# The Copenhagen Accord

## A legal analysis

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# The Copenhagen Accord: A Legal Analysis

## Executive Summary

- There were three **key outcomes of the COP15**: two COP decisions to extend the work and mandates of the AWG-LCA and AWG-KP until COP16 in Mexico, and a decision to 'take note of' the Copenhagen Accord.

- **The Accord is not 'legally binding'** on those countries that choose to associate themselves with it. As such **political consequences**, rather than legal sanctions, might flow from its breach. Any interpretation of the Accord must be read in the context of its **legal status**.

- A decision to 'take note of' the Accord is legally distinct from a decision to 'adopt' the Accord. By "taking note" of the Accord, UNFCCC parties **formally acknowledge its existence** without making a statement as to their support or otherwise of its content.

- The subject matter of the Accord **combines the work of the AWG-LCA and AWG-KP** and potentially sets a precedent for the eventual merging of the two AWGs.

- Until the form of the outcome of the AWG-LCA is agreed, it is possible that **the Accord will play a role in guiding the negotiations** of the AWG-LCA (and AWG-KP) in the coming months and years.

- **The Accord itself is not comprehensive, lacks clarity and is open to different interpretations** and there is no indication in the Accord of whether there is a goal for the Accord or the outcomes of the AWG-LCA to be formalised in a legally binding agreement.

- The shift of approach from the legally binding top-down Kyoto Protocol 'targets' to the non-legally binding bottom-up Copenhagen Accord 'pledges' **may create an obstacle for continuing negotiations for a second commitment period** under the Kyoto Protocol.

- While the Accord claims to be operational immediately, in most **cases further guidance needs to be given by the COP before the Accord can become operational** (e.g. in relation to adaptation, MRV, governance of finance, REDD, technology transfer and market mechanisms).

- However, if there is sufficient political will, **parties to the Accord could choose to take action and implement it outside the UNFCCC framework**, for example, in the MEF or G20.

- The Accord sets a target of limiting the increase in temperatures to 2 degrees Celsius but **does not specify 2020/2050 aggregate emissions reductions targets** or a base year for temperature comparison.

- **Developed countries** are invited to submit non-binding **pledges for emissions reductions** by 31 January 2010 (but may do so after if they wish) but there are no sanctions for any country that fails to meet its pledge.

- The Accord acknowledges that **developing countries should take mitigation actions** but there are no targets by which emissions or emissions growth should be reduced.

- The Accord envisages **MRV provisions for both developed and developing countries**, but those for developed countries will be stricter than for developing countries. Only internationally supported mitigation actions by developing countries will be subject to international MRV; domestic actions will be subject to domestic rules.

- With regards to **Adaptation**, the Accord language is brief and fails to address an adaptation framework for action or language pertaining to loss and damage. The Adaptation paragraph includes reference to response measures, and it calls for the provision of adequate, predictable and sustainable support.

- The Accord calls for $30bn in fast-start finance to be provided to developing countries with a longer term goal of $100bn by 2020. There is **no clarity yet as to how much individual developed countries will pledge**. It is also not clear whether finance will be "*new and additional"* to existing ODA spending or UN ODA targets.

- The failure to adopt the Accord means that **the COP is limited in its authority to establish the Green Climate Fund** or provide guidance for the **High Level Panel**. As a result, it may be difficult to manage funds committed under the Accord through these new arrangements, unless it is done outside of the UNFCCC process

- As an interim measure, **funding may be channelled through existing UNFCCC processes**, such as the Global Environment Facility (GEF) or other "*international institutions*" such as the World Bank Climate Investment Funds.

- With regards to **REDD**, the Accord purports to establish a mechanism to enable the mobilisation of financial resources from developed countries. In the absence of guidance from the COP, Parties may decide to set up or use an alternative outside of the UNFCCC such as UN-REDD or the World Bank's Forest Carbon Partnership Facility (FCPF).

- The Accord seeks to **establish a Technology Mechanism** to accelerate technology development and transfer in support of action on adaptation and mitigation. The realisation of any such mechanism will require further action by the COP or action outside the UNFCCC.

- **The Accord only briefly mentions the role of markets**. There is no agreement on scaling up carbon finance under the Kyoto Protocol, or whether to include CCS or forest preservation in the CDM. Again further clarification and decisions are required from the COP or by the parties associating with the Accord.

- There are **key omissions from the Accord** that might be relevant at a later stage if it is argued that the failure of the Accord to acknowledge these issues is evidence that they were never intended to make their way into any final deal (going beyond the Accord) that is agreed, if any.

**Introduction**

1. This note is a legal analysis of the Copenhagen Accord (Accord)[1] agreed on 19 December 2009 by various States at the UNFCCC Conference in Copenhagen. Given the vagueness of the Accord, a "pure" legal analysis is not possible and some interpretational opinion is ventured.

2. This analysis is set out in two parts. In Part I we set out:

   a) an overview of the outcomes of COP15;

   b) an analysis of the Accord's legal status;

   c) what it means to associate with the Accord;

   d) the Accord's relationship with the UNFCCC;

   e) the Accords relationship with the extended mandates of the Ad-hoc Working Group on Long-Term Co-operative Action (AWG-LCA) and the Ad-hoc Working Group on Further Commitments for Annex 1 Parties under the Kyoto Protocol (AWG-KP); and

   f) our view on whether a legally binding outcome can be expected at COP16.

3. In Part II we:

   a) examine the substantive elements of the Accord itself; and

   b) set out a critical legal analysis of the key thematic issues contained in the Accord.

4. For completeness, Annex 1 to this note contains a summary of the key provisions of the Accord.

[1] http://unfccc.int/files/meetings/cop_15/application/pdf/cop15_cph_auv.pdf.

## PART I – The Accord and the UNFCCC

### Overview of the key outcomes of COP15

5. On 19 December 2009, the Parties to the UNFCCC and the Kyoto Protocol passed, amongst other things, decisions to extend the work and mandates of the AWG-LCA and AWG-KP until COP16 in Mexico[2] and to 'take note of' the Copenhagen Accord (NB: the advance unedited version of the decision states that the conference of the parties (COP) takes note of the 'Accord of 18 December 2009'; however the decision was formally passed on 19 December 2009).

6. The Accord was therefore not formally adopted at COP15. The implications of this are discussed in the section below headed 'Legal Status of the Accord'. A summary of the key features of the Accord is set out in Annex 1.

7. Although most of the coverage of Copenhagen has focussed on the Accord, the extended mandates of the two Ad-hoc Working Groups (AWGs) are significant. The work and progress of the past two years has not been supplanted by the Accord. The draft decisions produced so far are still alive and will be the subject of negotiations under the UNFCCC during 2010. Whether the Accord will affect the work of the AWGs in practice remains to be seen. An analysis of the legal merits and deficiencies of the draft decisions are beyond the scope of this analysis.

### Legal Status of the Accord

8. In our view, the Accord is not legally binding on the parties that choose to associate themselves with it. It has been argued by some, that as between the parties that associated themselves with the Accord and insofar as the Accord is an international agreement between States in written form, the Accord would at first sight appear to come within the scope of the definition of a 'treaty' laid down in article 2(1)(a) of the 1969 Vienna Convention on the Law of Treaties. The article clarifies that the designation (i.e. accord, agreement, treaty etc.) of the instrument does not determine whether or not it qualifies as a binding treaty.

9. However, a final constitutive element appears to be missing, the intention to create internationally binding obligations. Indeed, when looking at the text it is clear that the Accord consists by and large of political commitments and declarations, which lack the required certainty to amount to legally binding rights and obligations. Thus, at paragraph 7, the signatories "*decide to pursue various approaches (…) to enhance the cost-effectiveness of, and to promote mitigation actions*." The vagueness of the language leaves little doubt that this can hardly be perceived as a legally binding norm.

10. Furthermore, numerous States stated when they announced they had agreed to the Accord or associated themselves with it, that the Accord was only a political agreement between those States. No State described the Accord as legally binding on them. Additionally, Yvo de Boer (Executive Secretary of the UNFCCC) in his press briefing[3] on 19 December 2009 said that an accord had been reached that has significant elements, but that is not legally binding. He described the accord as "politically important," demonstrating a willingness to move forward. Finally, in his Notification to Parties on 25 January 2010[4], Yvo de Boer sought to clarify the facts regarding the legal nature of the Accord. He wrote: "*First, that since the [COP] neither adopted*

[2] http://unfccc.int/files/meetings/cop_15/application/pdf/cop15_lca_auv.pdf and http://unfccc.int/files/meetings/cop_15/application/pdf/cmp5_awg_auv.pdf.
[3] http://unfccc.int/2860.php.
[4] http://unfccc.int/files/parties_and_observers/notifications/application/pdf/100125_noti_clarification.pdf.

