, Lesotho, Maldives, Mexico, Poland, Norway, Russia, Saudi Arabia Sudan, Sweden and the US.

2. See, e.g., paragraphs 5 and 8, Copenhagen Accord, 2009, available at: [http://unfccc.int/files/meetings/cop\\_15/application/pdf/cop15\\_cph\\_auv.pdf](http://unfccc.int/files/meetings/cop_15/application/pdf/cop15_cph_auv.pdf)

3. Paragraph 5, Copenhagen Accord, 2009.

4. Article 12(5), FCCC, 1992, read with the relevant CoP decision.

5. Article 4(3), FCCC, 1992.

6. The accord does express allegiance to the principles and provisions of the convention in general preambular language (recital 5), but this in itself is insufficient guarantee of the required funding.

cant portion of this funding to flow through the Copenhagen Green Climate Fund<sup>8</sup> which it envisages as an operating entity of the financial mechanism of the convention.<sup>9</sup> The establishment of such a fund would require a CoP decision, which as there was no agreement on the accord, will not be forthcoming. It is, of course, possible for this fund to be housed elsewhere, but since the existing understanding reflected in the accord has been displaced, there is no clarity or agreement on where, how and when this fund will be established. The link between developing country mitigation actions and developed country provision of financing, already tenuous in the accord, is further weakened by a lack of clarity on the channels through which this financing will be provided.

Third, given the accord's questionable legal basis and its fragile connection to the FCCC, the extent to which the FCCC Secretariat can facilitate further action on the accord is debatable. The Danish presidency and the UN Secretary General in a missive dated 30 December 2009, urged parties to 'sign onto the Accord', as well as to submit information to the FCCC Secretariat on their mitigation commitments and actions by 31 January 2010. Cuba responded immediately by questioning the authority of the Danish presidency and the secretary general to open the accord for signature, given not only the absence of consensus on it, but its express rejection by some states. Arguing that the CoP had not provided it the mandate to do so, Cuba also questioned the authority of the FCCC Secretariat to collate and reflect information on

those that were willing to be associated with the accord. Cuba's position is certainly tenable.

Some have argued that FCCC Article 7(2) (c) read in conjunction with FCCC Article 8(2) provides the secretariat with the authority to facilitate joint measures, such as the accord, taken by parties. While ingenious, this may not circumvent the requirement for a CoP decision. Article 7(2) authorizes the CoP to 'keep under regular review the implementation of the Convention' and to make 'decisions necessary to promote the effective implementation of the Convention.' And, 'to this end' in sub-paragraph (c) it authorizes 'the CoP to facilitate, at the request of two or more parties, the coordination of measures adopted by them to address climate change.' Article 8(2) (c) includes in the listing of the secretariat's functions, assistance to the parties, on request, in 'the compilation and communication of information required in accordance with the provisions of the Convention.'

A careful reading of these provisions reveals the difficulties of relying on them. If the Copenhagen Accord is designed to promote the effective implementation of the Convention, which it arguably is, rather than merely to keep it under review, then the CoP will need to take a decision to facilitate joint measures. A CoP decision would need to be wrought by consensus, which, given current politics, will not be forthcoming. Second, Article 8(2) (c) will, at the request of parties, permit the secretariat to compile information on parties' actions in so far as they are in accordance with provisions of the convention, and do not entail significant resources. If the informational burden placed on states is more onerous than under the Convention, or if secretariat actions have significant

resource implications (such as facilitation of meetings, production and translation of documents, etc.) a CoP decision would be necessary.

Given the tortured birthing process of the Copenhagen Accord, these identified legal and procedural challenges are likely to be merely the tip of the iceberg. It is in this context that the requests from the secretary general and the Danish presidency to states to express their 'willingness to be associated with the Accord' must be considered. What is it that states are being asked to associate with? And, what is it that such association entails? States are being asked to associate themselves with an accord which aims to be 'operational immediately'<sup>10</sup> but cannot be uniformly operationalized as currently drafted. At a minimum, the accord requires considerable further negotiation to flesh out the alternatives that will take the place of the understandings that currently exist in the text but were displaced as a result of CoP (in)action in the early hours of December 19. Therefore, states, should they choose to do so, will be associating themselves with a living being which, however attractive it may seem at this moment, may not remain so in the future.

