

## **Accord Finance – Results based mechanism**

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### **Introduction**

1. There has been a great deal of confusion since the Copenhagen Accord was agreed as to what the provisions relating to finance actually mean. In this briefing note, we address the following issues:
  - a. Whether the wording in paragraph 8 of the Copenhagen Accord binds countries under international law;
  - b. whether a “pay by results” approach in developing countries is the correct interpretation of the phrase “transparency on implementation” (para 8 of the Copenhagen Accord); and
  - c. how, in relation to para 8 of the Copenhagen Accord, the language “the needs of developing countries” should be interpreted. E.g., will developed countries decide what the climate change adaptation/mitigation needs of developing countries are?

### **Summary:**

2. The Copenhagen Accord is not binding and does not place obligations on developed or developing countries. Although it may provide the base for any future agreements, the wording of those binding agreements is negotiable.
3. The drafting in paragraph 8 of the Accord indicates that the phrase “transparency on implementation” is likely to impose an “obligation” (to the extent that the Copenhagen Accord is capable of imposing any obligations, see paragraph 8 below) on developed countries to make sure clear structures for funding are in place and not a “pay per results” obligation on developing countries.
4. However, it is possible that the language in the LCA negotiating text (paragraph 27, chapter I) could be used as an attempt by Parties to equate “transparency on implementation” and “results-based mechanisms”.
5. The drafting in paragraph 8 of the Accord is opaque as to who decides what the climate change adaption/mitigation needs of developing countries are.
6. Developing countries should pay close attention to the powers of the Copenhagen Green Climate Fund, as this body will have a large influence in the allocation of the funding for mitigation purposes.

**Paragraph 8 of the Copenhagen Accord and international law**

7. The Copenhagen Accord was not formally adopted by countries, but instead it was 'noted'. This difference is significant, meaning that countries formally acknowledge the existence of the Accord without putting obligations on any country.
8. The wording of the Accord, describing itself as a "draft decision" that would become "immediately operational" upon agreement means that, if agreed at a later Conference of Parties meeting, the Accord would bind countries with the obligations it contains.
9. For now, the wording of the Accord is not binding on countries, although it may form the basis for a later, binding agreement on countries. Developing countries could attempt to amend the wording of paragraph 8 at this later stage.

**'Transparency on implementation'**

10. The Copenhagen Accord does not provide any guidance as to the meaning of "transparency on implementation". If a literal interpretation of the term were to be taken, and "transparent" is taken to mean "open, non-discriminatory and/or clear", it may be argued that a "pay by results" approach could be an interpretation of the phrase 'transparency on implementation' as 'pay by results' would presumably (subject to the exact terms applicable) impose such open and clear criteria for the release of funds.
11. However, the text of paragraph 8 places "transparency on implementation" into a context in which developed countries commit to funding. Therefore, it is presented as an obligation for (to the extent that the Copenhagen Accord can impose obligations – see paragraph 8 above) developed countries.
12. As a 'pay by results' approach would seem to impose an obligation on developing countries, it could be argued that such an approach, if taken on its own, is likely to (i) fall short of full meaning of "transparency on implementation" and (ii) turn an obligation imposed on developed countries into one on developing countries.
13. We believe that "transparency on implementation" is more likely to mean that there needs to be an agreement with clear, open and non-discriminatory criteria on the structuring and direction of the aid flows. This fits in with the wording at the end of paragraph 8, which proposes methods of structuring the funding, including efficient fund arrangements and a governance structure providing for equal representation of developed and developing countries.
14. It should be noted in this context, however, that the draft LCA text of 17 May 2010 refers in paragraph 27 (Option 2) to funding being primarily "delivered to through results-based mechanisms". This is in addition to the language in the paragraph 23 (which mirrors the language in paragraph 8 of the Copenhagen Accord) relating to "transparency on implementation".
15. The inclusion of both phrases in the draft LCA text suggests that the Parties may try to equate one with the other, notwithstanding what is set out above.

**"The needs of developing countries"**

16. As to whether it will be developed countries that will decide what the climate change adaption/mitigation needs of developing countries are, is reliant on the rest of the wording of paragraph 8, which follows on from what is set out above:

*“This funding will come from a wide variety of sources, public and private, bilateral and multilateral, including alternative sources of finance. New multilateral funding for adaption will be delivered through effective and efficient funding arrangements, with a governance structure providing for equal representation of developed and developing countries. A significant portion of such funding should flow through the Copenhagen Green Climate Fund.”*

17. The wording of paragraph 8 is opaque in terms of (i) who decides what the climate change adaption/mitigation needs are and (ii) any governance of the relevant fund and eventual money transfer. In particular, the Copenhagen Accord is silent as to whether the governance involving the fund and/or the transfer will include developing countries.
18. Unfortunately no clear answer as to whether the developing countries will be involved in deciding what their mitigation/adaption needs are, is available based on the drafting of paragraph 8.
19. The most important part of paragraph 8 may be the wording that the funding should flow through the Copenhagen Green Climate Fund. This is likely to be the body that will allocate funds and so it is important that developing countries understand exactly what the powers and decision making structures of this body will be.