*or endorsed the Accord but merely took note of it, its provisions do not have any legal standing within the UNFCCC process even if some Parties decide to associate themselves with it.*" He went to state that "*the Accord is a political agreement, rather than a treaty instrument subject to signature*".

11. Therefore the Accord could be described as 'politically binding' on those countries that choose to associate with it. 'Politically binding' is not the same as 'legally binding'. Politically binding, if anything, means that political consequences will flow from its breach – diplomatic responses, efforts at public shaming, withholding of discretionary funding, etc. In this sense, the Accord can be considered a strong, high level political commitment by the countries that have associated with it, and many groups are choosing to interpret it in this sense.[5] As detailed below, much of the Accord is concerned with shaping a process for developing mechanisms and commitments in the future, rather than setting out precise commitments now. On this basis, the non-legally binding nature of the Accord is not necessarily a fundamental problem, provided that the political commitment exists to achieve its objectives.

12. It is important to note when looking at the specific text of the Accord that even clear cut commitments or obligations must be read in the context of the Accord's legal status.

**Associating with the Accord**

*Associating with the Accord and reservations*

13. In our view, a country 'associating' with the Accord has the same significance as 'signing' or 'acceding to' the Accord. In each case, it indicates that the country agrees with the substance of the Accord and agrees to be bound, politically, by its terms. In his Notification to Parties on 25 January 2010, Yvo de Boer notes that parties would not have to physically sign the Accord, but that "*a simple letter or note verbale to the secretariat from an appropriate authority in government is sufficient to communicate the intention of a Party to associate with the Accord*".

14. A number of developing countries have wondered whether they must associate themselves with the totality of the Accord or not at all or whether there is a middle ground whereby they could reserve their association in respect of a particular provision of the Accord.

15. Under international law, reservations to legally binding treaties are allowed by the 1969 Vienna Convention on the Law of Treaties, provided the treaty does not prohibit them. Reservations allow a country to be bound by an international treaty while being excused from those particular provisions stated in the reservation.

16. As discussed above, the Accord is not a legally binding treaty, but in our view it is arguable that the principle of entering a 'reservation' or not associating with a particular provision[6] would apply to non-binding international agreements between states.

17. Indeed, there is precedence for this in relation to the (non-binding) UN Declaration on the Rights of Indigenous Peoples and, more significantly in relation to the UNFCCC, the Geneva Ministerial Declaration (GMD) taken note of by the UNFCCC COP in 1996[7].

[5] "Taking Note" of the Copenhagen Accord: What it means, *Jacob Werksman* (http://www.wri.org/stories/2009/12/taking-note-copenhagen-accord-what-it-means).
[6] For present purposes, we treat 'reservations' and 'not associating with a particular provision' of the Accord in the same way.
[7] Report of COP2 at pages 70 and 71-74 (http://unfccc.int/resource/docs/cop2/15a01.pdf).

18. In respect of the GMD, a number of countries entered reservations including Australia and New Zealand (stating that they could not associate themselves with the language concerning targets for Annex I Parties) and Venezuela (who stated that it wished to reserve its position as it was concerned to ensure that the process of discussion and agreement of the GMD should be widely-based and transparent).

19. If reservations to the Accord are permitted, in principle, by the other parties associating with the Accord, it is possible that other countries would try to make the acceptance of the reservation conditional on some other factor. By way of example, if a non-Annex I Party wished to not associate with the provision (in paragraph 5) which requires international monitoring, reporting and verification (MRV) of mitigation actions which have international support, an Annex I Party could state that only countries who agree to international MRV of such mitigation actions will be eligible for financial support. In effect, this would preclude international finance for developing countries that do not want international MRV for internationally supported mitigation actions.

*Deadline for associating*

20. The Accord does not specify a deadline by when countries are required to associate with it. However, in his Notification to Parties on 18 January 2010[8], Yvo de Boer invited all countries to that wished to be associated with the Accord to transmit this information to the secretariat by 31 January. As has been subsequently noted in the press[9], and by Yvo de Boer in his press conference on 20 January 2010, this is a 'soft' deadline to assist with administrative issues. Those countries that indicate their desire to be associated with the Accord before 31 January will be listed in the chapeau of the Accord, which is to be attached to Yvo de Boer's report of COP15. Other countries will be able to indicate their desire to be associated with the Accord after 31 January, but will not be listed in the chapeau of the Accord. Instead, they will be listed, together with any statements they make at the time of associating, on the UNFCCC website, which the secretariat maintains and will keep up to date.

21. Similarly, and notwithstanding that there was a 31 January deadline for these specified in the Accord, developed country emissions reductions targets and developing country NAMAs submitted to the secretariat after 31 January will be listed on the UNFCCC website but not in Appendix I or II of the Accord which will be attached to the report of COP15.

**Relationship with the UNFCCC**

*'Taking note of' the Accord*

22. The Accord was not formally adopted under UNFCCC rules but merely 'noted' by the UNFCCC parties at COP15. 'Noting' a document can be legally distinguished from 'adopting it' which requires a consensus at COP meetings. However, no such consensus was achieved.

23. By 'taking note' of the Accord, UNFCCC parties formally acknowledge its existence without making a statement as to their support or otherwise of its content. Importantly, the act of 'taking note' of the Accord does not lend it the status of a COP decision (which adopting it would).

24. However, it could be argued that a document of which the UNFCCC parties have formally taken note has a somewhat higher status in the hierarchy of UN documents than documents

[8] http://unfccc.int/files/parties_and_observers/notifications/application/pdf/notification_to_parties_20100118.pdf.
[9] http://www.guardian.co.uk/environment/2010/jan/20/copenhagen-accord-deadline-climate-change.

that UNFCCC parties might submit during COP proceedings, which are typically described as 'miscellaneous' or 'informational' (MISC or INF) documents.[10]

25. By 'adopting' the Accord (which would require consensus), the UNFCCC parties would have formally endorsed it and brought it within the UNFCCC framework. This would then have given the COP the mandate to take action in relation to the Accord.

26. As it is, merely 'taking note of' the Accord means that it is outside the UNFCCC framework, implying that the COP, at the moment, does not have a mandate to implement the Accord.

*Article 7.2(c) of the UNFCCC*

27. It has been argued by some that the Accord has been brought within the UNFCCC framework by virtue of article 7.2(c) of the UNFCCC which gives the COP, at the request of at least two parties, the authority to facilitate the coordination of measures adopted by them to combat climate change.

28. It is argued that the request from numerous countries that the Accord be brought within the UNFCCC during the final plenary meeting of the COP is sufficient to satisfy article 7.2(c). It is not clear whether any country has submitted a formal written request (if indeed this is even necessary) to this end, and we will need to wait for the final report of the COP to see the secretariat's interpretation of the applicability of article 7.2(c).

29. Yvo de Boer's Notification to Parties on 25 January 2010 does not deal with this particular point, but (in the context of the fact that the Accord was merely taken note of) does make clear that he considers that "*the provisions [of the Accord] do not have legal standing within the UNFCCC process*". Whether this also means that article 7.2(c) does not apply is not clear and further enquiries should be made to the secretariat if this is not dealt with in the Report of COP15.

*Implementation of the Accord within the UNFCCC*

30. In relation to the implementation of the Accord, the distinction between 'taking note of' and 'adopting' may not be as relevant as it may at first appear. This is because if there is political will for the COP or Secretariat to take things forward, this is what will happen anyway regardless of the technical legal mandate.

31. If UNFCCC parties wish to implement the Accord and keep it within the UNFCCC, they might decide to take action (which in the Accord is reserved for the COP) before COP16 and present their acts to COP16 for ratification. One risk of this is that approval of these acts at COP16 may not be forthcoming (since they would have to be approved by consensus) and the COP would again have to 'take note of' them rather than adopt them. This approach risks leading to a scenario where the role of the UNFCCC is reduced to the extent that it merely 'takes note of' the actions agreed by the parties to the Accord (or any subsequent or replacement agreement) in a non-UNFCCC forum.

