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Mission Impossible? Making Sense of the Copenhagen Accord

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EVENT: The United Nations Climate Change Conference in Copenhagen, Denmark (Copenhagen Conference), comprising the 15th Conference of the Parties (COP 15) to the United Nations Framework Convention on Climate Change (UNFCCC) and fifth Conference of the Parties serving as the Meeting of the Parties to the Kyoto Protocol (COP/MOP 5), in conjunction with sessions of the UNFCCC and Kyoto Protocol ad hoc working groups.

MISSION: To conclude a fair, ambitious and binding international agreement on climate change, including agreement on (i) mid-term emission reductions by developed countries; (ii) clarity on mitigation actions by developed countries; (iii) short- and long-term finance; and (iv) government structures.

PARTIES: 115 Heads of State and Government and their delegations representing 194 countries, along with intergovernmental organizations, 21,000 non-governmental organizations and 5,000 media.

OUTCOME: The Copenhagen Accord, a non-binding political agreement which acknowledges that "climate change is one of the greatest challenges of our time" and emphasizes the parties' "strong political will to urgently combat climate change".

This article provides an overview of the Copenhagen Accord based on our attendance at the Copenhagen Conference and considers some of the implications of the Accord for Canadian businesses, particularly in the context of ever-evolving Canadian and U.S. climate change policies.

SOME LIKE IT HOT

From December 7 to 19, 2009, the eyes of the world were on Copenhagen, Denmark, where 194 countries had gathered to hammer out the details of an international climate change agreement for the post-2012 period. The Copenhagen Conference marked the culmination of a two-year-long negotiating process to enhance international co-operation on climate change under the Bali Road Map, which was launched by COP 13 in December 2007. For more details on the Bali framework, please see our February 2008 Blakes Bulletin on Environmental Law: *Drivers Needed: Mapping the Road to Global Climate Change Consensus*. If nothing else, the Copenhagen Conference illustrates the difficulty, if not impossibility, of reaching a global consensus on how to tackle the climate change challenge.

The product of two tense weeks of negotiations was the Copenhagen Accord, a non-binding political agreement which sets a 2 degrees Celsius target (i.e., that the increase in global temperature should be limited to 2 degrees Celsius). The Copenhagen Accord does not contain any specific emissions reduction targets nor any framework for a carbon market. While the Accord includes provisions for short- and long-term financing, there is no indication of where the money for a promised US$30-billion fund will come from or where it will be directed. Furthermore, the Copenhagen Accord omits any mention of plans to continue climate talks in 2010. Many parties were disappointed with the weak outcome of the Copenhagen Conference, but the Copenhagen Accord could represent an important first step towards more meaningful international action on climate change if countries are willing to implement it.

Some of the implications of the Copenhagen Conference for Canadian businesses are:

- continued uncertainty surrounding the timing and scope of federal climate change regulations
- a continuing patchwork of regulatory initiatives at the provincial and regional levels, resulting in the need for companies to comply with competing regulatory requirements
- a potential shift towards a new mode of climate negotiations among the world's major developed and developing countries
- no global carbon market in the foreseeable future given the lack of emission reduction targets, but domestic and regional carbon markets will continue to develop

CONT'D ON PAGE 2

CONT'D FROM PAGE 1

- potential costs to Canadian manufacturers and exporters as a consequence of proposed "border adjustment" provisions in U.S. climate legislation
- enhanced opportunities for Canadian companies to attract investment dollars and export clean technologies around the world.

COPENHAGEN ACCORD

The Copenhagen Accord was brokered directly by President Obama and a handful of key developing countries including China, India, Brazil and South Africa. The terms of the Copenhagen Accord were negotiated on the final day of the conference, topping off two weeks of high rhetoric and bitter procedural fights. It then took another day of tense negotiations to arrive at a procedural compromise that would allow the formalization of the Accord over the objections of several governments which complained about an "untransparent" and "undemocratic" negotiation process. Though far from perfect, the Copenhagen Accord is seen by many parties as a crucial step forward in international climate talks. The Copenhagen Accord is unique because, for the first time, all major economies including China and other key developing countries, have committed to reducing their greenhouse gas (GHG) emissions. However, it falls short of charting a path towards a treaty with binding commitments.

