

Adaptation Outcomes

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Introduction

1. In this briefing note, we set out:
 - to what extent the draft adaptation text of 18 December 2009 and the adaptation provisions of the Copenhagen Accord contain actionable provisions, arrangements or commitments as opposed to mere statements of intent or vague announcements;
 - to what extent these provisions are a step up from existing provisions under the (i) Adaptation Fund and its related COP decisions; (ii) other COP decisions related to adaptation; (iii) the Bali Action Plan; and (iv) provisions on adaptation in the Convention text and the Kyoto Protocol text; and
 - language which would strengthen the text in the draft adaptation text of 18 December 2009.
2. As a preliminary point we note that the extent to which either the text on adaptation (18 December 2009) and the adaptation and adaptation finance provisions in the Copenhagen Accord contain “actionable provisions, arrangements or commitments” is influenced by the extent to which each document is (or will become) a legally binding agreement between the relevant parties.
3. In relation to the Copenhagen Accord, as noted in the legal analysis of the Copenhagen Accord¹, “a final constitutive element appears to be missing, the intention to create legally binding obligations”.
4. That analysis advice goes on to say that the Copenhagen Accord “consists by and large of political commitments, and declarations lacking the required certainty to amount to legally binding rights and obligations”.
5. In relation to the draft decision of the COP, it depends greatly on whether the relevant items are decisions (or the establishment of something) or merely requests, guidance, invitations etc by the COP.

Actionable provisions

Draft COP decision

6. The draft COP decision on “enhanced action on adaptation” from 18 December 2009 (Draft Decision) contains options in relation to a number of key provisions, as well as brackets around certain issues which are not yet resolved. The degree to which precise, rather than vague or

¹ *The Copenhagen Accord: A legal analysis*, 2010, Bavishi and others

general statements are made depends on which option is ultimately chosen. But overall, we think the Draft Decision contains a number of actionable provisions, arrangements or commitments rather than mere statements of intent or vague announcements. For example, Article 2 establishes the Copenhagen Adaptation Framework [for Implementation] (Adaptation Framework) which has an objective of enhancing action on adaptation. In addition, option 1 of Article 7 establishes an “Adaptation Committee” under the Convention which, amongst other things, would “receive, evaluate and approve the applications of financial support from developing country Parties for implementation of adaptation projects, programmes and actions”.

7. However, there are critical differences between options which are provided in relation to key provisions.
8. Article 6 of the Draft Decision includes two options, the first of which provides for a decision that concrete numbers be included in a commitment by developed countries to provide developing countries with “long-term, scaled up, adequate, new and additional to official development commitments and predictable grant-based finance from public sources in the order of at least [x billion] [x percent of the gross domestic product of the developed country Party]”. Whereas, option 2 urges (i.e. is not a decision of the COP but merely a guiding statement) “developed country Parties and other developed Parties included in Annex II of the Convention to substantially scale up financial support as well as technology and capacity building assistance to support adaptation efforts” Clearly, the second option, until it becomes a decision is not actionable (i.e. legally enforceable) and is not as clearly defined or as measurable as the first option.²
9. Article 7 of the Draft Decision also includes two options. The first establishes an Adaptation Committee under the Convention to “guide, supervise, support, administer and monitor the operation of the Adaptation Framework”. Whereas the second option decides to “strengthen, enhance and better utilise existing institutional arrangements and expertise under the Convention” in order to support implementation of the Adaptation Framework (this option potentially opens the door to the use of the GEF to deliver adaptation finance). In this case, both options are equally actionable, but option 1 provides a greater level of certainty as to who will take action and what action is to be taken.
10. The two options provided in Article 8 follow the theme in Articles 6 and 7 in that option 1 both establishes an international mechanism to address sustainability losses and damage through risk management, insurance and compensation and rehabilitation, and decides to elaborate modalities and procedures for the international mechanism at COP 16. Whereas option 2 agrees “on the need to strengthen international cooperation and expertise” to address sustainable development loss and damage in developing countries through risk management and insurances as appropriate. It should be noted that option 2 makes no mention of the possibility of compensation (although it appears in square brackets in Article 4 of the Draft Decision and in option 1 of Article 7(h)). Option 2 goes on to request, invite and note various things in relation to exploring risk management mechanisms and strengthening international cooperation in this area. The focus of option 2 is for action to be “country-driven” (rather than through an international mechanism as contemplated by option 1) with enhanced “co-operation and co-ordination between regional stakeholders”. The language of option 2 is not about creating binding commitments and the diffuse nature of programmes created by option 2 may make the effectiveness of those actions difficult to measure.

