The Copenhagen Climate Change Agreement: Failure or Success? Next Steps and Key Considerations for Business

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This weekend, heads of state and government and negotiators from 193 countries concluded the Copenhagen Conference with a last-minute, three page framework document for a new global climate change deal (the "Copenhagen Accord")[1]. Hailed by some as a foundation for further progress, and derided or rejected by others as 'greenwash' (sounds good but really is not) and an outright negotiating failure[2], the Copenhagen Accord sets out a first basic agreement on key elements of the global climate change framework for the years to come. Negotiations towards a more detailed legally binding agreement and pressure towards a more ambitious outcome will continue throughout 2010 and possibly beyond. The parties agreed a review of the Accord and its implementation would be completed by 2015.

By its own terms, the Copenhagen Accord reflects a goal of reducing worldwide greenhouse emissions sufficient to limit the increase in global temperature to below 2 degrees C. Industrialized countries committed to implementing emission targets for 2020 by January 31, 2010, and all countries committed to achieving the peaking of global and national emissions as soon as possible. In addition, developing countries such as China, India and Brazil agreed to Nationally Appropriate Mitigation Actions ("NAMAs"), including some specific actions/targets to be set forth in an attachment to the Accord, and to a set of basic commitments aimed at making such NAMAs "Measurable, Reportable and Verifiable" ("MRV").

While the full range of challenges and opportunities that the new international climate change framework will present remains to be determined and many key questions remain unanswered, a number of elements can already be identified that companies should be aware of as we go into 2010. To help you set your own company's priorities, determine how this affects you and decide on possible action you may wish to undertake, we highlight the following six:

1. Billions of dollars in new climate change funding provide a major business opportunity... and a serious challenge. Central to the Accord is the concept that developed countries have an obligation to provide adequate, predictable and sustainable financial resources to support the implementation of adaptation and mitigation actions in developing countries. Industrialized countries have set as a goal making available some $100 billion a year in funding for developing countries to use for climate change-related actions by the year 2020. In the shorter term, they have agreed to provide $30 billion over the next three years and establish a Copenhagen Green Climate Fund. A High Level panel will be established to assess the contribution of potential sources of revenue including public and private, bilateral and multilateral, and alternative financing mechanisms, and funding for adaptation will be prioritized for the most vulnerable developing countries. The funding and mechanisms agreed to present tremendous possible opportunities for business and come on top of the hundreds of billions of dollars that the United States, European Union, China and others are already spending on 'green' stimulus measures domestically.[3] On the flip side, the money also poses major potential challenges as nations may well be tempted to favor domestic producers or content, or products or producers from certain countries over others. Exactly how new funds will be disbursed and used, and what rules, eligibility criteria and bidding processes are to be applied will be a key question in follow-on negotiations in 2010. Rules for transparency, non-discrimination and fairness (e.g., along the lines of the WTO's Government Procurement Agreement), as well as adequate agreement on technologies covered and/or technology neutrality of funding sources remain to be determined.

2. A Technology Mechanism and technology funding were agreed upon but implementing rules remain to be negotiated. Cleaner, more energy efficient, and lower-emission technologies are key to achieving global climate change goals, and technology transfer, technology financing and the role of Intellectual Property Rights (IPR) were the subject of intense negotiation both leading up to and in Copenhagen. The Copenhagen Accord reflects agreement on the establishment of a Technology Mechanism, as well as funding to be made available, including through the newly established Copenhagen Green Climate Fund. Intense discussions on these and remaining issues are expected to continue in 2010, while more detailed guidelines on availability of and eligibility for such financing remain to be negotiated, including in the context of ongoing negotiations in the Ad Hoc Working Group on Long Term Cooperative Action (AWG-LCA).

3. A complex yet powerful institutional framework is beginning to take shape, with enforcement mechanisms growing in importance. While a detailed description of the institutional framework that is beginning to form around global climate change issues is beyond the scope of this alert and its detailed architecture remains to be determined, suffice it to say that the framework is getting ever more complex, involving a range of UN institutions, ad hoc organizations, technology centers and finance mechanisms and funds, and active possible roles for the World Bank and other multilateral and regional financial institutions, as well as national governments around the world. Exactly how these mechanisms and institutions will operate and cooperate will need to be determined in further negotiations in 2010 and may have important consequences in terms of funding opportunities, transparency, and the international and domestic rules and regulations that will apply. Further negotiations on monitoring, transparency and MRV ("Measurement, Reporting and Verification") rules, a key part of the Copenhagen negotiations, also merit attention as these may become a key mechanism not just to ensure environmental goals are reached, but also to ensure the fair and equal competition across borders is maintained. As agreed in Copenhagen, mitigation actions taken by developing countries will be subject to domestic (as opposed to international) measurement, verification and reporting, but are to be reported internationally every two years according to the rules previously laid down for such reporting in the UNFCCC Convention. To the extent that a developing country seeks "international support", its mitigation actions will be subject to international measurement, reporting and verification under new UNFCCC guidelines.