At the end of COP 15, the parties adopted parallel decisions under the UNFCCC and the Kyoto Protocol that "take note" of the Accord and open the way for governments to individually sign on. In separate decisions, parties extended the mandate of the ad hoc working groups under both the UNFCCC and the Kyoto Protocol to continue negotiations toward a more comprehensive agreement in Mexico City at the next COP. This unprecedented outcome leaves uncertainty about the formal standing of the Copenhagen Accord under the United Nations climate process and about the nature of any future agreement. The aim of a "legally binding instrument", which appeared to be part of the deal when President Obama first announced it, was later taken out.

Key elements of the Copenhagen Accord include:

- a goal of limiting global temperature increase to 2 degrees Celsius
- a process for countries to enter their specific mitigation pledges by January 31, 2010
- action and co-operation on adaptation, with urgent attention given to the least developed countries, small island developing states and Africa
- broad terms for the reporting and verification of developing country actions
- an explicit acknowledgment to act on deforestation and forest degradation
- establishment of four new bodies: (i) a mechanism to support reducing emissions from deforestation and forest degradation in developing countries (REDD); (ii) a high level panel to study the implementation of financing provisions; (iii) the Copenhagen Green Climate Fund to support the mitigation and adaptation efforts of developing countries as well as capacity building and technology transfer; and (iv) a technology mechanism to accelerate technology development and transfer
- a commitment by developed countries to provide $30-billion in "new and additional" funding in the period 2010-2012 to help developing countries reduce emissions, preserve forests, and adapt to climate change
- a commitment by developed countries to mobilize $100-billion a year in public and private finance by 2020 to address the needs of developing countries.

By 2015, the Copenhagen Accord calls for an assessment of the implementation of the Accord, including strengthening of the long-term target.

The way in which the Copenhagen Accord was forged provides a preview of how future international efforts to reduce emissions will be co-ordinated – that is, by a much smaller group of nations responsible for the majority of emissions. One forum that may provide the basis for future international climate negotiations is the Major Economies Forum on Energy and Climate (MEF), which was launched in March 2009. The purpose of the MEF is to facilitate a dialogue among major developed and developing economies with the objective of generating the political leadership necessary to increase clean energy supplies while cutting GHG emissions. The 17 major economies participating in the MEF, which produce the majority of the world's GHG emissions, include: Australia, Brazil, Canada, China, the European Union, France, Germany, India, Indonesia, Italy, Japan, Korea, Mexico, Russia, South Africa, the United Kingdom, and the United States.

CONT'D ON PAGE 3

CONT'D FROM PAGE 2

RISE OF SUB-NATIONAL INITIATIVES

It became apparent at the Copenhagen Conference that governments lacked the political will to commit to concrete targets and actions. Climate change talks have essentially been deadlocked for the past two years as countries grapple with complex issues relating to economic development, trade, technology transfer, climate finance, responsibility for historical emissions, and responsibility for mitigating future emissions. It is hard to imagine any issue other than climate change which embodies the challenge of reconciling so many diverse national interests, not only between the developed and developing nations, but among the developed and developing nations themselves. As a result, "sub-national" governments including provinces, states and municipalities are becoming frustrated with this process and are forging ahead with their own strategies to reduce GHG emissions. For the foreseeable future, in the absence of an international climate change agreement, it looks like the onus will fall on provinces, states and municipalities to take meaningful emission reduction actions.

In North America, we have already seen a number of sub-national initiatives fill the leadership void left by federal governments on the climate change issue. Prominent among these are the Western Climate Initiative (WCI) and the Regional Greenhouse Gas Initiative. The WCI is a collaboration of four provinces (B.C., Ontario, Manitoba and Quebec) and seven U.S. states working together to reduce GHG emissions at a regional level. One of the main champions of sub-national action, and the main driver behind the WCI, is California's Governor, Arnold Schwarzenegger. Governor Schwarzenegger was in attendance at the Copenhagen Conference and once again pushed the sub-national agenda: "...as much as 80 percent of the necessary greenhouse-gas reductions will happen at the sub-national level." "So why" he asked, "should we focus all our faith and hope in international action?" Then, at the Climate Summit for Mayors in Copenhagen held on December 15, Governor Schwarzenegger called on the United Nations to convene a climate summit for cities, states, provinces and regions. He made the point that cities, states and provinces have, in many cases, already taken a leadership role in implementing policy innovations to curb GHG emissions and to spur the development of clean energy alternatives and transportation infrastructure. Sub-national governments have a distinct advantage over their sovereign counterparts – the advantage of governing a smaller population and geographic area.