² It is noted that option 2 of Article 6 includes a note that it is a placeholder “to ensure consistency with discussion on finance”, so the final option 2 may well be a decision and be more precise.

11. In Article 11 both options start out being framed in similar language with option 1 “requesting” and option 2 “inviting” Parties, but the difference lies in the fact that option 1 requests that developed country Parties support developing country Parties, whereas option 2 invites all Parties to strengthen, and where necessary, establish national-level institutional arrangements for adaptation. By inviting all Parties, option 2 shifts the onus of responsibility and places an equal amount of responsibility on developing countries to ensure that national-level institutional arrangements are strengthened. But the language in both options is of a guiding and not binding nature in any event.
12. There appears to be little divergence between the options in Article 12. Although in this case, option 2 provides the greater certainty by requiring that all parties report on support provided and received for adaptation under Article 12.3 of the Convention, whereas option 1 simply refers to using “existing channels” to report. Both options are decisions.

Copenhagen Accord

13. As noted above, the Copenhagen Accord is, at best, a “politically binding” agreement. The nature of the Accord impacts on whether or not any commitments made under the Accord are capable of being actioned. For example, in our view, the major hurdles for implementing the finance provisions of the Copenhagen Accord relate to the fact:
 - (a) clause 8 and clause 10 are subject to the provisions of the Convention; and
 - (b) clause 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.
14. As such, the failure of the COP to adopt the Copenhagen Accord through a COP decision means that the COP:
 - (a) is not yet 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 yet agreed to provide guidance to or assess accountability of the High Level Panel; and
 - (c) has not yet authorised the establishment of the Copenhagen Green Climate Fund as an operating entity under the UNFCCC.
15. The fact that the Copenhagen Accord currently falls 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 (if ever) by COP to adopt the Accord (the earliest possible time being in Mexico in November/December, 2010). This is particularly the case for funds for adaptation which “should” flow through the Copenhagen Green Climate Fund.³
16. We also note that 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. And, of course, 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

³ Rob Fowler, Law School, University of South Australia <http://www.teachingclimatelaw.org/2009/12/20/analysis-of-the-copenhagen-accord/>, posted 20 December 2009

17. Having said all that, one of the key features of the Copenhagen Accord is the commitment by developed countries to a specified amount of funding to assist developing countries with adaptation (amongst other things) which could possibly become a “floor” or benchmark for the minimum amount of funding that is needed to achieve adaptation implementation goals. In this regard, the commitment under clause 8 is framed in similar terms to option 1 of Article 6 of the Draft Decision referred to above (with the noticeable exception of the reference to the funds being “part of the repayment of [the developed countries] climate debt and their historic responsibility based on greenhouse gas emissions”). However, clause 8 of the Accord goes further than option 1 of Article 6 of the Draft Decision in that it also provides a timeframe within which the funds are to be “mobilised”.
18. The Accord is clearly more vague and less comprehensive in scope than the Draft Decision in most respects, and therefore more difficult to action (setting aside the legal and architectural issues). But there are also some clearly consistent elements between the Accord and the Draft Decision (e.g. at clauses 3 and 8 the parties “agree 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” which is consistent to a large extent with Article 6 option 1 of the Draft Decision), which could be used as the basis of moving forward either under the Copenhagen Accord or under the existing UNFCCC track through the Draft Decision. And the Accord has potential to become more detailed through the development of modalities and procedures for each of the elements of the statements of intent. This is particularly true in relation to the establishment and operation of the Copenhagen Green Climate Fund.

How far are the Draft Decision and the Copenhagen accord a step up from previous UNFCCC decisions?

19. The following table provides a chronology and summary of the adaptation provisions from the commencement of the Convention in 1992 through to the Copenhagen Accord.

