COUNTDOWN TO COPENHAGEN

APRODEV

Copenhagen Legal Options & Equity

An evaluation of legal outcome options for a post-2012 climate change agreement from an equity and climate justice perspective

APRODEV is the association of the 17 major development and humanitarian aid organisations in Europe, which work closely together with the World Council of Churches (Including Church of Sweden, Diakonia, Norwegian Church Aid, Dan Church Aid, Finn Church Aid, ICCO, EED, Brot für die Welt, Bread for All, and Christian Aid).

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This proposal argues the following…

- The Kyoto Protocol is the only international tool that can put *legally binding* requirements on industrialized countries to reduce their greenhouse gas emissions. Without the Kyoto Protocol, we would be left with emissions anarchy – in other words no top-down pressure on governments to deal with climate change. The result would no doubt be climate chaos and no international tools to deal with sky-rocketing emissions from individual countries – which have negative consequences for all the world's people and most of all for developing countries, the poorest and the most vulnerable.

- The Kyoto Protocol is also important because it makes a clear distinction between industrialized and developing countries and the types of obligations they have under an international climate regime. Since industrialized countries have created the climate crisis, and have the greatest capacity to act, they are the only ones with legally binding obligations to reduce their emissions under the Kyoto Protocol. Developing countries, which are not to blame for climate change and which have scarce resources to deal with it, do not have legal obligations, but are entitled to receiving financial support to enable sustainable development. This distinction is crucial as it enshrines the important principles of equity and climate justice, and safeguards developing countries' right to development.

- The first commitment period of the Kyoto Protocol expires in 2012. Countries now urgently need to reach agreement on how to strengthen and continue international climate cooperation after 2012. Agreement needs to be reached in Copenhagen in December this year, to avoid gaps between commitment periods and to respond to the urgency of the climate crisis.

- 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.

- What the climate and the world's poor need from Copenhagen is a strong commitment to build on and improve the existing climate architecture, as enshrined in the KP, with a clear distinction between developed and developing countries, and legally binding, top-down, and more ambitious emission reduction obligations with strong monitoring and compliance measures for industrialized countries. As a network of development agencies, with partners in developing countries all over the world, Aprodev believes that anything less than the KP will undermine the world's chances of preventing dangerous climate chance, as well as global efforts to eradicate poverty.

- Gambling with the Kyoto Protocol is a dangerous game. Our call to the EU and other industrialized countries ahead of Copenhagen: Do not play roulette with the future of our planet.

An evaluation of legal outcome options for a post-2012 climate change agreement from an equity and climate justice perspective

APRODEV Briefing Paper

Prepared by Johannah Bernstein, November 2009

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1. INTRODUCTION

The purpose of this briefing paper is to examine and evaluate the different options for the legal nature/form[1] of the agreed outcomes to implement the UN Framework Convention on Climate Change (UNFCCC) and its Kyoto Protocol. Each of options is examined in terms of their equity, justice and adequacy implications.

The options that are examined in this paper include:

- Procedural COP decision
- Substantive COP decision
- Amendment to the Kyoto Protocol
- Amendment to the UNFCCC
- New protocol or other instrument
- Combination of instruments

It is important to recall that each of the two distinct negotiation tracks require legally and substantively distinct outcomes. First, the AWG-KP negotiating track 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. Several options exist, including a new international treaty/Protocol under the Convention, and a decision of the Conference of the Parties (COP) of the UNFCCC or a set of COP decisions, or another international treaty or Protocol under the Convention. These various options are further discussed in this paper.

Aprodev asserts that any option that entails abandoning the Kyoto Protocol, as currently being proposed by several developed countries in the UNFCCC negotiations, 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. In addition, in the current political climate it is not conceivable that parties will be able to agree on any alternative treaty/protocol that is stronger than the Kyoto Protocol in terms of its top-down approach, legally binding, economy-wide targets for developed countries, compliance mechanisms and long-term viability.

Aprodev believes that that the combination of instruments in the form of an amendment to the Kyoto Protocol and a set of COP decisions deserves careful consideration by all parties, but that

[1] Distinction: The "form" of an agreement refers to the one-track vs two-track discussion, whether the outcome is presented in one, two or several different documents, etc. The "legal nature" refers to the bindingness, whether the outcome is a protocol or a set of COP decisions, combinations of these, etc. The two terms are related but not entirely the same. In this report, both "form" and "legal nature" options are evaluated based on the equity, justice and adeuacy criteria.

other options for the LCA track could also potentially serve equity, justice and adequacy criteria in a satisfying way, depending on significant political developments and the substance of the agreement.

