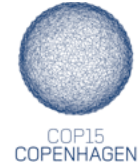


## A Legal Analysis of the Copenhagen Accord



**Paul Curnow, Partner – Sydney**

UNSW CEEM 2010 Conference  
Sydney, Thursday 25 February 2010

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# Negotiating Basis

## Bali Roadmap – two track process

- Ad-hoc working group on Article 3(9) of Kyoto Protocol (**AWG-KP**)
  - Mandated to continue work of AWG-KP established at COP/MOP 1 to consider commitments for developed country Kyoto Parties
- Ad-hoc working group on long term co-operative action under the UNFCCC (**AWG-LCA**)
  - Mandated to looking at building blocks of mitigation, adaptation, technology transfer and financing and overarching shared vision (Decision 1/CP 13 – The Bali Mandate)

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# Legal Status of the Accord

## Legal Status of the Accord

- Copenhagen Accord is not a formal decision of the COP
  - “Noted” by the COP, not formally “adopted”
- Nor is it a legally binding international agreement recognized under international law
  - no intention to create “internationally binding obligations” – Vienna Convention
- Operates as a political statement by those Parties that choose to endorse it and, at best, creates bilateral or multilateral relations between those Parties
  - “politically binding” = political consequences, diplomatic responses, public shaming, withholding of funding etc.
- Todd Stern: “Operational Agreement” – more a “sketch than a painting”

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## Associating with the Accord

- “Associating” with the Accord has same significance as “signing” or “acceding” to the Accord
  - indicates that country agrees with substance of Accord and agrees to be bound, politically, by its terms
- Number of developing countries wondered whether they must associate themselves with totality of Accord or not at all, or whether there is a middle ground
- Deadline with associating with Accord nominally 31 January, but soft deadline – several pledges and associations came after 31 January

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# Relationship with UNFCCC

## Relationship with UNFCCC

- Accord not formally adopted by UNFCCC rules but merely “noted” by UNFCCC Parties at COP1
  - “Noting” a document can be distinguished from “adopting it” which requires a consensus at COP meetings – which was not achieved in Copenhagen
- Importantly, act of “taking note” of the Accord does not lend it the status of a COP decision
- However, distinction of “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

## Implementation of Accord outside UNFCCC

- Failure of COP to adopt Accord by consensus has led to some views that Accord represents “beginning of the end of the UN process”
  - Talk of another forum of fewer countries that take the international climate change regime forward
- Many alternative fora which could be used:
  - “Friends of the Accord”
  - Bilateral agreements
  - Regional agreements
  - Major Economies Forum
  - G20 or G8
- But premature to make a judgment on this: likely that UNFCCC forms cornerstone of multilateral action, with political momentum injected from different fora <sup>9</sup>

## Relationship between Accord and AWG-LCA

- Mandate of AWG-LCA has been extended and requested to report back to COP16 in Mexico
- But legal form of outcome of AWG-LCA is still unclear:
  - some Parties would like to see adoption of binding agreement in form of another Protocol or implementing agreement to UNFCCC (= developed countries)
  - while others would be satisfied with series of COP decision to implement key outcomes of AWG-LCA (= developing countries)
- Until the form of outcomes of AWG-LCA is agreed, likely that Accord will play a role in guiding negotiations of AWG-LCA

## Relationship between Accord and AWG-KP

- Mandate of AWG-KP has also been extended to COP16 in Mexico
- As it currently stands, the Accord does not affect current Kyoto targets during 1<sup>st</sup> commitment period and provided there are amendments to Kyoto Protocol for a 2<sup>nd</sup> commitment period and these are adopted, these will be legally binding, regardless of the Accord
- But Accord does not specify a 2<sup>nd</sup> commitment period of Kyoto Protocol:
  - Accord invites Annex I Parties to submit 2020 targets
- Ongoing questions over whether Annex I pledges under Accord lead to 2<sup>nd</sup> commitment period targets:
  - Developing countries very committed to continuance of Kyoto Protocol
  - But developed countries only prepared to sign up to 2<sup>nd</sup> commitment period if corresponding legally-binding implementing agreement under UNFCCC that brings in developing countries with (voluntary) commitments open to international scrutiny