32. In addition, even if the Accord has been brought under the authority of the COP by the virtue of Article 7.2(c) of the Convention, since the COP issued no guidance on the Accord's implementation at Copenhagen, we will have to wait until COP16 to discover how the COP intends to facilitate the coordination of measures set out in the Accord. As before, if there is

[10] "Taking Note" of the Copenhagen Accord: What it means, *Jacob Werksman* (http://www.wri.org/stories/2009/12/taking-note-copenhagen-accord-what-it-means).

the political will, there is nothing to prevent the countries that have associated themselves with the Accord taking such action as they feel necessary to implement it before then.

33. Finally, the reports of the COP and the AWG-LCA are likely to contain information on how the Secretariat believes the COP will implement the Accord. These reports will need to be reviewed once they are finalised and published.

*Implementation of the Accord outside the UNFCCC*

34. The failure of the COP to adopt the Accord by consensus has led a number of commentators to wonder whether having all UNFCCC parties involved in negotiations means a global agreement is less likely and that a forum which consists of fewer countries is more appropriate. These countries could then try and reach agreement on how to combat climate change and invite others to associate themselves with what is agreed. We do not offer an opinion on the policy merits of this view, but instead look at the some of the options that have been suggested as alternative to the UNFCCC process.

35. As is mentioned above (and throughout this analysis) there is no reason why parties associating with the Accord could not decide to ignore the UNFCCC altogether and choose to implement (and expand on) the Accord in another forum, leaving the UNFCCC as a parallel process.

36. There are a near-infinite number of alternative forums, formal and informal, which the parties could choose to use in place of the UNFCCC. We do not propose to list them all, but below we highlight a handful of different avenues (both formal and informal) which the parties might choose to pursue, subject to political will:

    a) A grouping of 'Friends of the Accord';

    b) Bilateral agreements between individual states (e.g. between USA and China);

    c) Regional agreements (e.g. the EU, Organisation of American States etc.);

    d) Inter-regional agreements (e.g. between the EU and BASIC);

    e) The Major Economies Forum (MEF), which seems to be the USA's preference[11];

    f) The G20 and/or the G8; and

    g) Some variant of the BASIC group.

37. Yvo de Boer, in his press conference on Wednesday 20 January 2010, acknowledged that a smaller setting of countries may be appropriate in certain circumstances but caveated this by saying any agreement by this smaller setting should be "*brought back to the larger community*"[12]. However, if the larger community (i.e. the UNFCCC COP) failed to adopt such as agreement, those parties that do agree with it could take it forward themselves outside the UNFCCC in any case.

38. If the parties associating with the Accord decide that any one (or number) of these alternatives is the best way forward, an analysis of these would be necessary, particularly in relation to

[11] http://www.guardian.co.uk/environment/2010/jan/14/climate-change-us-envoy-copenhagen.
[12] http://www.guardian.co.uk/environment/2010/jan/20/copenhagen-accord-deadline-climate-change.

how various countries (especially LDCs and SIDS) would be represented and the level of access granted to civil society.

**Relationship between the Accord and the work of the AWG-LCA**

39. The mandate of the AWG-LCA has been extended and it has been requested to report back to COP16 in Mexico in December 2010. However, other than a meeting in Bonn in June, further interim sessions of the AWG-LCA have not been discussed or agreed to at this stage. However, we note that the COP Bureau will meet in February and will discuss the possibility of holding at least two more inter-sessionals: one before Bonn and another after Bonn but before Mexico.

40. The implications of this is that during 2010 Parties will continue to work on the draft decision text that is contained in documents FCCC/AWGLCA/2009/L.7/Rev.1, Add1-9. These documents contain many brackets and include a number of issues that require political-level decisions to be taken to resolve them.

41. The legal form of the outcome of the AWG-LCA is still unclear. Whilst it is the objective of some Parties to adopt a legally binding agreement in the form of another Protocol or implementing agreement to the UNFCCC, other Parties would be satisfied with a series of COP decisions to implement the key outcomes of the AWG-LCA. During COP15, the AWG-LCA prepared draft decisions, but many have raised concern that such decisions do not have the legally binding force of a new agreement and some may be beyond the powers and functions of the COP under the UNFCCC.

42. If the COP and/or CMP were to adopt decisions, amendments or a new agreement, these would have greater force and effect than the Accord, at least within the context of international law under the UNFCCC. To the extent that the provisions of such documents were inconsistent with the Accord, it is likely that the UNFCCC documents, if adopted and agreed to by consensus, would take precedence.

43. Until the form of the outcome of the AWG-LCA is agreed, it is possible that the Accord will play a role in guiding the negotiations of the AWG-LCA (and AWG-KP) in the coming months and years. Whether it will or not will depend on the number of countries that associate with the Accord. In this scenario, it could operate as an interim statement of intent by those Parties that choose to endorse it whilst a more formal arrangement is negotiated under the UNFCCC, or it could take a more primary role: shaping the future architecture for commitments by all Parties to the UNFCCC. Until we see whether and how many countries move to endorse the Accord and submit voluntary pledges, its role is unclear.

44. Finally, the Accord calls for a review of the implementation of the Accord in 2015 (paragraph 12). It is unclear whether the inclusion of this provision means that the parties intend for the Accord to be the primary instrument for reducing emissions over the next five years. If that is the intention, it is possible that the parties to the Accord that support this view could point to this as evidence that the outcome of the AWG-LCA should not be effective until at least 2015. They may also point to the fact that references to concluding a legally binding instrument by COP16 in respect of the work of the AWG-LCA was removed from previous drafts of the Accord and the COP decision extending the mandate of the AWG-LCA. For those countries that want legally binding emissions reductions targets, this interpretation should be rejected as early as possible.

**Relationship between the Accord and the work of the AWG-KP**

45. As with the AWG-LCA, the mandate of the AWG-KP has been extended for another year – the AWG-KP is required to report its recommendations to the sixth session of the conference of the parties serving as the meeting of the parties to the Kyoto Protocol (CMP6) in December 2010. Only one interim session (scheduled for June 2010 in Bonn) has been agreed for the AWG-KP so far but we note, as above, that the COP Bureau will meet in February and will discuss the possibility of holding two more inter-sessionals. To the extent that the Accord conflicts with decisions taken by the CMP in Mexico, the decisions of the conference of the parties serving as the meeting of the parties to the Kyoto Protocol (CMP) will take precedence. In the meantime, it is possible that the Accord will guide negotiations in the AWG-KP.

46. As the situation currently stands, the Accord does not affect the current Quantified Emission Limitation and Reduction Objectives (QELROs) under the Kyoto Protocol during its first commitment period. If countries continue to negotiate a second commitment period for the Kyoto Protocol under the AWG-KP then, provided the amendments to the Protocol and its Annexes are adopted by the Parties and those amendments enter into force, they will be legally binding, notwithstanding what is said in the Accord.

47. The shift from a top-down approach in the Kyoto Protocol to a bottom-up one in the Accord potentially affects the level of ambition for targets but of itself does not affect the legally binding nature of those commitments if adopted in an international agreement.

48. It should also be noted that the Accord does not specifically talk about or envisage a second commitment period for the Kyoto Protocol. The Accord invites Annex I Parties to commit individually or jointly to quantified, economy-wide emission targets for 2020 having regard to a base year of the country's choosing. There is no reference to the target being achieved during a particular commitment period.

49. If targets for the period beyond 2012 are only adopted in the Accord, and not in amendments to the Kyoto Protocol or some other legally binding agreement, then they will operate as voluntary pledges. There will be no clear sanction for not meeting the pledge, other than through the use of political pressure and linking progress with access to finance and possibly markets, as the MRV, compliance and enforcement mechanisms of the Kyoto Protocol will not apply to the Accord. It should be noted that the Compliance Committee will continue to oversee other provisions of the Kyoto Protocol, such as the submission of national inventory information, which do not expire at the end of the first commitment period.

50. It is not possible to definitely say that the approach adopted in the Accord will lead to the abandonment of the Kyoto Protocol. At present, the CMP has mandated the continued negotiation of the Kyoto Protocol's second commitment period by the AWG-KP. Developing countries have also clearly stated during the Copenhagen meetings that they will not accept the abandonment of the Kyoto Protocol and its requirement for Annex I Parties to meet QELROs. The fact that Annex I Parties have indicated a willingness to continue to work under both tracks as well as many of them agreeing to the Accord, may allow some progress to be made on negotiating a second commitment period for the Kyoto Protocol during 2010.