Aprodev asserts that the legal instruments for each of the two negotiating 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 whatever outcome is agreed for the LCA track. The equity, justice and adequacy criteria are further described below and are used as a basis for evaluating the different options that are currently under discussion.

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.

2. THE NEGOTIATING TRACKS AND LEGAL MANDATES

The Bali Action Plan adopted by the 13th Conference of the Parties (COP) to the UN Framework Convention on Climate Change (UNFCCC) launched "… a comprehensive process to enable the full, effective and sustained implementation of the Convention through long-term cooperative action, now, up to and beyond 2012, in order to reach an agreed outcome and adopt a decision at its fifteenth session…"

Hence the legal outcome mandated by this decision of COP-13 is to reach an agreed outcome and adopt a decision at COP-15 at Copenhagen in December 2009.

It is important to recall that there are two distinct negotiation tracks and mandates. The AWG-KP is a negotiating track under the Kyoto Protocol and the AWG-LCA is a negotiating track under the Framework Convention on Climate Change. There should be two outcomes in Copenhagen, and they should be legally and substantively distinct.

The Ad-Hoc Working Group on the Kyoto Protocol (AWG-KP)

Negotiations on the Kyoto Protocol are being undertaken in an ad hoc working group for countries that have ratified the Kyoto Protocol. Known as the AWG-KP, its mandate is to review the Protocol and to agree on further commitments for Annex 1 Parties for the second commitment period after the first ends in 2012.

The legal outcome of the AWG-KP should not be put into question. The legal requirements are clear - 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 next commitment period. In Copenhagen, parties' proposals for amending the Kyoto Protocol will be discussed. An agreed amendment should be adopted at the meeting of the Parties to the Kyoto Protocol (MOP).

Ad-Hoc Working Group on Long-Term Cooperative Action (AWG-LCA)

The second track is governed by the ad hoc working group on long-term, cooperative action (AWG-LCA). This track involves all countries and its mandate is to launch a comprehensive process to enable the full, effective and sustained implementation of the Convention through long-term cooperative action, now, up to and beyond 2012, in order to reach an agreed outcome and adopt a decision at its fifteenth session.

The legal nature/form options that are relevant to the AWG-LCA track include a set of COP decisions, a new overarching or limited legal instrument in the form of a Protocol or Treaty, or indeed the possible amendment to the UNFCCC.

The AWG-LCA has no pre-judged legal outcome. This is subject to ongoing negotiations and discussions. The Bali Action Plan only specifies that an "agreed outcome" should be reached and a decision should be adopted in Copenhagen. Several options exist, including a new international treaty/Protocol under the Convention, and a decision of the Conference of the Parties (COP) of the UNFCCC or a set of COP decisions, or another international treaty or Protocol under the Convention. These various options are discussed in Section 4 of this paper.

3. THE IMPORTANCE OF EQUITY, JUSTICE AND ADEQUACY FOR EVALUATING LEGAL NATURE/FORM OPTIONS

As described above, the legal outcome mandated by COP-13 is to reach an agreed outcome (for the KP track) and adopt a decision (for the LCA track). Each of these instruments must be grounded in a principled approach that is based on equity, justice and adequacy.

The climate justice movement has made important contributions in advancing these concerns in the negotiations. However, there is a lack of conceptual clarity in the way the concepts of equity and justice have been distinguished, not to mention a continuing resistance on the part of Annex 1 Parties to the equity and justice imperative. Many claim that these issues, however important, will only obscure the critical issues under negotiation. Despite the fact that the climate debt concept has now been endorsed by over 50 countries, there is still considerable awareness-raising to be undertaken before the concept will gain sufficient political traction.

That said, it should be noted at the outset that the UNFCCC[2] is itself grounded in fundamental principles of equity, justice and adequacy, which for largely economic and political reasons, have been systematically disregarded by industrialized nations since the UNFCCC was adopted in 1992.