Date	Decision/Report	Summary of Decision/Report
1992	United Nations Framework Convention on Climate Change (UNFCCC)	20. Outlines commitments of Parties including formulating and implementing measures to facilitate adequate adaptation to climate change; and cooperating to prepare for adaptation.
1997	Kyoto Protocol	<p>Outlines that the Parties should reaffirm existing commitments under the UNFCCC. Specifies the areas that adaptation programs would involve such as energy, transport, agriculture etc., (see Article 10).</p> <p>States that developing countries may provide financial assistance to implement Article 10.</p> <p>The Conference of the Parties to regularly review the implementation of the Protocol and make decisions necessary to implement</p>

Date	Decision/Report	Summary of Decision/Report
		it.
29 October to 10 November 2001	FCCC/CP/2001/13/Add.1 Decision 5/CP.7 - Marrakesh	<p>Parties insist that action related to adaptation follow an assessment and evaluation process.</p> <p>Parties decide on the implementation of various activities relating to adaptation be supported through the Global Environment Facility and the Special Climate Change Fund (paragraphs 7 and 8).</p> <p>Parties decide that a least developed countries fund be established to support a work program including the preparation and implementation of national adaptation programs of action (paragraph 12).</p> <p>Invitation to Annex II countries to support least developed country Parties and outlines methods to support national adaptation programs of action (paragraph 13 onwards).</p> <p>Parties request that the secretariat organises regional workshops to facilitate information exchange and integrated assessments, including for adaptation (paragraph 32).</p>
	FCCC/CP/2001/13/Add.1 Decision 10/CP.7 - Marrakesh	<p>Parties decide to establish an adaptation fund and that it is to be financed from the share of proceeds on the clean development mechanism project activities, and other sources (paragraphs 1 and 2).</p> <p>Parties decide that the adaptation fund be operated and managed by an entity entrusted with the operation of the financial mechanism of the Convention (paragraph 4).</p>
6 to 18 December 2004	FCCC/CP/2004/10/Add.1 Decision 1/CP.10 - Buenos Aires	<p>Urges Annex II Parties to contribute to the Special Climate Change Fund to support adaptation activities (paragraph 3).</p> <p>Parties decide to further implement actions under Decision 5/CP.7 - Marrakesh (paragraph 5).</p> <p>Parties request that the Global Environment Facility report to the Conference at future sessions about adaptation activities and</p>

Date	Decision/Report	Summary of Decision/Report
		<p>programs (paragraph 6).</p> <p>Parties request that the Subsidiary Body for Scientific and Technological Advice develops a work program on impacts, vulnerability and adaptation to climate change.</p>
6 to 17 November 2006	FCCC/KP/CMP/2006/10/Add.1 Decision 5/CMP.2 - Nairobi	Parties decide the Adaptation Fund's principles, modalities and membership of the governing body of the Fund.
3 to 15 December 2007	FCCC/KP/CMP/2007/9/Add.1 Decision 1/CMP.3 - Bali	<p>Parties decide that developing country Parties are eligible for funding from the Adaptation Fund and that the Fund will finance concrete adaptation projects and programs (paragraphs 1 and 2).</p> <p>Parties decide that the operating entity of the Fund is the Adaptation Fund Board.</p> <p>Parties decide details regarding the Board's functions, composition, membership, quorum, decision-making, chairmanship, frequency of meetings, observers, transparency, secretariat, trustee, monetisation, access to funding, and institutional arrangements.</p>
3 to 15 December 2007	FCCC/CP/2007/6/Add.1 Decision 1/CP.13 - Bali Action Plan	<p>Conference of the Parties decide to launch a process to implement the Convention to reach an agreed outcome and adopt a decision at its 15th session by addressing "enhanced action on adaptation" - specifies adaptation actions such as vulnerability assessments, financial needs assessments etc., (paragraph 1(c)(i)).</p> <p>Parties also to address enhanced action on the provision of financial resources to support adaptation (paragraph 1(e)).</p>
1 to 12 December 2008	FCCC/KP/CMP/2008/11/Add.2 Decision 1/CMP.4 - Poznan	<p>Parties adopt rules of procedure of the Adaptation Fund Board.</p> <p>Parties request that the Board accelerate the development, adoption and implementation of:</p> <ul style="list-style-type: none"> - particular operational policies and guidelines (see paragraphs 7 and 8); and