51. The carbon markets, which are a creature of the Kyoto Protocol, are affected by the Accord and the outcome at COP15/CMP5 in that outcomes at COP15 add to their uncertainty. The lack of agreement on the scope of the Clean Development Mechanism (CDM) for the period beyond 2012, the inclusion of new market mechanisms such as sectoral crediting and the

formal establishment of a market based approach to REDD could create greater uncertainty in the carbon markets.

52. In addition, the lack of clarity on whether a second commitment period of the Kyoto Protocol will be agreed will affect the carbon markets and investment in green projects. A total shift to the voluntary pledge and review approach, as adopted by the Accord, would further add to the uncertainty.

53. Under the Kyoto Protocol, countries were able to offset emissions which exceeded their target by using the Protocol's flexible mechanisms. Under the Accord, there is no legal requirement for a country to meet its pledge on emissions reductions and therefore no pressure on countries to offset emissions that exceed their emissions reductions pledge. In our view, there is therefore likely to be a corresponding drop in the demand for offsets and carbon credits generated by the flexible mechanisms. This in turn will reduce investment in CDM projects, for example, as companies will be unable to ensure they are profitable.

54. In a world without a second commitment period, there will still be a role for markets as has been noted in the Accord, but until the role of the markets is elaborated by the COP (or the parties to the Accord themselves), the carbon markets are likely to remain uncertain.

**Adopting a legally binding agreement at COP16**

55. Yvo de Boer, in his closing press conference on 19 December 2009, talked of the challenge to turn the Accord into a legally binding agreement at COP16, notwithstanding the fact that such references were removed from the Accord and the COP decision extending the mandate of the AWG-LCA.

56. Whether this will occur is a matter of political will, regardless of whether the references to agreeing a legally binding agreement remained in the Accord or the COP decision extending the mandate of the AWG-LCA.

57. This is illustrated by a quick review of the GMD [13], which was taken note of by the COP at COP2. At COP2 in 1996, the parties had failed to make significant progress in accordance with the Berlin Mandate[14]. The Berlin Mandate had called for a progress report to be given to COP2 with a legally binding agreement being reached at COP3. The GMD was the result of the lack of progress at COP2.

58. The GMD called for work to continue along the lines of the Berlin Mandate with certain principles being expanded on. Yamin and Depledge note that the GMD "injected political momentum into the Protocol negotiations" but was not adopted by the COP due to a lack of consensus[15]. Instead the Parties 'noted' the GMD in a COP decision which was reproduced in a report of the meeting together with the objections raised by Parties.

59. Given the similarity between the GMD and the Accord in terms of how it was adopted, some might argue that the fact that the GMD led to the Kyoto Protocol could mean that the Accord should lead to a legally-binding agreement.

60. However, a comparison between the consequences of the GMD and the potential consequences of the Accord is not that useful. Each text and the decision leading to its

[13] Report of COP2 at pages 70 and 71-74 (http://unfccc.int/resource/docs/cop2/15a01.pdf).
[14] Decision 1/CP.1 (http://unfccc.int/resource/docs/cop1/07a01.pdf, at pages 4-6).
[15] See "The international climate change regime Guide" by Farhana Yamin and Joanna Depledge, Cambridge 2004, page 406.

adoption by the COP must be considered on its own merits and in light of the statements made by Parties at the meeting concerned since that will provide the clearest evidence as to what Parties intended in adopting a particular text (intention being critical to an assessment as to whether a text is binding or not). In respect of the Accord, these will be found in the Report of COP15 which has not yet been published, and thereafter on the UNFCCC website.

61. In our view, the GMD did not impose a legal obligation on Parties leading to the adoption of the Kyoto Protocol even though it talked about a legally binding agreement being adopted in Kyoto (COP3). It represented a political commitment which was not fully endorsed by all Parties and thus exerted influence over the process at a political level only. In our view, it is always open to Parties collectively not to adopt an instrument which is referred to in an earlier mandate (e.g. the Berlin Mandate), either because negotiations have not been concluded or because there is insufficient agreement.

62. Thus the adoption of a legally-binding protocol at COP3 would have been the result of the political decision of the Parties at that meeting. Similarly, even if the Accord referenced adopting a legally binding outcome at COP16, this would not necessarily lead to such an outcome; it would depend on the political will of the parties. Whether the Accord brings to COP16 the political momentum that the GMD did to COP3 remains to be seen.

## PART II - Thematic analyses of the provisions of the Accord

### General

63. The Accord itself is not comprehensive, lacks clarity and is open to different interpretations. As a result, there are no clear guidelines regarding how, when and by whom the Accord should be operationalised. It is possible that different interpretations of the Accord can become influential in guiding how and when aspects of the Accord are operationalised.

64. The Accord recognises the decisions in the COP and CMP to extend the separate mandates of the AWG-LCA and AWG-KP. However, the subject matter of the Accord combines both tracks: emissions reductions for Annex 1 Parties (purview of the AWG-KP) and mitigation actions (and other issues) for non-Annex 1 Parties (purview of the AWG-LCA). Whether this merging leads to the eventual merging of the two AWGs (something which is strongly resisted by developing countries) remains to be seen, but it could be argued that the Accord has set a precedent in this regard. In addition, the shift of approach from the legally binding top-down Kyoto Protocol 'targets' to the non-legally binding bottom-up Copenhagen Accord 'pledges' may create an obstacle for continuing negotiations for a second commitment period under the Kyoto Protocol (see section on "Relationship between Accord and the AWG-KP" above).

65. The Accord claims to be "*immediately operational*". Apart from the fact that the Accord has not been adopted as a COP decision, the Accord does not contain any commitments that could, at UNFCCC level, become operational. In most cases, as we will see below, further guidance needs to be given by the COP before concepts such as the technology mechanism, the High Level Panel or the Copenhagen Green Climate Fund (CGCF) can become operational under the UNFCCC.

66. However, individual UNFCCC parties could, either alone or in conjunction with other UNFCCC parties, implement those parts of the Accord within the UNFCCC process that do not require further guidance or action from the COP, such as, for example, the specific country-level commitments and actions in Appendix I and Appendix II of the Accord (on which more below) which must be submitted to the secretariat by 31 January 2010. This is allowed pursuant to articles 8 and 12 of the UNFCCC.

67. Alternatively, and as noted elsewhere in this note, with sufficient political will, the parties to the Accord could choose to ignore the UNFCCC entirely and agree the various mechanisms and guidelines mentioned in the Accord in some other forum and self-regulate their own compliance with it.

68. While the Accord may help in providing a route map to future agreements (potentially of a legally binding nature), it does not include this as an objective and this lack of specificity undermines its effectiveness. For example, there is no indication of whether there is a shared objective to agree a legally binding successor to the Kyoto Protocol or whether a single new treaty is desired or two. Furthermore, no new time frames have been adopted other than the call for an assessment of the implementation of the Accord itself by 2015.

### Long-term cooperation

69. The first two paragraphs of the Accord emphasise the signatories' "*strong political will to urgently combat climate change in accordance with the principle of common but differentiated responsibilities and respective capabilities.*" In addition, States recognise "*the scientific view that the increase in global temperature should be below 2 degrees*"; agree that "*deep cuts in*

*global emissions are required according to science*"; and that they "*take action to meet this [2 degrees] objective consistent with science and on the basis of equity*". However, there is no real clarity as to the Parties' respective responsibilities. The reference to "*deep cuts*" being required "*with a view*" to holding increases below 2 degrees Celsius and apportioning action "*on the basis of equity*" is vaguer and weaker than specific individual commitments.

70. Further, there is no way to ensure that the targets put forward by individual countries respect the principle of common but differentiated responsibilities. For example, the expected US 'target' of 17-20% reduction from 2005 levels by 2020 is far less than the targets expected to be put forward by Japan, even though the US has been an historically bigger emitter of carbon than Japan.

71. They also acknowledge that they "*should cooperate in achieving the peaking of global and national emissions as soon as possible*", but do not specify a year or range of years. The vague wording included here makes it difficult to use this provision of the Accord to hold Parties accountable for non-compliance, unless Parties are clearly moving in the opposite direction.