These principles include the following:

- The *principle of common but differentiated responsibilities*, which recognizes that developed country Parties should take the lead in combating climate change in light of the fact that the largest share of historical and current emissions of GHGs has originated in those countries;

- The *principle of intergenerational equity*, which calls for all Parties to protect the climate system for the benefit of present and future generations of humankind;

- The *precautionary principle and the principle of prevention*, which require Parties to take precautionary measures to anticipate, prevent or minimize the causes of climate change and mitigate its adverse effects and not to delay action on the basis of scientific uncertainty where there are threats of serious or irreversible damage; and

- The *principle of special and differential treatment of developing countries*, which requires special priority to be given to the specific needs and special circumstances of developing country Parties, especially the least developed and most environmentally vulnerable to the adverse effects of change.

3.1. THE PRINCIPLE OF EQUITY

The principle of equity requires that historical responsibility and a fair sharing of the global atmospheric resources underpin the climate agreement. It has three important components that are relevant for both the AWG-KP and AWG-LCA tracks.

[2] See Article 3 and the Preamble of the UNFCCC.

- The scale of emission reductions must be sufficient to stabilize atmospheric GHG concentrations at a level 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 [3];

- The other resources such as finance and technology must be provided to developing countries to enable them to adapt to climate change and to stimulate their own low-carbon development.

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. [4]

Equity and climate debt

The developed countries representing less than one fifth of the world's population have emitted almost three quarters of all historical emissions. They continue to be the source of current and committed future warming.

Developed countries' excessive historical and current emissions not only occupy the atmosphere, but their overuse of the carbon-constrained atmosphere is depriving developing countries of their equitable access to a global public good. As a result, developed countries owe a two-fold climate debt to the developing world as a result of their disproportionate contribution to the causes and consequences of climate change. As the Centre for Science and Environment (CSE) notes:

Industrialized countries set out on the path of development much earlier than developing countries, and have been emitting GHGs [Greenhouse gases] in the atmosphere for years without any restrictions. Since GHG emissions accumulate in the atmosphere for decades and centuries, the industrialized countries' emissions are still present in the earth's atmosphere. Therefore, the North is responsible for the problem of global warming given their huge historical emissions. It owes its current prosperity to decades of overuse of the common atmospheric space and its limited capacity to absorb GHGs. [5]

The concept of climate debt grows out of the principle of historical responsibility and is part of the larger ecological, social and economic debt owed by the rich industrialized world to the developing countries. The concept of repaying climate debt has been endorsed by over 50 countries and is now broadly reflected in the documents and negotiation texts under consideration.

For their disproportionate contribution to the causes and consequences of climate change, developed countries owe a two-fold climate debt to the poor majority:

- For their excessive historical and current per person emissions – denying developing countries their fair share of atmospheric space – developed countries have incurred an "emissions debt"

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[3] Pendleton, Andrew et al. "Countdown to Copenhagen: the race for climate justice in the UNFCCC talks." August 2008.
[4] Shah, Anup. "Climate Justice and Equity." Date retrieved: Aug. 4, 2009. <http://www.globalissues.org/article/231/climate-justice-and-equity#Climatenegotiationsignoringsocialjusticeandequity.> January 2008.
[5] Ibid.

to developing countries; and

- For their disproportionate contribution to the effects of climate change – requiring developing countries to adapt to rising climate impacts and damage – developed countries have incurred an "adaptation debt" to developing countries.

Developing countries assert that the repayment of climate debt should provide the basis for (i) the shared vision to implement the UNFCCC; (ii) the level of emission reductions required of Annex I countries under both the UNFCCC and Kyoto Protocol; and (iii) the assured financing and technology transfer needed by developing countries.

Equity and fair share of the development space

In addition to ensuring a fair sharing of the atmospheric space, the principle of equity requires that developing countries be assured their fair share of the development space. Article 3.1 of the UNFCCC states that "parties should protect the climate system for the benefit of present and future generations of humankind, on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities."

Article 3.4 furthermore states, that "parties have a right to, and should, promote sustainable development". The right to development implies more than a viable portion of the scant remaining atmospheric space. It means a path beyond poverty and the provision of basic human needs, to a life of dignity, prosperity and sustainability. [6]

EQUITY CRITERIA QUESTIONS

In assessing whether the legal nature/form upholds the different dimensions of the principle of equity, the following questions must be addressed:

1. How well does the legal nature/form *reduce burdens and distribute benefits,* particularly with respect to vulnerable developing countries and communities and their right to development?

