



SAVE THE KYOTO PROTOCOL

APRODEV Position Paper ¹

**United Nations Climate Change Negotiations
Barcelona, 2 to 6 November 2009**

This is an appeal to the heads of national government delegations attending the current round of climate negotiations in Barcelona from 2 to 6 November, 2009:

Aprodev believes that that the combination of instruments in the form of an amendment to the Kyoto Protocol and a set of COP decisions for the LCA track is the option most likely to lay the foundation for an equitable, just and adequate, legally binding agreement in Copenhagen in December 2009.

Fulfill the legal mandate

We remind Parties that each of the two distinct negotiation tracks require legally and substantively distinct outcomes. First, the AWG-KP negotiating is charged with the mandate of producing a second commitment period. Its required legal outcome is clear, namely an amendment of the Kyoto Protocol according to the mandate clearly set out in its Article 3.9 for the amount of emission reductions by Annex I Parties in their subsequent commitment period.

Second, the AWG-LCA negotiating track is charged with the mandate to enhance implementation of the UNFCCC. Its legal outcome is less certain since the Bali Action Plan only specifies that an “agreed outcome” should be reached and a decision should be adopted in Copenhagen.

¹ APRODEV position paper, prepared by Johannah Bernstein in November 2009. The author gratefully acknowledges the invaluable advice provided by Mathew Stilwell and Lin Li Lim as well as Marlene Grundstrom and Nelson Muffuh. Additional research and editing was undertaken by Charlotta Savolainen, Brad Brasseur, Halyna Zalucky and Ryan Berglas.

Aprodev asserts that the legal instruments for each of these two tracks must be grounded in the principles of equity, justice and adequacy. The UNFCCC's fundamental principles of historical responsibility and a fair sharing of the global atmospheric resources must underpin both the KP amendment and the agreed outcome for the LCA track.

Aprodev emphasises that these elements are essential in order to redress the tragedy of the atmospheric commons that has been created by the industrialized countries having emitted GHG levels far in excess of the carrying capacity of the Earth, especially since the excessive overuse and "free-riding" of atmospheric capital has deprived developing countries of their fair share.

Save the Kyoto Protocol

We are deeply concerned that many developed countries such as Japan, the US and now the EU have been actively working towards the dismantling of the Kyoto Protocol beyond the first commitment period in 2012.

Developed country proposals for new instruments are significantly weaker than the Kyoto Protocol. They include proposals to weaken reduction targets and to obscure the distinction between Annex I and non-Annex I countries. Moreover, they do not establish the ambitious basis necessary for future action, and will most certainly trigger a "race to the bottom", as well as a possible mass exodus from the Kyoto Protocol. Not only will this violate the fundamental principles of the UNFCCC, but it will seriously undermine the integrity of the global climate regime.

Other developed country Parties seek to go beyond the scope of the legal mandate established by the Bali Action Plan by bringing in a wide range of other issues into the actual negotiation of the possible amendment to the Kyoto Protocol.

Without further progress on targets for Annex 1 countries, we believe that this push to do "more" is disingenuous. It is causing serious delays in the process, and diverting political energy and attention from the most important issue at hand, namely to adopt an amendment to Annex B of the Kyoto Protocol to ensure that a robust second commitment period is established as quickly as possible.

Any option that entails abandoning the Kyoto Protocol is a very dangerous strategy that puts equity, justice and adequacy concerns at risk. The Kyoto Protocol and its clear distinction between developed and developing countries and their respective obligations is the best tool for ensuring that the principle "common but differentiated responsibilities" is enshrined in a post-2012 agreement.

The outcome needed for the AWG-KP track

As noted above, for the AWG-KP, the legal outcome is clear – an amendment of the Kyoto Protocol, based on the mandate clearly set out in its Article 3.9 for Annex 1 emission reduction targets in their next commitment period.

Aprodev asserts that failure to comply with these provisions by failing to agree a second commitment period would be a breach by all Parties to the Kyoto Protocol - not merely Annex I Parties - of their legally binding obligations.