72. While recognising the '2 degrees objective' is a step towards meeting the Bali Action Plan's aim of a 'shared vision of long-term cooperation' a number of reservations should nonetheless be made. First, it is clear that these two paragraphs state a political objective rather than legally binding commitments. Second, in accordance with a UN report leaked during the conference[16], the emissions reduction pledges made before and during the Copenhagen conference will not suffice to limit the global temperature rise to 2 degrees. Third, it should be recalled that the more tangible goal of having GHG emissions reduced by 50% by 2050 (as compared to 1990 levels) was eventually dropped from the text. It must also be noted that no reference point is determined to assess above what temperature level the two degrees threshold must be applied to.

73. The Accord has therefore set an ambiguous goal without clearly specifying the means to achieve it in the long run.

**Developed country emissions reductions**

74. Paragraph 4 of the Accord states that "*Annex I Parties commit to implement individually or jointly the quantified economy-wide emissions targets for 2020, to be submitted in the format given by Appendix I by Annex I Parties to the secretariat by 31 January 2010*." However, the Accord does not specify penalties for any country that fails to meet its pledge. Based on projections from informal pledges given prior to COP15, these pledges amount to a reduction of emissions of 13-19 per cent below 1990 levels by 2020[17], compared to the 40% science has suggested is required. It should also be noted that there is no sanction for failing to submit pledges by 31 January 2010. In his Notification to Parties on 18 January 2010[18], Yvo de Boer states that both Annex I and non-Annex I Parties may submit to the secretariat by 31 January information on emissions reductions targets and mitigation actions respectively. In his press conference on 20 January 2010, he indicated that 31 January is not a 'hard' target and that information submitted by countries after 31 January will be made available on the UNFCCC website.

[16] http://www.350.org/sites/all/files/leaked-UN-Climate-Doc.pdf.
[17] Comparability of Annex I Emissions Reductions Pledges, Kelly Levin and Rob Bradley, World Resources Institute, December 2009, at page 2 (http://pdf.wri.org/working_papers/comparability_of_annex1_emission_reduction_pledges_2009-12-04.pdf).
[18] http://unfccc.int/files/parties_and_observers/notifications/application/pdf/notification_to_parties_20100118.pdf.

75. Further, the Accord does not specify when these emissions reductions should start, so there is flexibility for countries to not meet their 2020 targets until much closer to the time, potentially increasing the risk of failing to meet targets.

76. The Accord also adds that the implementation of these commitments will be measured, reported and verified in accordance with "*existing and any further guidelines*" adopted by the COP, so as to guarantee that accounting is "*rigorous, robust and transparent*". For more details on the deficiencies of the MRV system, see the "MRV" section below.

77. Notwithstanding that the Accord as a whole is not legally binding, some have wondered whether the targets submitted by Annex I countries could be argued to be legally binding on the grounds that they are unilateral declarations by States. In our view this is highly unlikely.

78. However, proponents of this view point to the *Nuclear Test cases* (1974)[19] as a precedent for unilateral statements by a State creating internationally binding obligations on its part. In that case, the International Court of Justice found that France was legally bound by earlier declarations that it would halt atmospheric nuclear testing in the Pacific Ocean. The Court explained that for unilateral acts to have legal consequences, the acts should be public or generally known, and should evidence the intention of the State to be bound. As long as the act was explicit and unambiguous, the form was deemed irrelevant. Acceptance from other States was not needed. However, in the *Frontier Dispute case* (1986)[20], the Court warned that one should be cautious in deriving legally binding obligations from unilateral conduct, especially "when it is a question of unilateral conduct not directed to any particular recipient." It was moreover emphasised that in the context of the Nuclear Test cases, the French government could not have expressed an intention to be bound "otherwise than by unilateral declarations."

79. In light of the above cases, some commentators argue that the language of paragraph 4 of the Accord ("Annex I Parties commit to implement") establishes a presumption that notifications of emissions targets under Appendix 1 may at least create an obligation on behalf of the state(s) concerned.

80. In our view, however, an indication to the contrary flows from the removal from earlier drafts of the Accord that it would be 'legally binding'. In addition, it may be that a State, when associating itself with the Accord or subsequently notifying the Secretariat of its target, would assert that its commitment is of a strictly political nature. Given the nature of the Accord and its agreement, and the requirement to see the unilateral statement or act in light of its context (see *Nuclear Tests case*), it is highly unlikely that the 'commitments' made by States would be legally binding under international law as there is no evidence of the intention to be legally bound on the part of any state.

81. Apart from the possible binding nature of the commitments notified under paragraph 4, a second issue pertains to the monitoring thereof. For further information on this point see "MRV" section below.

82. The Accord also states that "*Annex I Parties that are party to the Kyoto Protocol will...strengthen the emissions reductions initiated by the Kyoto Protocol*". Since targets for a second commitment period have not yet been agreed, it could be argued that this means that Annex I Parties (which are party to the Kyoto Protocol) should, for the period 2010-2012, go beyond their Kyoto targets. Moreover, this could be further interpreted to mean that targets

[19] *Nuclear Test Cases (New Zealand & Australia v France)*, ICJ Judgment of 20 December 1974, §§ 43 et seq.
[20] *Frontier Dispute Case (Burkina Faso v Mali)*, ICJ Judgment of 22 December 1986, §§ 39-40.

for any second commitment period (2013-2017) should be guided by the pledges made in the Accord.

83. However, an alternative interpretation of the reference to the Kyoto Protocol in the Accord could be that it creates the risk that a second commitment period is no longer necessary as targets for 2020 (i.e. beyond the end of the second commitment period) will have already been agreed, thus disincentivising Annex 1 countries from negotiating legally binding targets for a second commitment period. For more on this point see the "Relationship between the Accord and the AWG-KP" section above.

84. It is not possible to tell which of these two interpretations is correct at this stage as the extent of the pledges is not yet known and we do not have a clear idea of the intentions of the Parties. More information on this should be forthcoming when the Report of COP15 is finalised and as and when Annex I Parties make statements of their pledges. If Annex I Parties express a preference for the latter interpretation (that a second commitment period is no longer necessary), developing countries who disagree with this could raise formal objections to this interpretation at the time so as not to give this interpretation any developing country support.

**Developing country mitigation actions**

85. The Accord, in paragraph 5, sets forth the idea that developing countries will implement mitigation actions:

"*Non-Annex I Parties to the Convention will implement mitigation actions, including those to be submitted to the secretariat by non-Annex I Parties in the format given in Appendix II by 31 January 2010, for compilation in an INF document, consistent with Article 4.1 and Article 4.7 and in the context of sustainable development. [LDCs and SIDS] may undertake actions voluntarily and on the basis of support*" (emphasis added).

86. Thus, even if no fixed emissions targets are set, non-Annex I Parties are invited to register such actions under Appendix II to the Accord. It must be noted that the scope of "*mitigation actions*" is unclear. Some commentators seem to have assumed that these are actions to reduce growth in emissions, as opposed to actions to reduce total emissions. However, either of these definitions could apply.

87. As with much of the rest of the Accord, the language in paragraph 5 is vague and open to interpretation. One interpretation (of "*Non-Annex I Parties to the Convention will implement mitigation actions*") is that it does not obligate applicable non-Annex I Parties[21] to carry out mitigation actions and that this statement is predictive (i.e. that those applicable non-Annex I Parties that associate themselves with the Accord will carry out mitigations actions), rather than prescriptive. The alternative interpretation is that the statement is prescriptive. On balance, it is likely that the former interpretation will be the prevailing one or, at the very least, that the difference in the different interpretations is not significant as only applicable non-Annex I Parties which intend to undertake mitigation actions under the Accord will associate themselves with it.

88. In respect of 'support' for mitigation actions for developing countries the language remains vague. Again there are two interpretations. First, that only LDC and SIDS mitigation actions are eligible for support. However, we believe that a more likely interpretation is that non-Annex I Parties (which are not LDCs or SIDS) may also be eligible for support as the express words do

[21] These are non-Annex I Parties which are not LDCs or SIDS.

not specifically exclude this possibility. It may be that support for applicable non-Annex I Parties will be on a case-by-case basis as determined by the (yet-to-be-established) CGCF (whether under guidance from the COP or as agreed by the parties themselves outside of the UNFCCC process). This is another point on which further information on the intentions of the Parties is necessary before a likely interpretation can be reached.