R20 – A New Proposal from California

Building on the concept of sub-national initiatives, Governor Schwarzenegger offered a new proposal while in Copenhagen. This proposal draws on the G(X) model of international co-operation (as in the G-20 group of nations) and suggests that sub-national governments come together to advance climate policy in their own "R20", or "Club of 20 Regions". According to the Governor's office, officials from Quebec, Nigeria, France and Algeria have already signed on to the idea of "a new regional coalition to fast-track the results of the Copenhagen Climate Change Conference and push their respective national governments into more rapid actions and stronger commitments to fight climate change." Founding members of the group include Quebec's Premier, Jean Charest, who said the arrangement would facilitate the transfer of green technologies to developing countries.

According to a concept document released on December 14, R20 aspires to "demonstrate the feasibility" of the arrangement by 2012. The Governor's announcement provided no indication of whether other members of the WCI had signed on to R20 (the "20" is symbolic so far). If implemented, this initiative could present opportunities for members to exchange expertise and facilitate the transfer of green technologies to developing countries.

C40 – An Initiative by Cities

At the municipal level, "C40" was established in 2005 and represents a group of the world's largest cities committed to tackling climate change. C40 is currently chaired by Toronto's Mayor, David Miller. C40 recognizes that cities have a central role to play in dealing with climate change, particularly as cities bear a disproportionate responsibility for causing it. According to C40, approximately 50% of the world's population currently live in cities (set to reach 60% by 2030). However, cities and urban areas consume a disproportionate amount of the world's energy – approximately 75% – and produce up to 75% of the world's GHG emissions. C40's member cities are committed to taking action on a number of fronts, including the creation of procurement policies and alliances to accelerate the uptake of climate-friendly technologies and to influence the marketplace.

CONT'D ON PAGE 4

CONT'D FROM PAGE 3

PROVINCES ON THE WORLD STAGE

In Copenhagen, deep divisions between the federal government and the provinces on the climate change issue were pushed to the fore. A number of provinces and Canadian cities made their presence known at Copenhagen, seemingly to show the world that Canada is a climate leader despite a weak climate policy from Ottawa. Among those in attendance at Copenhagen were Quebec Premier Jean Charest, British Columbia Premier Gordon Campbell, Manitoba Premier Greg Selinger, Nova Scotia Premier Darrell Dexter, Ontario Environment Minister John Gerretsen, Mayor David Miller of Toronto, Mayor Gregor Robertson of Vancouver and Mayor Dave Bronconnier of Calgary. Quebec Premier Jean Charest summed up the view from some of the provinces: "There is something of a tale of two Canadas here. You have provinces leading with bold action, whether it's in Quebec or it's Manitoba or Ontario or British Columbia – leading on renewables, leading on passing carbon taxes, putting comprehensive climate legislation in place. And we have a federal government that is not taking the right role for Canada in these international negotiations. ... We'd love to see that national position change." This followed earlier comments from Ontario and Quebec officials that they want to ensure that Ontario and Quebec do not carry the burden of national GHG reductions while other provinces, such as Alberta, do not see any significant GHG emission reductions for years. Quebec and Ontario's criticism of the federal government for its emission reduction targets – 20% below 2006 levels by 2020 – has led to a continuing spat between the federal government and Quebec and Ontario's provincial governments.

As a result of weak federal action on climate change, likely to go on for several years, the provinces and cities will continue to implement their own emission reduction strategies. It will be up to the federal government to bring the provinces together if it is to have any chance of meeting the country's emission reduction targets – no easy task. This means that for the foreseeable future, Canadian businesses will continue to face a patchwork of regulations and competing regulatory requirements.