2. Does the legal nature/form compel developed countries to take the lead in cutting emissions at a level sufficient to ensure the fair allocation of atmospheric space to developing countries? Specifically, does the legal nature/form provide for the *repayment of the emissions debt to developing countries*

3. Does the legal nature/form provide for the necessary level of financing and technology to ensure full compensation for losses incurred and the means to avoid future impacts? Specifically, does the legal nature/form provide for the *repayment of the adaptation debt owed to developing countries?*

4. Does the legal nature/form provide for the *necessary level of financing and technology required by developing countries to live under the constraints of a more hostile climate, restricted atmospheric space*, carbon constrained budget and the urgency of transitioning to a low-carbon energy future?

[6] See Article 3.4 of the UNFCCC.

3.2 THE PRINCIPLE OF JUSTICE

The principle of justice has three important dimensions, namely distributive justice, restorative justice and procedural justice. All three are directly relevant to the assessment of the legal nature/form of the agreed outcome.

Distributive justice

The concept of distributive justice relates to the fairness with respect to the allocation of goods (i.e. in the climate context this would specifically relate to atmospheric resources) within and between societies.

Distributive justice requires that the allocation of goods in order to be fair, must take into account the total amount of goods to be allocated (i.e. the carbon budget), the process for allocation (i.e. in accordance with the emissions debt concept) and the formula or pattern of the allocation or division.

It is important to highlight that there is a clear overlap between the concept of distributive justice and the afore-mentioned elements of the principle of equity, notably the concept of climate debt.

Restorative justice

The concept of restorative justice relates to the responsibility for wrongdoing and promotes non-violent approaches to conflict resolution. Restorative justice seeks to build innovative approaches in re-establishing mutual responsibility in responding to wrongdoing.

Restorative justice is relevant to the concept of adaptation debt. Specifically, it would require a sufficiently robust compliance regime to ensure that parties responsible for harm assumed responsibility for their actions and that the parties who had been harmed were duly compensated.

Procedural justice

The concept of procedural justice relates to fairness in the processes designed to resolve disputes and allocate resources. Typically, the concept relates to the administration of justice and the form of legal proceedings. In contrast with distributive justice (i.e. fairness in the distribution of rights or resources), and retributive justice (fairness in the rectification of wrongs), procedural justice concerns the fairness, transparency and accountability of the processes through which decisions are made.

Applied to the climate negotiations, procedural justice would be assessed in terms of how and by whom decisions are being made, who is recognised and heard in decision-making, who controls the decision-making process and the relative power of different groups to influence the decisions.

JUSTICE CRITERIA QUESTIONS

In assessing whether the legal nature/form upholds the principle of justice, the following questions must be addressed:

1. Does the legal nature/form conform with the principles of distributive justice, notably does it provide for a fair allocation of atmospheric resources? Is the formula and allocation process itself fair?

2. Does the legal nature/form conform with the principles of restorative justice, notably does it provide for a sufficiently robust and fair mechanism for assigning responsibility, rectifying wrongdoing and ensuring compliance?

3. Does the legal nature/form adhere to procedural justice, notably does it result from a process that is fair, participatory, transparent and accountable?

3.3 Adequacy

The principle of adequacy essentially relates to whether or not the form (and of course its contents) fulfill the ultimate objective of the UNFCCC as enshrined in Article 2 of the Convention, namely:

"… stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system. Such a level should be achieved within a time-frame sufficient to allow ecosystems to adapt naturally to climate change, to ensure that food production is not threatened and to enable economic development to proceed in a sustainable manner."

One of the key concerns that has been raised with adequacy criteria as noted above, relates to the binding character of the agreed outcome. There is an assumption that a legally binding outcome will necessary be a more effective and adequate response to the challenge of climate stabilization. However, what we know from the study of the effectiveness of international environmental law in general is that in many cases soft law can often have even greater impact in changing behavior.

While bindingness is certainly an important factor in underpinning compliance regimes and review mechanisms, these can be established for soft law instruments as well. Moreover, in many cases ambitious norms are more easily achieved in soft law institutions than in legally binding ones.[7]

[7] Skjaerseth, Jon Birger et al. "Soft Law, Hard Law, and Effective Implementation of International Environmental Norms." MIT, 2006.

ADEQUACY CRITERIA QUESTIONS

In assessing whether the legal nature/form will ensure an adequate response to the climate challenge, the following questions must be addressed:

1. Does the legal nature/form provide for an outcome that will ensure the stabilization of GHG emissions within a sufficient timeframe to ensure that the global carbon budget is not overspent nor borrowed against in the future?