Date	Decision/Report	Summary of Decision/Report
		<ul style="list-style-type: none"> - criteria referred to in paragraph 30 of Decision 1/CMP.3 (Bali) to start the approval and disbursement of funds of project proposals (see paragraph 9). <p>Parties request that the Board begin to process proposals for funding projects (paragraph 10).</p>
7 to 15 December 2009	<p>Advance Version - FCCC/AWGLCA/2009/17</p> <p>Report of the Ad Hoc Working Group on Long-Term Cooperative Action (AWG-LCA) under the Convention on its eighth session - Copenhagen</p>	<p>AWG-LCA decide to present draft decisions for consideration and adoption by the COP at its 15th session, including decisions regarding enhanced action on adaptation; enhanced action on the provision of financial resources and investment; enhanced action on technology development and transfer; enhanced action on capacity building; and cooperative sectoral approaches and sector specific actions in agriculture.</p>
7 to 15 December 2009	<p>FCCC/CP/2009/L.7</p> <p>Draft decision -/CP.15 Copenhagen Accord</p>	<p>Parties stress the need to establish a comprehensive adaptation program.</p> <p>Parties agree that developed countries shall provide financial resources, technology and capacity building to support the implementation of adaptation activities in developing countries.</p> <p>Scaled up, new and additional funding shall be provided to developing countries to enable enhanced action on adaptation (see paragraph 8 for details regarding funding assistance to be provided to developing countries from developed countries).</p>
	<p>Outcome of the work of the informal group on adaptation established under the COP - latest (unofficial) text</p>	<p>Invites parties to enhance adaptation action and outlines actions.</p> <p>Provides options of provisions regarding financial support for adaptation, establishment of an Adaptation Committee, international mechanisms/cooperation to implement adaptation and support for developing countries through establishing national-level institutional arrangements for adaptation.</p>

21. What the chronology and summary table demonstrates is that until the Bali conference in 2007 there had been limited progress in operationalising and scaling-up the necessary architecture and funding for adaptation, despite recognition in 1992 of the need to implement measures. In 2004, the COP was still at the stage of “urging” Annex II Parties to contribute to the Special Climate Change Fund to support adaptation activities.
22. However, the decisions also indicate that the Parties are gaining a better understanding of the science and actions which are required to be taken to implement appropriate and sufficient adaptation measures and this is reflected in the level of detail regarding adaptation and adaptation funding in the COP and MOP decisions from Bali onwards.
23. In particular, there is now a strong recognition of the need to urgently provide assistance to those developing countries which are most vulnerable to the impacts of climate change and have the least internal capacity to implement adaptation measures. Also, the institutional arrangements for adaptation and adaptation funding (e.g. the Adaptation Fund Board) are now settled and have the potential to provide a sound foundation upon which to build the next phase of adaptation and adaptation funding implementation.

Strengthening the Draft Decision

24. The Draft Decision is a necessary next step in the process, not necessarily a “step up” as such, just another step in a continuum. However, in order for there to be progress in this regard, it would seem to us that the Draft Decision needs to include decisions which impose obligations on all Parties with respect to critical elements (e.g. funding amount, governance, access to funding), rather than issuing guidance statements which invite, urge or request parties to take on responsibility in a manner which effectively minimises accountability of the Parties to the COP.
25. The fact that the issue has received high-level political support under the Copenhagen Accord, through pledges of significant funds (although it is likely that the funds are insufficient to meet the cost of implementing all the adaptation measures which are required by developing countries) is, we think, important progress. But the progress will be limited by the extent to which the commitments made under the Copenhagen Accord can be implemented, either under the Accord or under the Draft Decision.
26. In our view, the key to strengthening the Draft Decision is to:
 - choose options which impose obligations on Parties in respect to critical elements of implementation, such as a commitment to specific funding amounts (i.e. mostly option 1 in the paragraphs referred to above);
 - ensure that wherever possible, precise language is used. If “existing institutional arrangements” are to be used, the institutional arrangements should be specified. Whilst the use of more general terms provides greater flexibility, it makes it difficult to hold people accountable for actions in circumstances where the responsibility is not clearly allocated; and
 - avoid potentially controversial language if it is not necessary to give effect to the obligation or requirement e.g. referring to the “*repayment of [the developed countries’] climate debt*” may be seen by some as inflammatory and counterproductive. Instead, it may be preferable to use terms which are accepted, such as “common but differentiated responsibility”. It is widely understood that this term covers the issue of the developed countries’ climate debt.