89. Regardless of which of these alternative interpretations is determined to be the correct one by the parties that associate with the Accord, it is important to remember that the obligations on the parties are voluntary. If developed or developing countries 'associate' themselves with the Accord, they will be likely to offer emissions reductions, finance or mitigation actions. If a country 'associates itself with' the Accord and makes a commitment, but then fails to honour it, that country could always decide to withdraw their association with the Accord (leaving aside issues where it may have received financial support for a NAMA) so as to avoid the political consequences of not meeting its commitments. Of course, withdrawing altogether is likely to have other political consequences as well.

90. Another significant aspect of the Accord is the recognition of monitoring, reporting and verification of mitigation actions by developing countries. The need for "*rigorous, robust and transparent*" monitoring, mentioned under paragraph 4 in relation to Annex I Parties, is not copied in the provision dealing with non-Annex I Parties. Instead, the provision states that certain mitigation actions will be subject to reporting, via national communications, which will take place in full respect of "*national sovereignty*" while other mitigation actions (those with international support) will be subject to international MRV. See "MRV" section below for further details.

91. Finally, for clarity, the following is a list of mitigation actions that will appear in Appendix II to the Accord:

    a) those mitigation actions submitted to the secretariat by 31 January 2010;

    b) all mitigation actions taken and envisaged by non-Annex I Parties after 31 January 2010 (these are required to be communicated to the secretariat in national communications on a biennial basis); and

    c) all mitigation actions seeking international support in the form of technology, finance or capacity building support.

**MRV**

92. The Accord contains MRV provisions for both developed countries (in respect of emissions reductions and financial support to developing countries) and developing countries (in respect of mitigation actions). The level of MRV varies between the two and reflects the concept of common but differentiated responsibilities.

93. In respect of the developed country MRV, the Accord states "*Delivery of reductions and financing by developed countries will be measured, reported and verified in accordance with existing and any further guidelines adopted by the Conference of the Parties, and will ensure that accounting of such targets and finance is rigorous, robust and transparent*" (paragraph 4).

94. It is interesting that this provision refers to "*existing*" guidelines adopted by the COP since the COP has not adopted any MRV guidelines in respect of emissions reductions and finance. It is possible that this reference is intended to be to the CMP which has adopted MRV guidelines in

respect of obligations under the Kyoto Protocol. However, since the Accord was "*take[n] note of*" by the COP (rather than the CMP), absent an amendment to the Kyoto Protocol, MRV of commitments registered in Appendix I of the Accord cannot be addressed through the Kyoto Protocol's monitoring and compliance mechanisms. This is because the Kyoto Protocol explicitly regulates the procedure for the establishment of additional commitments (Art. 3(9) and 21(7)), as well as the fact that the Protocol, in its present form, does not deal with emissions reductions targets after 2012.

95. Therefore, in order to implement MRV for developed countries, the COP will have to pass guidelines which are rigorous, robust and transparent as soon as possible. These could be comparable to the guidelines on MRV in respect of the Kyoto Protocol passed by the CMP.

96. Under the Accord, financial support given by developed countries is subject to MRV. However, there is no appendix for finance pledges from individual developed countries and therefore nothing against which to scrutinise the flow of finance[22]. The results of the MRV of finance will therefore be less useful than the results of MRV of emissions reductions in terms of holding individual States accountable for the collective failure to reach either the $30bn or $100bn targets for finance.

97. In respect of developing country mitigation actions, the Accord (in paragraph 5) does set forth some form of oversight through:

    a) the inclusion of information on mitigation actions (and their implementation) in national communications consistent with Article 12(1)(b) UNFCCC every two years; and

    b) "*international measurement, reporting and verification*" of actions receiving international support.

98. Therefore, NAMAs will be subject to two distinct accounting requirements:

    a) guidelines concerning national communications (required every two years) on the implementation of NAMAs which are unsupported and which ensure that national sovereignty is respected; and

    b) guidelines concerning MRV of mitigation actions which have international support (in the form of technology, finance or capacity-building),

    both of which need to be created by the COP. As this now cannot occur before COP16 at the earliest (unless an extraordinary COP is convened), the question of the intended extent of these guidelines remains unanswered, though it is clear that the former will be far less intrusive than the latter. Of course, the parties to the Accord may decide to ignore the UNFCCC altogether and agree these guidelines in another international forum.

99. The reason for the two levels of MRV is that developing country mitigation actions not receiving international support will be subject to domestic rules on MRV, which the COP (or other international grouping) will not have authority over. Those mitigation actions receiving international support will be subject to international MRV, as defined by the COP (or other international grouping). The MRV provisions balance developed countries wish for international scrutiny, and developing countries' concerns about retaining national sovereignty (largely in favour of the latter) such that developing countries will set their own monitoring

[22] The actual level of international financial support for developing country mitigation actions will be recorded in a registry (para 5 of the Accord), but there will be no 'targets' against which to compare these figures.

rules and monitor their own efforts, but must report the results of such monitoring to the UN biennially in a manner consistent with the guidelines on national communications.

100. It should also be noted that the need for "*rigorous, robust and transparent*" monitoring, mentioned under paragraph 4 (in relation to Annex I Parties), is not replicated in paragraph 5 in relation to the provision dealing with MRV for Non-Annex I Parties which receive international support. The level of MRV for internationally supported mitigation actions in developing countries will therefore be less rigorous than that for developed countries.

101. In our view, the lack of certainty as to the level of MRV for developing country mitigation actions could mean that some States will be wary of associating with the Accord. Clarity on this issue is required urgently in order to give enough comfort to developing countries to begin implementing mitigation actions. If all countries are comfortable with the Accord by COP16, this should be made a priority of the COP to ensure that the objectives of the Convention are achieved as soon as possible by passing all the necessary guidelines in respect of MRV. If this cannot be achieved within the UNFCCC for whatever reason, these guidelines will need to be developed in other fora (e.g. G20, MEF etc.) in order for these provisions to have effect.

102. Given that one of the conditions attached to the goal to mobilise $100 billion for developing countries by 2020 (see 'Finance' section below) is "*transparency on implementation*" of mitigation actions, it is important that guidelines in respect of national communications and international MRV for developing countries are agreed as soon as possible.

**Adaptation**

103. Adaptation is only mentioned briefly in the Accord (at paragraph 3) where it recognises that adaptation to the adverse effects of climate change is a challenge faced by all countries. However, the Accord language does not progress significantly from the Bali Action Plan that was agreed two years ago, and in many respects the legal strength of the Accord has regressed relative to the Bali Action Plan because of the omission of certain adaptation provisions.

104. There is no discussion of an adaptation framework and no language in respect of loss and damage, which appears in the Bali Action Plan and the draft COP decision on Adaptation. On the other hand, language relating to the potential impacts of response measures (language which is opposed by many developing countries and NGOs) remains in. It is possible that in the future certain countries may point to the fact that the adaptation paragraph speaks of response measures but ignores loss and damage as a precedent to stop progress on the issue of loss and damage and remove references to it from the draft COP decision.

105. The few strengths in paragraph 3 (i.e. the recognition of adaptation needs with emphasis on LDCs, SIDS and Africa, support from developed countries and the provision of "*adequate, predictable and sustainable*" support) are helpful in that they may be used to help prioritise steps for the future. However, as with much else in the Accord, without elaboration from the COP or the parties themselves, the paragraph on adaptation may be little more than a recognition that enhanced action on adaptation is required.

106. Even the relatively strong commitment that "*[w]e agree that developed countries shall provide*" support is problematic as the apportionment of responsibility between developed countries will inevitably remain a contentious issue.

**Finance**

107. Paragraph 8 of the Accord sets out the aspirational goals for funding commitments by the developed countries in the immediate short term (i.e. US$30 billion for the period 2010 - 2012) and the medium to long term (i.e. US$100 billion per annum by 2020) "*to enable and support enhanced action on mitigation, including substantial finance to deduce emissions from deforestation and forest degradation (REDD-plus), adaptation, technology development and transfer, and capacity building*". Significantly, the proposed "*scaled up, new and additional*" funding commitments under the Copenhagen Accord are to be provided to developing countries "*in accordance with the relevant provisions*" of the UNFCCC for the purpose of enhancing the implementation of the UNFCCC.