2. Does the legal nature/form ensure the fulfillment of promises and agreed commitments? Specifically, does the legal nature/form prevent any backsliding of existing commitments?

3. Does the legal nature/form provide sufficient incentives for early action?

4. Does the legal nature/form provide for comparable emission reductions and compliance among Annex 1 countries and sufficient incentives for compliance among all parties?

5. Does the legal nature/form provide for flexibility to review and strengthen the regime in response to new scientific findings in a timely manner?

4.EVALUATION OF THE OPTIONS FOR THE AGREED OUTCOME

The various options for the legal nature/form of the Copenhagen agreed outcome are described and evaluated in the following matrix. It is important to recall that each of the two negotiating tracks require different outcomes. Under the KP track, Parties are legally bound to adopt an amendment to the Kyoto Protocol to establish the terms of the second commitment period. Under the LCA track, the outcome is not specified and a range of options are available to Parties, as evaluated below.

It is important to understand the ramifications for each of the potential options under discussion, since the actual form is directly relevant to the equity, justice and adequacy of the post-2012 global climate regime.

OPTION	OVERVIEW AND CONTEXT	EQUITY, JUSTICE AND ADEQUACY CONSIDERATIONS
Procedural decision of the COP	Extends the time frame for the negotiations under the Bali Action Plan. Currently being mentioned as possible outcome due to political divide between parties on key substantive matters	Delays fulfilment of Annex I obligations under the Convention and prevents early action., [8] leaving equity imperatives un-addressed May lead to a gap between commitment periods, which will delay ambitious mitigation action and exacerbate the climate debt. Provides more time for parties to potentially reach stronger outcome, in particular to include more ambitious mitigation targets for Annex 1 countries Allows for evolving climate science to be more empirically grounded and taken into account when mitigation targets are agreed. Avoids illusion of false progress and lock-in into a weak agreement
Substantive decision of the COP	Under Article 7.2 of the UNFCCC, the COP is authorized to the decisions necessary to promote the effective implementation of the Convention. Hence this option pertains only to the LCA track. Bali Action Plan specifies that *a* decision is required to address all the elements of the Bali Action Plan.	Decision will be quicker and easier than under the other options under debate for the LCA track. Speed is positive for developing countries, since it avoids the risks and delays associated with negotiating a new treaty or re-opening the Annexes of the Convention A decision would better fulfil the mandate of the Bali Action Plan for action commencing now.[10] No need for ratification, thereby avoiding the risks and

[8] Interview with Mathew Stilwell and Lin Li Lim (September 1, 2009

[10] Interview with Mathew Stilwell and Lin Li Lim, September 1, 2009

	Sufficient to address concrete implementation actions (under AWG-LCA track), including institutional arrangements, rules and procedures needed to enhance implementation of the UNFCCC. For example, CDM Executive Board was established by COP decision. Several Parties have expressed the view that decisions by the COP would suffice to ensure an agreed outcome that would enable the full, effective and sustained implementation of the Convention through long-term cooperative action.[9]	delays. While a non-ratifiable outcome may be perceived as having less legally binding weight than a ratifiable outcome, at least for the purposes of enhancing implementation of the UNFCCC, this option would be sufficient as developed country obligations towards developing countries are already enshrined in the Convention and do not need to be re-negotiated. Could ensure that developing country concerns such as fulfilment of finance obligations of industrialized countries are fully addressed. A key issue relates to the importance of ensuring "comparability of efforts" for those Annex I Parties to the Convention that are not Parties to the Kyoto Protocol: COP decisions might set up two legal tiers of agreement and split commitments across the Kyoto Protocol and non-treaty level commitments and thus not create sufficiently strong foundation for comparable action amongst Annex 1 countries. May not be seen as fair and equitable among Annex 1 countries under the KP. There are a variety of means this 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, could be a way to enhance the attractiveness of remaining in the KP. Further efforts to explore these options and to evaluate their political feasibility are required.

[9] There is continuing debate regarding the legal binding nature of COP decisions. According to the Climate Action Network (CAN), the binding nature of a COP decision eventually rests on the powers ascribed to the COP in the treaty text. There is some acceptance that the supreme treaty body has "substantive powers" of decision-making where these powers are delegated by the Parties and provided for in the treaty text. Legal scholars assert that the authority to take binding decisions can be granted explicitly or implicitly, however, it is important to note that because implicit authority can be ambiguous, it is a weaker basis for taking binding decisions. Many developing countries such as India, Brazil, the Philippines assert that COP decisions are legally binding since they are based upon provisions of the UNFCCC.