4. While some progress has been achieved, many of the key reforms and additional agreement on market-based finance mechanisms, including the Clean Development Mechanism (CDM) and carbon offset mechanisms, remain to be agreed upon. In addition to direct public financing, reform of existing offset mechanisms such as the CDM were another major negotiation issue in Copenhagen, but the Copenhagen Accord remains silent on them except for a general reference to "opportunities to use markets". More detailed rules on and a fundamental reform of carbon offsets such as those contained in the Clean Development Mechanism (CDM) remain to be negotiated, as do implementing rules for the newly agreed upon REDD-plus (Reduce Emissions from Deforestation and Forest Degradation) mechanism – which will compensate landowners for leaving forest land untouched and not using it for mining, agricultural or industrial use. It appears that there was some basic agreement as to future work, as reflected in negotiating documents coming out of the Copenhagen discussions, including references to possible inclusion of Carbon Capture and Storage technology in the CDM, but their ultimate adoption and more detailed implementation remain uncertain.

5. Even more uncertain is what will happen to sectoral approaches, including in the agricultural and aviation and transportation sectors on which no agreement was so far reached. While substantial discussion on sectoral approaches took place in the run up to Copenhagen as well as during the first days of negotiations, issues such as aviation bunker fuels, and specific agricultural sector rules were ultimately not included in the Copenhagen Accord or other adopted instruments and remain to be negotiated in 2010 and beyond.

6. Many questions concerning the link between new climate change rules and existing international trade and investment rules (e.g., under the WTO) remain unanswered. While the Copenhagen Accord concluded this weekend does not specifically address border measures such as those contemplated in the United States and Europe, questions surrounding the WTO compatibility of such measures became the topic of heated debate among negotiators. Some developing countries demanded clear guarantees that no such measures would be imposed on their products or vowed to appeal them at the WTO. Beyond border measures, the finance-related trade issues and technology transfer already mentioned, a range of other trade issues looms in the background as well, including WTO subsidies issues (under the SCM Agreement and potentially the Agriculture Agreement), and the Agreements on Technical Barriers to Trade (TBT

Agreement) and Sanitary and Phytosanitary measures (SPS Agreement).

While these six points are only a selection of the key issues emanating from the Copenhagen Accord and the negotiations that have taken place thus far, they demonstrate the potentially deep impact of the new global climate change framework that is beginning to take shape and the effects it will have on a broad range of industries and countries around the world. With negotiators from 193 countries, more than 115 heads of state and government, hundreds of NGOs and business organizations, thousands of journalists and tens of thousands of activists, the negotiations that took place in Copenhagen these past two weeks are already going down in the books as the largest international negotiation in history. They were also among the most complex as alliances shifted, powerful new negotiating blocks took shape and the diplomatic dynamics of a new world order began to emerge. China-U.S. bilateral negotiations were important, as were small-group G20 talks that delivered what was essentially to become the final agreement; an active brokering role of European countries as well as Brazil; and active engagement by African nations and Small Island Developing States (SMIDS). As negotiations continue into 2010, these dynamics can be expected to continue and yet new layers of geopolitical complexity may be added. At the same time, renewed attention will be focused on the U.S. legislative process as well as domestic measures to be undertaken by China, India, Brazil, Europe and others. As Secretary Chu noted during his speech in Copenhagen at the beginning of the week (and it has already become somewhat of a Copenhagen cliché): "Whatever agreements are made here – it is not the end, but rather just the start..."

[1] A copy of the agreement can be found here. In addition to the Accord, several decisions and draft decisions emanated from the two weeks of negotiations in Copenhagen. At the time of writing of this alert the exact legal status of many of these remained uncertain.

[2] See, e.g., here, here and here for some of the online reports on the Copenhagen outcome and overviews of the key issues.

[3] To view prior publications on this issue, click here.

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