108. The funding for the 2010-2012 period (which is being referred to by some commentators as "fast-start" funding) is described in paragraph 8 as being a combination of "*new and additional resources, including forestry and investments through international institutions*". The meaning of this provision is not clear: how 'forestry' can be considered a 'new and additional resource' rather than something the funding should be spent on is confusing. Additionally, 'investments through international institutions' has a number of interpretations including:

    a) the money put forward by international institutions is expected to generate a revenue for those institutions;

    b) those institutions will make investments and the revenue from those investments will be put towards the $30 billion; or

    c) something else entirely,

    but given the uncertainty in the provision, it remains to be seen how the parties decide to raise the $30 billion.

109. Whichever form it takes, this fast-track funding should have "*balanced allocation between adaptation and mitigation*". Funding relating to adaptation is to be prioritised for the "*most vulnerable*" developing countries, though this not a defined term. Examples provided are the LDCs, SIDS and Africa (we note that this is not an exhaustive list of "*most vulnerable developing countries*").

110. Paragraph 8 does not provide any detail about how funding is to be jointly mobilised by the developed countries in order to meet the 2020 US$100 billion per annum goal, which is anticipated to be achieved from a base of $US10 billion per annum (on average) from 2012. However, paragraph 8 acknowledges that funding will have to come from a wide variety of sources.

111. The Accord does not include specific funding commitments from individual developed countries. Instead, paragraph 8 makes reference to general sources of funding such as:

    a) public and private sources;

    b) bilateral and multilateral agreements; and

    c) alternative sources of funding (the use of the word "*alternative*" in this context appears to leave open the possibility of some form of financing which does not fall neatly within traditional or established categories, for example in relation to bunkers).

112. In our view, the new and additional funding contemplated by paragraph 8 is conditional with respect to the following:

a) Funds in the 2010-2012 funding period are to be allocated in a "*balanced way*" between adaptation and mitigation. It is not clear from the wording whether this means that funds are to be allocated equally or are to be allocated taking into account the relative merits of funding mitigation action over adaptation actions in the short term.

b) All funding allocated in relation to adaptation in the 2010-2012 funding period must be prioritised in favour of the most vulnerable developing countries (it remains to be seen whether countries other than those named in paragraph 8 as "*most vulnerable developing countries*" will be able to successfully claim the required vulnerability so as to access this adaptation funding).

c) The funding for the period 2012-2020 is conditional on:

i. meaningful mitigation actions, presumably being implemented by developing countries; and

ii. transparency in relation to the implementation, presumably of the "*meaningful mitigation actions*",

though we note that paragraph 8 does not include detail about how transparency is to be monitored or verified. Presumably, this is caught by the MRV provisions for NAMAs implemented by developing countries in accordance with paragraph 5 of the Accord.

d) A signification portion of new multilateral funding for adaptation should flow through the CGCF. There is no definition of 'significant portion' so no way at the moment to determine what this threshold is or will be. The CGCF is established under paragraph 10 of the Copenhagen Accord as an operating entity of the financial mechanism of the Convention (i.e. under Article 11 of the UNFCCC).

e) The scaled up, new and additional funding must be provided in accordance with the existing provisions and structure of the UNFCCC.

113. It is also not clear whether the $100bn, which is conditional on "*meaningful mitigation actions and transparency of implementation*", relates to both mitigation and adaptation, or just mitigation. In our view however, the $100bn is intended for both mitigation and adaptation for the following reasons. This interpretation is given support by the language in the paragraph that the purpose of the money is "*to address the needs of developing countries*". "*The needs of developing countries*" could easily be interpreted as encompassing both mitigation actions and adaptation. In addition, the fact that the scale of "*multilateral funding for adaptation*" is not specified (whereas, on the first interpretation, the scale of mitigation finance is) could lend weight to the interpretation that the $100bn is for both mitigation and adaptation. Finally, in relation to the $100bn goal, Hilary Clinton (on 17 December 2009) stated that the money "*will include a significant focus on forestry and adaptation*".[23]

114. The desirable interpretation for developing countries will, of course, be that the $100bn is only for mitigation, but we will need to see statements made by countries as they deliver their

[23] http://www.state.gov/secretary/rm/2009a/12/133734.htm.

finance pledges to confirm how they intend the money to be used, at least until the CGCF is operationalised.

115. It should also be noted that, as with the draft COP decisions on finance, it is not clear whether the finance provided by developed countries will be 'new and additional' to existing ODA spending, or existing ODA targets. If it is the former, climate finance will come at the expense of development aid unrelated to climate change.

116. In our view, the up-side of a purely aspirational funding goal is that the number quoted is not set in the context of a cap, but could well form the basis of a floor value. Accordingly, a notable absence in the conditions is any form of cap on the funding. However, it should be noted that developed countries' obligation in respect of these funds only extends to "*committing to a goal*", which does not necessarily equate to realising this sum.

117. Assuming that the $100bn goal relates to mitigation and adaptation, another danger is that the target (which is lower than the level of finance suggested by the World Bank as being required – the costs of adaptation have been identified as being $75-$100bn per year from 2010[24]) is not sufficient for developing country mitigations actions (as well as adaptation plans). If developed countries believe that developing countries mitigation and adaptation actions are not meaningful or have not been transparently implemented, there is a risk that developed countries will withhold finance. It is possible that this might lead to a downward spiral where not enough finance leads to ineffective mitigation actions which in turn could lead to less finance from developed countries.

118. It seems to us that the major hurdles for implementing the finance provisions of the Copenhagen Accord relate to the fact that:

    a) paragraph 8 and paragraph 10 are subject to the provisions of the UNFCCC; and

    b) paragraph 9 (the establishment of the High Level Panel to study potential sources of revenue) purports to create a new panel "*under the guidance of and accountable to*" the COP.

119. One result of the COP not 'adopting' the Copenhagen Accord through a COP decision is that the COP, at the present time:

    a) is not authorised to make parties to the Copenhagen Accord accountable to the COP in relation to commitments, the application of funding, or transparency;

    b) has not agreed to provide guidance to or assess accountability of the High Level Panel; and

    c) has not authorised the establishment of the CGCF as an operating entity under the UNFCCC.

120. The fact that the Copenhagen Accord may be said to fall outside the jurisdiction of the UNFCCC and the COP may make it difficult to manage funds committed under the Copenhagen Accord within the UNFCCC process until after a decision is taken by COP to adopt the Accord. This is particularly the case for funds for adaptation which "should" flow through the CGCF.[25]

[24] The Cost to Developing Countries of Adapting to Climate Change, *World Bank* (30 September 2009).
[25] Rob Fowler, Law School, University of South Australia http://www.teachingclimatelaw.org/2009/12/20/analysis-of-the-copenhagen-accord/, posted 20 December 2009.

Additionally, the lack of clarity and guidance could mean that even if countries make pledges in relation to finance, these may not be delivered until the COP takes action.

121. As has been mentioned previously, if the Accord can be said to have been brought within the UNFCCC by virtue of Article 7.2(c) of the UNFCCC or if the COP subsequently adopts decisions which operationalise the Accord, it could be said that the COP then has authority to act in relation to the implementation of the Accord. However, the COP will not be able to take action until it next meets at the end of 2010. There is always the possibility, however, that those countries associating themselves with the Accord will take action to operationalise the Accord outside the UNFCCC process (i.e. in the MEF, G20 or some other forum).

122. As an interim measure, it may be possible for additional funding which is committed by developed countries under the Copenhagen Accord to be managed through existing UNFCCC processes, such as the Global Environment Facility (GEF) under article 11 of the UNFCCC. Indeed, certain commentators[26] have suggested that the GEF or another existing international institution such as the World Bank's Climate Investment Funds (CIF) could be used for this purpose.

123. Funding for mitigation, adaptation, technology development and transfer, and capacity-building can still occur on a bilateral and multilateral basis between parties to the UNFCCC and/or the Copenhagen Accord. However, the legal force of such agreements would rest within the individual agreements between those parties and would not necessarily be subject to scrutiny by the COP.

**REDD**

124. The Accord "*recognises the crucial role of reducing emission from deforestation and forest degradation and the need to enhance removals or greenhouse gas emission by forests*", and agrees to provide "*positive incentives*" to mobilise financial resources from the developed world (at paragraph 6).