The equity, justice and adequacy arguments in favour of the amendment option (as opposed to an entirely new protocol for the second commitment period) are summarised below:

1. An amendment to the Kyoto Protocol would establish new robust and legally-binding targets for Annex I countries
2. As well, since the amendment option would preserve the substantive elements of the Kyoto Protocol, there is less chance that developed countries could succeed in their efforts to weaken the current regime. In this way, the fundamental principles of the UNFCCC would be respected.
3. By contrast, many developed countries are pressing for a new protocol to govern the second commitment period. Given the current state of climate politics, there is a considerable risk that the new protocol option would result in a much weaker regime than the Kyoto Protocol.
4. The motivation for some developed countries for abandoning the KP is a desire to fundamentally change the UNFCCC and get rid of the distinction between Annex I and non-Annex I countries, making advanced developing countries also take on legally binding targets to reduce their emissions. This would violate the principle of “common but differentiated responsibilities” enshrined in the Convention. In a situation when Annex 1 countries have not taken their full responsibility and are not delivering what science requires in terms of emission reductions, it is a clear violation of climate justice principles to demand from developing countries compensate for developed countries’ mitigation failure.
5. Moreover, a new protocol might never actually enter into force if there are not enough ratifications, acceptances, approvals or accessions.² If this were to be the case, the climate regime would be irreversibly compromised.
6. It is important to highlight that if a new protocol was in fact adopted which was considerably weaker than the existing Kyoto Protocol, it is certain to trigger a ‘mass exodus’ from the Kyoto Protocol. While the EU argues that this is the reason why the existing Kyoto Protocol should not be maintained, it is certainly not a justification for its replacement. Instead efforts should be directed towards ensuring that Parties strengthen and build on the existing regime and uphold their legal obligation to adopt a second commitment period there-under.
7. Since the amendment option would itself require formal ratification, this would generate a much stronger outcome in light of its bindingness. However, the requirement for ratification could involve potential delays and possible gaps between commitment periods. The possible gap period could lead to greater backtracking of existing commitments.
8. An amendment to the Kyoto Protocol would preserve the robust but rarely enforced compliance regime that already exists under the Kyoto Protocol. Considering how far apart Parties now are on the most fundamental of elements for the second commitment period, it is highly unlikely that Parties would ever

² Interview with Mathew Stilwell and Lin Li Lim, September 1, 2009.

agree to a more rigorous compliance regime than the one that has been established under the Kyoto Protocol. A new protocol option would most likely weaken the existing compliance regime.

The outcome needed for the LCA track

At this point, Aprovev maintains that the set of COP decisions would be preferable to the other options under discussion for a number of equity, justice and adequacy considerations. These are summarised below.

1. A set of COP decisions is sufficient to address concrete implementation actions, including institutional arrangements, rules and procedures needed to enhance implementation of the UNFCCC
2. Since COP decisions do not require ratification, this option is best suited to address key implementation challenges with the greatest speed and certainty and to facilitate immediate action up to and beyond 2012.
3. There is a concern about the legal bindingness of the COP decision option. According to the Vienna Convention on the Law of Treaties, decisions of the COP may be considered as a ‘subsequent agreement between the Parties regarding the interpretation of the treaty or the application of its provisions’
4. Most if not all of the developed country obligations under the Convention, as well as the elements of the Bali Action Plan - including enhanced actions and institutional arrangements for mitigation, adaptation, technology and finance – can be addressed through decisions taken by the Conference of Parties. The Convention has considerable experience establishing institutional arrangements via decisions (e.g. the CDM Executive Board and the Joint Implementation Supervisory Committee). Other multilateral environmental agreements have experience establishing financing and technology transfer mechanisms through decisions and without new treaties (e.g. the Montreal Protocol’s Multilateral Fund).
5. The main outstanding issue with a COP decision would be ensuring “comparability of efforts” for those Annex I Parties to the Convention that are not Parties to the Kyoto Protocol. There are a variety of means this could be addressed without a new treaty/protocol, including through internationally binding national actions (e.g. a unilateral declaration of States capable of creating legal obligations – see Annex 1) and through appropriate institutional arrangements for ensuring efforts are measurable, reportable and verifiable.
6. For such options to be viable and not undermine adequacy of Annex 1 mitigation efforts, a firewall would need to be created around the US to prevent other Annex 1 countries from abandoning the KP in favor of new, less stringent arrangements. Disincentives could be created to prevent such “ship-jumping”, including limiting access to carbon trading/flexible mechanisms for countries that do not comply with their “national actions” agreed to through COP decisions under the LCA track. Further efforts to explore these options and to evaluate their political feasibility are required.
7. Proceeding through decisions avoids the risks and delays associated with re-