Amendment to UNFCCC	The COP may adopt an amendment to the Convention by a three-quarters majority vote after exhausting all efforts to reach consensus. If new annex or an amendment to an annex is proposed, the purpose must be to enable the "full, effective and sustained implementation of the Convention", as specified in the Bali Action Plan. This option pertains to the LCA track. Developed countries are main supporters. Developing countries are deeply opposed. They maintain that the UNFCCC should not be altered. An amendment falls outside the Bali Action Plan mandate.	Developed countries seek to weaken fundamental principles of the UNFCCC by proposing new annexes containing new forms of graduation and differentiation and binding targets for developing countries. This would violate UNFCCC fundamental principles. The likely weaker UNFCCC amendment would therefore enables developed countries to avoid their responsibility for historical and current emission levels. It would also enable developed countries to avoid repaying emissions debt or adaptation debts owed to developing countries. Would neither distribute burdens nor benefits fairly Would not result from a fair decision-making process, in light of current developing country opposition. Would lead to considerable delay due to exacerbating existing trust gap between developing and industrialized countries.
Amendment to Kyoto Protocol	Parties have a clear mandate to negotiate a second commitment period under the Kyoto Protocol. Under the Kyoto Protocol, Parties are clearly bound to establish second and subsequent commitment periods for Annex I Parties. Article 3.9 provides that, *"Commitments for subsequent periods for Parties included in Annex I shall be established in amendments to Annex B to this Protocol, which shall be adopted in accordance with the provisions of Article 21, paragraph 7" (emphasis added).* A failure to agree on subsequent commitment periods is a violation of international law. These are existing treaty	Requires formal ratification which would generate a stronger outcome in light of its bindingness,[11] It is important to highlight that a legally binding instrument for the KP track is essential, but less important for most elements of the LCA track (which is why a set of COP decisions would be acceptable for the LCA track but not for the KP track) However, ratification implies potential delays and possible gaps between commitment periods. Would preserve the substantive elements of the Kyoto Protocol including compliance, top-down approach, 5-year commitment periods allowing for scientific rigidity and long-term viability, providing an important foundation for ambitious mitigation action by industrialized countries.

[11] Germanwatch. "Political Will at the Highest Level needed." Date retrieved: August 20, 2009. <http://www.germanwatch.org/klima/sb30rese.pdf> Jun. 2009.

	obligations. 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. ¾ majority vote only after efforts to reach consensus exhausted. No substantive limits on the scope and substance of the potential amendment. Could establish new robust and legally-binding targets for Annex I countries, as well as new commitments for other groups of countries.	An amendment to Annex B could establish more robust legally binding targets for Annex I countries. This option is more likely to respect the fundamental principles in the UNFCCC, which call for common but differentiated responsibilities. This is critical from an equity and justice perspective, whereas the new single treaty option presents the risk of totally reopening the UNFCCC including its equity principles, and producing a much weaker regime than the Kyoto Protocol, in terms of ensuring adequacy of Annex 1 emission reduction targets.
New protocol	Article 17 of the UNFCCC authorizes the COP to adopt protocols. In theory could be considered either as single, new treaty/protocol, or as a protocol applying only to LCA track – i.e. could operate in parallel to the Kyoto Protocol, or it could subsume it entirely. A single, new treaty/protocol to the Convention would consolidate all parties' commitments to further implement the Convention. However, since it is argued above that parties are legally bound to amend (and not replace) the Kyoto Protocol, the 'new protocol' option applies only to the LCA track and not to the KP track. Could include rules and mechanisms for achieving the Convention's objectives, technology cooperation, support for clean development and flexibility mechanisms. In the absence of COP rules of procedure regarding voting, adoption of a new Protocol would require consensus.[12] The Conclusions of the EU Environment and European Councils on its position	In principle, this option could provide a strong, legally binding basis for implementation of certain key provisions of the Bali Action Plan; including fulfilment of industrialized countries' finance obligations under the LCA track However, the key point is that it is almost certain that a new protocol – either a single new protocol or a protocol covering only the LCA - would be significantly weaker than the Kyoto Protocol in terms of Annex 1 mitigation commitments and would not establish a sufficiently ambitious basis for future action. If a new protocol is weaker, this could trigger 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 not a justification for replacing the Kyoto Protocol. Instead efforts should be directed towards ensuring that Parties uphold the existing regime and uphold their legal obligation to adopt a second commitment period thereunder. Since adoption of a new protocol require consensus, risk of delay and gap between commitment periods. This will exacerbate implementation delay The gap period could lead to greater backtracking of existing commitments under the Convention. A new protocol might never actually enter into force if there are not enough ratifications, acceptances, approvals or accessions. [13]