COPENHAGEN: THE ROLE OF BUSINESS

Business leaders from around the world were present at Copenhagen. The main COP gathering for industry took place at the Business Day event, which was convened on December 11, 2009. Organized by the World Business Council for Sustainable Development (WBCSD), the International Chamber of Commerce and the Confederation of Danish Industry, the Business Day event was a recognition of the importance of business in generating solutions to the climate change challenge. A growing number of companies are acknowledging the importance of risk mitigation, corporate social responsibility, and the profitability and cost savings associated with innovative climate solutions. As a result, the business community is becoming increasingly involved with issues relating to clean technology, carbon markets, energy efficiency, demand-side management, and voluntary emission reduction commitments. At the end of the Business Day event, the WBCSD announced the launch of the Value Chain Initiative, which aims to optimize carbon reductions throughout the supply chains of consumer goods companies. The Value Chain Initiative, led by the Coca-Cola Company and Unilever, underscores the importance of influencing behavioural change in suppliers and consumers. As an increasing number of blue chip companies embrace carbon reduction initiatives, there is no doubt that these efforts will impact companies at all levels of the supply chain.

On December 12-13, 2009, the Bright Green Expo was also held in Copenhagen. The Bright Green Expo featured more than 180 of the world's leading companies and their cutting-edge, market-ready climate solutions. The exhibition focused on business-driven innovation and technology as the only feasible way to meet global climate challenges. Author Thomas Friedman has written that the next great global industry is going to be energy technology based on clean power and energy efficiency. The entire premise of the exhibition was that leaders in the energy technology industry will reap economic benefits, attract the most innovative companies and gain global respect.

From a business perspective, it was evident in Copenhagen that despite the political inertia, the business community is engaged on the climate change issue and continues to push forward with clean technology solutions in the spirit that innovation is good for the bottom line. There is no doubt that governments will need to play a key role in providing incentives to drive innovation and facilitate market access for companies at competitive prices. From a Canadian perspective, there continues to be significant international interest in Canadian companies and investment opportunities. As a result, there is great potential for Canadian companies to attract investment dollars and export their expertise and clean technology solutions to markets around the world.

CONT'D ON PAGE 5

CONT'D FROM PAGE 4

CARBON MARKETS – A "BOTTOM-UP" APPROACH

The Copenhagen talks did not produce any framework for a global carbon market. As a result, the outcome of the Copenhagen Conference was disappointing from the perspective of the carbon markets. The Copenhagen Accord only provides for a list of national pledges of GHG emission reductions and fails to set any concrete emission reduction targets. Further, there was no indication of whether the price for carbon will be regulated by governments (for example, by imposing a price cap) or determined by the carbon market itself. The uncertainty surrounding carbon pricing will make it difficult for companies to work out the costs of doing business in an increasingly carbon-constrained economy. Also, this will make it difficult for carbon market participants to estimate their earning opportunities. However, countries have chosen cap-and-trade as one of the tools to combat climate change and, in the longer term, the prospects for the global carbon market should improve. With countries developing their own domestic and regional markets, it looks like the global carbon market will take a "bottom-up" approach. This means that countries will link their carbon trading systems to one another to create the global market for carbon credits. There continues to be significant carbon market activity with the EU's Emissions Trading System and as the carbon markets of other countries come online, such as Japan, South Korea and Australia, the demand for carbon credits will only increase. Assuming that North America gets its climate act together, the long-term potential for the global carbon market looks very positive indeed.

U.S. PRESENCE IN COPENHAGEN

Despite the failure of the U.S. to pass climate change legislation prior to the Copenhagen Conference, the American delegation was fully engaged in climate talks at Copenhagen. On the first day of the conference, the U.S. made a major announcement that the U.S. Environmental Protection Agency (EPA) had issued a final ruling that GHGs pose a danger to human health and the environment, thus paving the way for regulating emissions from vehicles, power plants, factories and other major industrial emitters. The ruling provides the Obama administration with a significant administrative tool to combat GHGs even though Congress remains stalled on climate legislation.