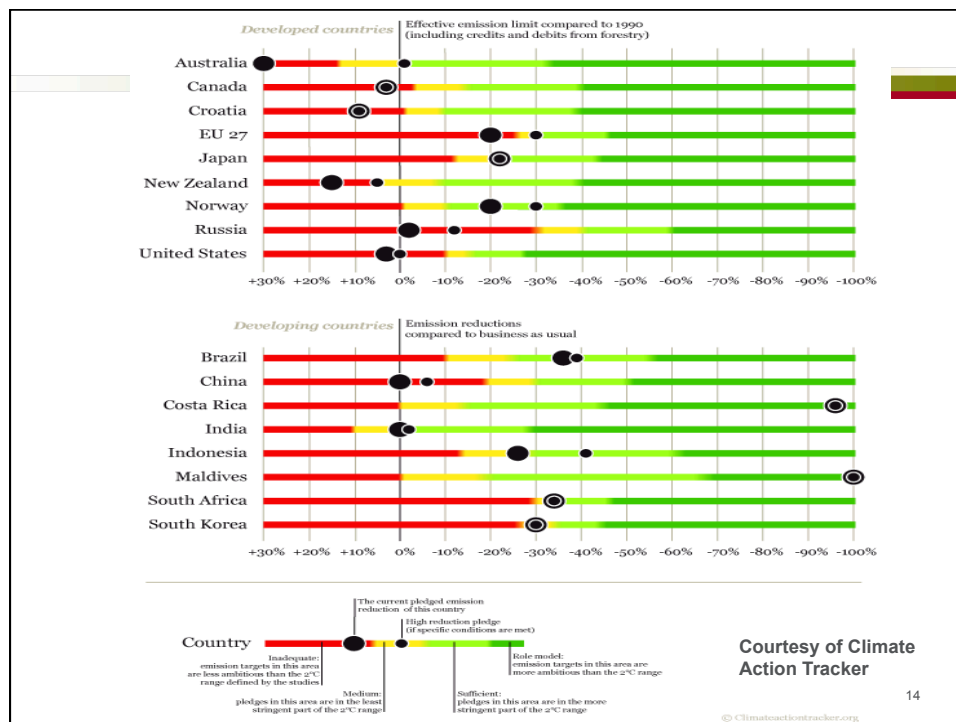
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# Accord Pledges

## Accord Pledges

- As of 24 February over 70 developed and developing countries have submitted national pledges
- BASIC Countries
  - Coordinated approach in submitting NAMAs as voluntary pledges with reference to UNFCCC obligations
  - Have stressed that they support the Copenhagen Accord but unanimously of the view that its value lies not as a stand-alone document but as an input into the two-track negotiation process under UNFCCC. Accord will not become a legally binding Agreement.
  - Seeking interim meetings of the AWGs prior to Mexico City
  - Establishing a fund to help SIDS, LDCs and the most vulnerable
- Annex 1 Countries
  - Reiterating previously stated targets – many conditional
  - Mixed views on the role of the Accord and its strengths and weaknesses

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# Adopting Legally Binding Agreement at COP16

## A “breach in the firewall”?

- Pledges by BASIC countries indicate desire by key developing countries to limit impact of the Accord:
  - language in their letters to the Secretariat puts their pledges in context of existing obligations under UNFCCC to take mitigation action – rather than within the Accord
  - developing countries likely to push for ongoing negotiations to go back to draft formal negotiating texts that were left hanging in Copenhagen
- BUT US and other Annex I Parties are looking at the Accord as an operational agreement that forms basis of post-2012 framework:
  - want to see Accord provisions move forward in their entirety – especially mitigation actions for developing countries subject to international transparency
  - should materially influence further negotiations

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## A precedent from COP2?

- Geneva Ministerial Declaration was taken “note of” by the COP at COP2
  - at COP2 Parties had failed to make significant progress in accordance with Berlin Mandate
  - GMD was a Ministerial statement of political intent as a result of the lack of progress which expanded on certain principles under the Berlin Mandate
  - Parties went on to adopt the Kyoto Protocol at COP3 as a legally binding agreement
- GMD represented a political commitment which was not fully endorsed by all Parties, but it did inject political momentum into the Kyoto Protocol negotiations

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## Will Accord lead to legally binding agreement at COP16?

- Unlikely that Accord itself in current format will become legally binding agreement
- More likely to present a renewed political basis for ongoing negotiations (including AWG-LCA and AWG-KP texts) that will form legally binding agreement:
  - Line has been drawn: Annex I 2020 targets contingent on developing countries voluntary commitments being open to some level of international MRV (Monitoring, Reporting and Verification)
- Clear from Copenhagen that 2-track process will form basis for post-2012 binding framework:
  - Further targets of Annex I Parties under Kyoto Protocol
  - Mitigation commitments of developing countries under UNFCCC track

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Thank You

Questions?

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