[12] Interview with Mathew Stilwell and Lin Li Lim, September 1, 2009.
[13] Ibid.

	for Copenhagen refer to a "single legally binding instrument" and emphasize the need for "a legally binding agreement for the period starting 1 January 2013 that builds on the Kyoto Protocol and incorporates all its essentials, as an outcome from Copenhagen in December 2009". In effect, the EU is calling for the end of the Kyoto Protocol after the first commitment period. This position is also held by Japan, Canada, the US and a number of other developed countries.	This is why a set of COP decisions is a better option for most elements being discussed in the LCA track. As explained above, a set of COP decisions is sufficient to address the vast majority of UNFCCC implementation challenges (under the AWG-LCA track) but not sufficient for establishing the second commitment period (under the AWG-KP track). A new protocol under the LCA track could potentially address the comparability of efforts of the US in a more robust legally binding manner. However, this advantage must be weighed against the risks of delay involved in creating a new protocol, as well as the risk of the new protocol subsuming the KP in its entirety. It is also very important to undertstand the underlying motivation of certain developed countries, who get rid of the distinction between developed and developing countries, and to force the more advanced developing countries to also take on internationally binding commitments to reduce greenhouse gas emissions, not in line with the UNFCCC principle "common but differentiated responsibilities". Some are also motivated by their objection to taking on internationally binding emission reduction commitments altogether, which puts adequacy and climate justice concerns at risk. This mirrors the position of the US which has been insisting on its unilateral domestic emission reduction commitments/actions.

Implementing Agreement	The US proposal for an implementing agreement is designed to allow for legally binding approaches and to reflect the Bali Action Plan's mandate to further the implementation of the Convention. The US proposal for a combination of a COP decision on shared vision and implementing agreement reflects a middle ground between a COP decision on one end of the spectrum, and an entirely new protocol at the other end. The implementing agreement could co-exist with an amended Kyoto Protocol or a new protocol or protocols, or a comprehensive implementation agreement could even replace the Kyoto Protocol. [1]	Could undermine UNFCCC by sanctioning potentially low ambition levels for richer countries (as set out in their "domestic law") whilst requiring actions for developing countries to be based on "objective criteria for economic development at levels that must be "consistent with the level of ambition needed to contribute to meeting the objective of the Convention." This approach is potentially inconsistent with fundamental principles of UNFCCC, especially common but differentiated responsibilities. Could catalyse a "race to the bottom," where the least common denominator controls the level of ambition of rich countries. Would replace science-based targets with power politics and undermines the science that defines abatement levels.[1] Moves away from multilateral framework based on top-down carbon budgets towards non-transparent, nationally defined actions. Risks overburdening developing countries since finance and technology support not sufficiently addressed.
Combination of forms	**First possible combination** Includes an amendment to the Kyoto Protocol for a second commitment period (under the KP track) combined with a new Copenhagen Protocol (for the LCA track). In this case, case countries would ratify the amendment of the Kyoto Protocol (with the exception of those governments who have not ratified the Kyoto Protocol) and the Copenhagen Protocol (which would address elements of the Bali Action Plan) simultaneously. **Second possible combination** Involves an amendment to the Kyoto Protocol combined with a set of COP decisions to govern the LCA track. This is a more viable viable option in light of the fact that the KP amendment is the outcome that Parties are legally bound to adopt for the KP track, and given the fact that	Although the **first option** has been openly supported by several governments, it is not an optimal option in light of the concerns raised above with a new protocol option. The **second combination** is more viable given the current state of the negotiations. Further equity, justice and adequacy arguments in favour of the second combination (ie KP amendment and COP decisions) are outlined below in this column. Would provide a transitional option that builds on the strengths of the Kyoto Protocol, as well as lead-in time for more ambitious engagement from key players. Could provide developing countries with the scale of financial and technical resources that they require. Would allow for rapid implementation and provide developing countries with the assurance that their special needs and considerations were being adequately addressed without delay. Would demonstrate renewed political will on the part of industrialized countries to account for their non-compliance with Kyoto targets.