At Copenhagen, the U.S. negotiating position was focused on the need for any international climate change treaty to include major emitters, in particular the emerging economies of China, India and Brazil. In addition, the U.S. insisted on having the targets and actions of these countries monitored and verified by an international body. Another concern of the U.S., as well as Canada and the European Union, related to the competitive advantage that emerging economies could have in the absence of legally binding targets. This competitive advantage is referred to as "carbon leakage". The Intergovernmental Panel on Climate Change defines carbon leakage as the increase in GHG emissions from countries without emission reduction commitments, occurring as a result of reductions in emissions-constrained nations. To illustrate, carbon leakage could occur if the emissions policy of one country raises local costs, leaving another country that has a more relaxed policy with a trading advantage. In this scenario, if demand for these goods remains the same, production may move offshore to the cheaper country with lower standards, and global emissions will not be reduced.

These concerns were underscored in a letter sent by a group of 10 Senate Democrats to President Obama on December 3, 2009 in the lead-up to the Copenhagen Conference. These Senators, who come from industrial states or regions heavily dependent on coal-fired power generation, are considered swing votes on climate legislation. In the letter, the Senators indicated they will only support climate legislation based on an international agreement that includes stringent verification and enforcement mechanisms, and border adjustment measures, together with emission allowances or rebates to trade- and energy-intensive sectors of the economy. In a session held at the Copenhagen Conference on December 15, a panel of House and Senate representatives (including staff of Senators Jeanne Shaheen (New Hampshire), Richard Lugar (Indiana) and Sherrod Brown (Ohio)) indicated that carbon leakage, competitiveness and environmental integrity will be key to any action taken by the Senate. Furthermore, any treaty or bill must protect U.S. jobs in order to have U.S. support.

The December 3rd letter calls for "border adjustments on imports from nations that have not yet adopted sufficient emission control measures." The Waxman-

CONT'D ON PAGE 6

CONT'D FROM PAGE 5

Markey bill (discussed in further detail below) already contains "rebate" and "border adjustment" provisions designed to keep U.S. companies competitive. These provisions, and any similar provisions inserted into Senate legislation, will likely cause controversy as they may come into conflict with global trade rules. Although these measures are aimed at countries without "sufficient emission control measures", Canadian companies could be inadvertently caught by them. Apart from trade levies that could be imposed on carbon-intensive exports, Canadian manufacturers will also likely face increased costs arising from the complex task of calculating the emissions embedded in internationally traded goods. As companies look for ways to remain competitive, Canadian industries will increasingly need to consider the carbon footprint of their products and services, particularly if they do business in the U.S.

OUTSOURCING OF CANADA'S CLIMATE POLICY?

Despite the broad commitments under the Copenhagen Accord, Canadian businesses face a lengthy wait before the federal government introduces its revamped climate change plan. It was not long ago that Prime Minister Stephen Harper touted a "made in Canada" approach to climate change. However, the federal government has continued to delay the release of GHG emission reduction regulations based on the broad framework document it released in March 2008 entitled *Turning the Corner: Taking Action to Fight Climate Change*. This plan established the structure of GHG targets and compliance mechanisms for the period 2010 to 2020. After the election of President Barack Obama in late 2008, federal climate change policy underwent a major policy shift to embrace the concept of a common North American approach to GHG management. Regulations were expected to be in place by 2010, which was pushed to 2012 when the federal government committed to releasing its climate change plan before the Copenhagen Conference. However, any such regulations or new climate change plans have yet to be released.

Following the Copenhagen conference, during which the federal government was considered by its critics to be, at best, a passive participant, Prime Minister Harper indicated that Canada would have to watch from the sidelines while the U.S. pushes its climate change legislation through Congress: "What will be most critical for Canada in terms of filling out the details of our regulatory framework will be the regulatory framework of the United States. If the Americans don't act, it will severely limit our ability to act. But if the Americans do act, it is essential that we act in concert with them." The risk, of course, of following the U.S. lead in establishing a regulatory regime for managing GHG emissions is that U.S.-designed legislation will not likely be sufficient to protect the interests of Canadian industries, particularly since U.S. legislation is heavily influenced by lobbyist groups and tends to skew in favour of certain industries. For example, the Waxman-Markey bill was heavily influenced by coal interests and the Senate legislation will likely reflect the interests of an even greater number of lobbyist groups. As a result, while U.S. legislation may be a good fit for American businesses, it won't necessarily be a good fit for Canadian ones. Also, if Canada adopts trade measures similar to the ones proposed in U.S. legislation, Canadian industries could face potentially more severe repercussions than their American counterparts given that our economy is heavily dependent on trade for its prosperity.