- opening the Convention, merging the Kyoto Protocol and the Convention or negotiating a new instrument. The use of decisions minimizes the potential that key obligations in the Convention will be weakened or altered.
8. Whereas a new protocol under the LCA along with a set of COP decisions also could provide a good basis for implementation of developed country obligations under the UNFCCC, including finance and technology, as well as provide a strong basis for ensuring comparability of efforts of the US in a legally binding manner, there are also certain risks involved in negotiating a second protocol under the LCA:
 - a. This would enhance the political risks of a new protocol entirely subsuming KP and therefore undermining its adequacy and equity elements
 - b. It risks creating a “permanent home” for the US, which, even in the long term, may be different from the top-down approach of the KP.
 - c. Negotiating a new protocol is not likely to be possible in the few weeks remaining until the end of COP 15. Delay on reaching agreement on the second protocol outcome could stall progress both in the KP and in the set of COP decisions intended to facilitate rapid implementation of developed country obligations the UNFCCC (finance, technology, etc). There is no guarantee that delaying progress will lead to a higher ambition from the US or preference for a binding rather than “pledge & review approach”.
 - d. Given the political reality we are facing, negotiating a new protocol under the LCA could easily lead to new demands being placed on developing countries to commit to legally binding emission reduction commitments, whereas COP decisions could enshrine developing country mitigation actions in a non-legally binding way, which is more in line with the principle “common but differentiated responsibilities”.
 - e. COP decisions could also encourage more ambitious mitigation action from developing countries, compared to if they were enshrined in more robust legally binding mitigation commitments/targets under a new protocol.
 9. As regards the viability of a COP decision in terms of addressing comparability of efforts of the US, there is some concern that only a new protocol could provide sufficient legal bindingness as a basis for adequate mitigation action. This concern remains valid and must be evaluated in the light of political developments, as well as judged against the actual substance of the decision and/or protocol.

However, there are a number of interesting proposals on how this issue could be addressed without a new treaty, including through internationally binding national actions (e.g. a unilateral declaration of States capable of creating legal obligations) and through appropriate institutional arrangements for ensuring efforts are measurable, reportable and verifiable. Creating a firewall around the US could be a way to ensure that other developed countries to not “jump ship”,

backslide and abandon the KP, in order to protect adequacy of developed country mitigation commitments. Creating disincentives for leaving the KP, such as limiting access to flexible mechanisms under the carbon market for Annex 1 countries have mitigation commitments under the LCA track and fail to comply, could be a way to enhance the attractiveness of remaining in the KP.

10. Given the current climate politics and developed country efforts to weaken the current regime, it is unlikely that anything other than a COP decision could meet the essential equity, justice and adequacy considerations related to the challenges of enhancing implementation of the UNFCCC.

Aprodev messages to climate negotiators in Barcelona

Developed countries must comply with their legally binding responsibility to ensure a robust second commitment period under the Kyoto Protocol. It is essential that the AWG-KP and AWG-LCA tracks be kept distinct, as per the existing legal mandates. All efforts must be directed towards aggressively advancing work in the AWG-KP.

It is critical for the outcomes of the two negotiating tracks to express in clear and unambiguous terms the essential parameters for the second commitment period from an equity, justice and adequacy perspective, notably:

- *The scale of emission reductions must be sufficient to stabilize atmospheric GHG concentrations at 350 ppm, which is the level necessary to prevent dangerous interference with the climate system;*
- *The reduction burden-sharing arrangement between industrialized and developing countries must be fair, in particular the North must not only take the lead but assume deep and sustained cuts in emissions to ensure that the costs of adaptation for developing countries are to be kept low;*
- *Significant financial and technological resources must be provided urgently to developing countries to enable them to adapt to climate change and to stimulate their own low-carbon development.*

In other words, Annex I countries must accept a share of the global resource that reflects the full extent of their historical responsibility. They must accept responsibility for the emissions that have contributed disproportionately to causing climate change, denying atmospheric space to developing countries and its adverse impacts on the poor. Climate politics as usual will not deliver the cuts needed to avoid catastrophic climate change.

The Kyoto Protocol is the only internationally binding instrument that sets quantified commitment targets for Annex I Parties to reduce greenhouse gas emissions. The Kyoto Protocol has many flaws, but the prospect of losing an international law that requires specific amounts of emission reductions by Annex I countries as a whole and individually, with a binding timetable and compliance measures is very dangerous, especially since there is no better alternative in place.

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Full report can be found at: http://www.aprodev.net/climate/ClimateChange_index.htm