Needless to say, those states that participated directly in the negotiation of the accord, as well as those that expressed support for it in the plenary, are morally and/or politically obliged to associate themselves with it. Moral and political pressure on these states would stem presumably from the engagement of their heads of state and government in an unprecedented drafting exercise on climate change. However, in expressing support for the accord, given the many

7. Paragraph 8, Copenhagen Accord, 2009.

8. Ibid.

9. Paragraph 10, Copenhagen Accord, 2009.

10. Preambular recital 5, Copenhagen Accord, 2009.

uncertainties that currently exist, states may be well advised to explain, qualify, and condition the nature and extent of their support for it. A blanket association with the accord will imply not just that states cannot take positions (in the negotiations) or actions (on the ground) that run counter to the accord, but also arguably that they are obliged to implement the accord independent of the enabling circumstances. Developing states may find themselves obliged to implement the requirements of them in the accord and the actions they have put forward in the absence of predictable and assured support to do so.

The Copenhagen Accord, for all its imperfections, has captured much of the popular and political imagination in the aftermath of the Copenhagen conference. The accord, however, does not represent the ‘agreed outcome’ mandated by the Bali Action Plan.<sup>11</sup> The ‘agreed outcome’ of the two-year process, the ad hoc working group on long-term cooperative action (AWG-LCA), launched by the Bali Action Plan in December 2007 is a CoP decision that extends the mandate of the AWG-LCA, and imposes a new deadline of CoP-16, scheduled to be held in November-December 2010 in Mexico.<sup>12</sup> The AWG-LCA is tasked

with continuing on the basis of the work that has been undertaken thus far – reams of party proposals, months of painstaking negotiations, and numerous versions of negotiating texts including the latest overarching one drafted in the first week of CoP-15.<sup>13</sup>

The agreed outcome in December 2010, whatever its legal form, will need both to incorporate the hard-won political compromises reflected in the Copenhagen Accord, and to resolve the remaining substantive disagreements. This will be no mean task for several reasons. First, the accord is vigorously resisted by a few vocal opponents who in a consensus-based decision-making process have acquired veto power. Second, the accord reflects an internal balance and logic which may be difficult to replicate in the context of the unwieldy negotiating tracks and documents currently in play. And, finally, the Copenhagen Accord left most substantive disagreements unresolved – in particular on the deeply divisive issue of the future (or lack thereof) of the Kyoto Protocol, the nature and extent of differential treatment between developed and developing states, and the architecture of a future legal regime (top-down or bottom-up).

If the FCCC negotiation process does not prove receptive to the incorporation of the Copenhagen Accord, those states that have associated themselves with the accord may be constrained to create or use a different forum to craft an alternate architecture to operationalize it. Needless to say, although global attention will surely shift elsewhere in 2010, the international negotiations on climate change, whether under the auspices of the UN or not, are far from over.

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11. Decision 1/CP.13, *Bali Action Plan*, available at, <http://unfccc.int/resource/docs/2007/cop13/eng/06a01.pdf#page=3>

12. Draft Decision -/CP.15, *Outcome of the work of the Ad Hoc Working Group on Long-term Cooperative Action under the Convention*, 2009 available at, [http://unfccc.int/files/meetings/cop\\_15/application/pdf/cop15\\_lca\\_auv.pdf](http://unfccc.int/files/meetings/cop_15/application/pdf/cop15_lca_auv.pdf)

In parallel negotiations on the Kyoto Protocol track, Draft Decision -/CMP.5, *Outcome of the Ad Hoc Working Group on Further Commitments for Annex I Parties under the Kyoto Protocol*, 2009, sets COP-16 as the deadline for the group to deliver the result of its work, available at, [http://unfccc.int/files/meetings/cop\\_15/application/pdf/cmp5\\_awg\\_auv.pdf](http://unfccc.int/files/meetings/cop_15/application/pdf/cmp5_awg_auv.pdf)

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13. FCCC/AWGLCA/2009/L.7/Rev.1, available at *ibid*.