Further delays in implementing federal climate change legislation may make it increasingly difficult – and more costly – for Canada to meet its 20% below 2006 levels by 2020 target. Without knowing the types of emission limits they face, many companies are adopting a wait-and-see attitude, which means that emission cuts may ultimately be deeper and more expensive to make within a shrinking timeframe. In addition, companies will need to manage the competing regulatory requirements of provincial and federal systems.

SPOTLIGHT ON THE U.S.

Following the election of President Obama, there was great optimism about the prospects for an international climate change treaty with the return of the U.S. to the negotiating table. During the first year of the Obama administration, energy and climate change issues remained top priorities despite the economic crisis. In June 2009, the *American Clean Energy and Security Act of 2009* (ACES), also known as the Waxman-Markey Bill, was passed by the U.S. House of Representatives. The ACES sets out a framework for the establishment of an economy-wide cap-and-trade system and measures to help address climate change and build a clean energy economy. For more information on the ACES, please see

CONT'D ON PAGE 7

CONT'D FROM PAGE 6

our April 2009 Blakes Bulletin on Energy/Environmental Law/CleanTech: *A Bold Step Forward: What the Draft U.S. Clean Energy and Security Act of 2009 Means for Canadian Industry*. The vote on the ACES in the U.S. House of Representatives is the first step in a two-stage process. In order for the ACES to become law, it must next pass the U.S. Senate where similar legislation is now stalled in Senate committees. If the Senate passes a bill, the differences between the ACES and Senate bill would need to be reconciled, with the final bill passed by both houses, before it can be sent to President Obama and signed into law.

The timing of the climate change debate within the broader Congressional agenda remains unclear because of the nature of shifting political priorities in the U.S. There is a small window of opportunity for the Senate to pass climate legislation this spring if the political will exists. It is anticipated that Senators John Kerry, Graham Lindsey and Joe Lieberman will release a new climate bill into the Senate in early 2010. In December 2009, Senators Kerry, Lindsey and Lieberman outlined a sparse framework of their compromise climate bill in an attempt to jumpstart the Senate's stalled legislation on energy and climate change. There is still a chance that the U.S. will pass climate change legislation in 2010, however climate change legislation faces a tough fight in the Senate. This is because political and regional differences are more pronounced in the Senate and less populated agricultural states carry more weight in the Senate than in the House. Furthermore, any changes made to climate legislation by the Senate will likely be zero-sum in nature. The failure of Congress to pass climate legislation would provide greater incentive for states to adopt their own climate regulations and for the Obama administration to use the EPA's powers to impose emission regulations such as a low-carbon fuel standard.

Already in the first month of 2010, 11 governors of the northeast mid-Atlantic states signed a memorandum of understanding (MOU) to develop a comprehensive, regional low carbon fuel standard to reduce GHG emissions from transportation fuels. The governors have made it clear that they would prefer federal regulations rather than a patchwork of state-based regulations, but the MOU signals their intent to move forward if Washington does not. The potential for an even more complex and costly patchwork of climate regulations is of particular concern for Canadian-based oil sands producers, who are already grappling with the challenge of cutting their per-barrel emissions.

NEXT STOP: MEXICO CITY

The Copenhagen Accord is a first step in the next stage of international climate negotiations. For many participants, the climate negotiation process that nations have relied on for almost two decades since the establishment of the UNFCCC in 1992 broke down in Copenhagen because it was virtually impossible to bring about a consensus among groups with so many disparate interests. The "top-down" style of targets and timetables under the Kyoto Protocol may have met its end in Copenhagen. What may emerge in its place is a "bottom-up" approach that will consist of voluntary pledges to reduce emissions at a domestic level. There is significant work that needs to be done on the road to COP 16, which will be held from November 29 to December 10, 2010 in Mexico City.

The impacts of the Copenhagen Accord have yet to be felt as countries wrestle with the timing and scope of climate change regulations. However, the push for clean, green technologies continues and companies are innovating despite the policy uncertainty and fragmented approach to regulating GHG emissions. This is because many businesses believe that clean technology will play a key role in the shift towards a low-carbon economy and that such innovations will lead to "climate prosperity".

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