125. To this end, the Accord purports to establish a mechanism (which includes REDD-plus) to enable the mobilisation of financial resources from developed countries. Paragraph 8 of the Accord mandates the provision of additional financial resources, including "*substantial finance*" for REDD-plus. Later paragraphs also indicate that the CGCF will play a role in financing REDD-plus, but not an exclusive role. That fund cannot become the operating entity of the UNFCCC's financial mechanism without COP approval, but there is nothing which prevents countries associating with the Accord from establishing a new REDD mechanism or from making use of an existing REDD mechanism, such as UNREDD, the World Bank's FCPF, or various nationally based funds, such as Brazil's Amazon Fund.[27]

126. There still, however, remains a lack of clarity as to how this mechanism will work, which makes its immediate establishment difficult despite the fact that its need has been expressly identified. Furthermore, paragraph 6 omits many other REDD issues such as specific funds for forest preservation, conservation and enhancement of forest carbon stocks (as referenced in the draft COP decision on REDD) and protection for the Asian peat lands.

[26] Taking Note" of the Copenhagen Accord: What it means, *Jacob Werksman* (http://www.wri.org/stories/2009/12/taking-note-copenhagen-accord-what-it-means).
[27] "Taking Note" of the Copenhagen Accord: What it means, *Jacob Werksman* (http://www.wri.org/stories/2009/12/taking-note-copenhagen-accord-what-it-means).

**Tech transfer**

127. Paragraph 11 'decides' to establish a Technology Mechanism to accelerate technology development and transfer in support of action on adaptation and mitigation. In each of these cases, further action by the COP is needed to take the necessary measures of implementation. Despite the language of the text ("*will be established*"; "*decides to establish*"), these paragraphs are therefore in fact mere recommendations/suggestions for future consideration by the COP.

128. The recognition that such a mechanism is necessary to enhance action on development and transfer of technology is clearly helpful, however there is a lack of clarity as to how this mechanism will work and will require further agreement by the parties.

**Markets**

129. Carbon markets are only briefly mentioned in the Accord, and no detail is provided: "*we decide to pursue various approaches, including opportunities to use markets to enhance the cost-effectiveness of and to promote mitigation actions*" (at paragraph (7)).

130. The endorsement of market mechanisms will require further clarification and decision through the COP. It does not amount to the reform of the CDM that some were expecting from the Copenhagen conference.

131. On one analysis, without legally binding commitments under the Accord, it adds nothing to the certainty required for a functioning international market for carbon.

132. Another analysis is that the required certainty and rules need not come from a universal set of international rules but can be as effective if promulgated amongst smaller group (regional markets such as the EU ETS), through bilateral arrangements or even unilateral rule setting.

133. In respect of the markets, therefore, further action is required either by the COP or the countries that have associated themselves with the Accord. The current lack of guidance could increase the level of uncertainty in the current carbon markets, and in particular around the use of the flexible mechanisms promoted by the Kyoto Protocol.

**Key omissions and deletions**

134. A number of important issues did not make their way into the Accord, either because they were not deemed important enough to start with, or because they had to be dropped in order to gain agreement. In respect of both of these (issues omitted or deleted from the Accord), it should be noted that it could be argued by states at some stage in the future that the failure of the Accord to acknowledge these issues is evidence that they were never intended to make their way into any final deal beyond the Accord that is reached, if any. In our view, developing countries should make clear as soon as possible that the Accord is the first step and that there are significant issues which remain and which are not addressed by the Accord. In the following paragraphs we identify a number of the key issues we believe have been omitted from the Accord. This list is not intended to be exhaustive.

135. Firstly, there is no agreement in respect of aggregate emissions reduction goals for developed countries whether by 2020 or 2050. A provision to this end was removed at a late stage in the negotiations. Commentators believe that this would be needed to meet the 2 degrees temperature cap, which is still included in the Accord – the objective is still present, but not

the means to achieve it. Neither is there any agreement in respect of the long-term reductions that developed countries must make. Provisions in a previous draft of the Accord suggested that in respect of developing countries, there should be a 15-30% reduction in emissions from the business as usual scenario by 2020 but were removed from the final draft.

136. Although reference to the 2 degrees threshold remains, there is no agreement on the base year, against which temperature rises should be judged. Similarly, there is no standardised base year in respect of emissions reductions pledges from developed countries.

137. There is no indication in the Accord of whether there is a goal for the Accord (or some other agreement) to be formalised as a legally binding agreement, whether by COP16 or later. The required review of the Accord in 2015, together with the fact that references in the Accord to adopting a legally binding instrument were dropped, could suggest that the parties do not intend for such an instrument in the short term (see section on "Relationship between the Accord and the work of the AWG-LCA" above).

138. Although the Accord sets a target of $30bn and $100bn for finance from developed countries, there is no requirement on any individual country to pledge a certain sum. Indeed, an appendix which appeared in a previous draft of the Accord which would require developed countries to state their pledges (as they should do for emissions reductions) was also removed. This makes it very difficult for meaningful MRV of the provision of finance as there is nothing formal against which to compare the finance that is actually given.

139. The Accord provides no sanctions for breach of any of its terms. This is likely to be intentional, but provides no incentive to comply with pledges given.

140. There is no agreement in respect of whether to include emissions from aviation and shipping in any targets. The Kyoto Protocol excludes greenhouse gases from aviation and shipping, but these are responsible for at least 5 per cent of global emissions.

141. Neither is there any agreement in respect of whether to include emissions from deforestation farming and LULUCF. These are also excluded from the Kyoto Protocol, but they are responsible for a third of all global greenhouse gases.

142. Finally, there is no explicit mention in the Accord of whether there is intended to be a second commitment period under the Kyoto Protocol nor how the flexible mechanisms are to be reformed.

## ANNEX 1: Summary of key provisions of Accord

SHARED VISION

- Recognising the scientific view that keeping warming within two degrees is required to avoid dangerous climate change.

- Agreeing that deep cuts in greenhouse gas emissions are required to hold temperature increases at below two degrees and agreeing to cooperate to achieve a peaking of global and national emissions as soon as possible.

- Recognising that the peaking of greenhouse gas emissions will be longer in developing countries bearing in mind their overriding priorities are social and economic development and poverty eradication.

ADAPTATION

- Noting that adaptation is a challenge faced by all countries and that enhanced action and international cooperation on adaptation is urgently needed, particularly for those that are particularly vulnerable, being the least developed countries (LDCs), small island developing States (SIDS) and Africa.

- Agreeing that developed countries shall provide adequate, predictable and sustainable financial resources, technology and capacity building to support the implementation of adaptation action in developing countries.

MITIGATION

- Annex I Parties agreeing to commit to implement individually or jointly the quantified, economy-wide emission targets for 2020. This is intended to further strengthen the emission reductions initiated by the Kyoto Protocol.

    - Annex I Parties agreeing to deliver emission reductions and financing that will be measured, reported and verified in accordance with existing and further guidelines adopted by the COP.

- Non-Annex I Parties agreeing to implement mitigation actions that will be submitted to the UNFCCC Secretariat. LDCs and SIDS may do so voluntarily.

    - Domestic, non-supported mitigation actions subsequently taken by non-Annex I Parties, including national inventory reports, will be communicated through national communications, and will be subject to their domestic measurement, reporting and verification every two years. There will be international consultation and analysis of this information, in accordance with clearly defined guidelines and in a manner that respects national sovereignty.

- Nationally Appropriate Mitigation Actions by developing country parties (NAMAs) seeking international support in the form of finance, capacity building and technology will be recorded in a registry, along with that support. Those internationally supported NAMAs will be subject to international measurement, reporting and verification.

REDD

- Recognising the important role of reducing emissions from deforestation and forest degradation in developing countries (REDD-plus) and the need to enhance the removal of greenhouse gases by forest sinks through the establishment of a REDD-plus mechanism.

FINANCE AND INSTITUTIONS

- Recognising the important role of markets in achieving cost-effective mitigation actions.

- Developed economies committing US$30 billion over 3 years in prompt start funding.

- In the context of meaningful mitigation actions and transparency on implementation, developed countries commit to a goal of mobilising jointly US$100 billion a year, from a variety of public and private sources, by 2020 to address the needs of developing countries.

- Funding being delivered through the "Green Climate Fund" which shall be the operating entity of the financial mechanism of the Convention to support projects, programmes, policies and other activities in developing countries including REDD-plus, adaptation, capacity building, technology development and transfer.

TECHNOLOGY

- Establishing a technology mechanism to accelerate technology development and transfer in support of action on mitigation and adaptation that will be guided by a country-driven approach and based on national circumstances and priorities.

REVIEW

- Agreeing to review the terms of the Accord by end of 2015.