	for reasons identified above, a set of COP decisions is sufficient for the LCA track. **Third possible combination** The third combination has been proposed by an NGO coalition that involves three elements: an amendment to the Kyoto Protocol, a new Copenhagen Protocol and a set of COP and CMP1 decisions. The NGO coalition recommends that many of the provisions in the Copenhagen Protocol should mirror amendments and provisions of the Kyoto Protocol, particularly for commitments and a compliance structure related to industrialized countries that have not yet ratified the Kyoto Protocol. [1]	Could eventually draw Parties towards a simple, co-herent, implementable and ambitious climate regime. [1] Could lay the groundwork for the action needed up to and beyond 2012.[1] Risks not adequately addressing comparability of efforts of the US. The **third combination** could also address most of the same equity, justice and adequacy concerns. It could also provide for a legally binding framework to address the comparability of efforts of the US. However, the creation of a new protocol under the LCA track could entail certain risks: - Enhance political risks of new protocol entirely subsuming KP and therefore undermining its adequacy and equity elements - 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". - 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" - 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.

		In order to ensure adequate US action as well as prevent backsliding from KP Annex 1 countries into a weaker LCA track, it is key to ensure that COP decisions entail strong language on comparability of efforts in terms of magnitude, scale and legal nature of Annex 1 mitigation efforts under the LCA. Disincentives like preventing LCA non-KP parties to benefit from flexible mechanisms and AAU's system should also be considered.

5. APRODEV'S PRELIMINARY CONCLUSIONS

5.1. Conclusions regarding AWG-KP track

As noted above, for the AWG-KP, the legal outcome is clear – 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. Contrary to popular perception, partly resulting from politically motivated communication strategies, the Kyoto Protocol does *not* expire in 2012, only its first commitment period.

Aprodev asserts that failure to comply with the provisions in Article 3.9 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 subsuming the KP) 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 nature and balance of responsibilities enshrined in 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 missions. 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. Although a discussion on increasing the obligations of more advanced non-Annex 1 countries may need to be held in advance of the third commitment period, to reflect the evolving responsibility and capacity of these countries, it is not politically feasible or desirable to initiate a discussion on dismantling the Annexes at this late stage of the negotiations for the next commitment period.

5. Moreover, a new protocol might never actually enter into force if there are not enough ratifications, acceptances, approvals or accessions. [14] If this were to be the case, the climate regime would be irreversibly compromised.

[14] Interview with Mathew Stilwell and Lin Li Lim, September 1, 2009.

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 replacing the Kyoto Protocol. 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 thereunder.

7. Since the amendment option would itself require formal ratification, this would generate a much stronger outcome in light of its bindingness,[15] However, it should be noted that the requirement for ratification could involve potential delays and possible gaps between commitment periods, which would be negative from an adequacy and climate debt perspective.

8. In addition, an amendment to the Kyoto Protocol would preserve the compliance regime that already exists under the Kyoto Protocol. In fact, the KP compliance regime is relatively robust compared with those contained in other international environmental agreements. 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 agree to a more rigorous compliance regime than the one that has been established under the Kyoto Protocol.[16] A new protocol option would most likely weaken the existing compliance regime.

9. There are a number of developed country Parties who are seeking to go beyond the scope of the legal mandate, either by proposing an entirely new protocol, or 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 specifying targets for Annex 1 countries, we see this push to do "more" as 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 to ensure that a robust second commitment period is put in place.

10. This has very serious implications as 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 other alternative in place that is better.

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[15] Germanwatch. "Political Will at the Highest Level needed." Date retrieved: August 20, 2009. <http://www.germanwatch.org/klima/sb30rese.pdf> Jun. 2009.

[16] The Kyoto Protocol`s compliance regime consists of the Compliance Committee, which is charged with monitoring compliance with GHG reduction targets, together with the three possible penalties to which a non-complying Party might be subject (i.e. requirement to produce a compliance plan, trade sanctions in the form of non-eligibility to participate in the quota trading system and flexible mechanisms under the Kyoto Protocol, and obligation to make up for deficiency created by non-compliance, in the next commitment period). See Danish Ministry of Climate and Emergency. "Compliance with the Kyoto Protocol." Date retrieved: Aug. 5, 2009. < http://www.kemin.dk/EN-US/CLIMATEANDENERGYPOLICY/UNCLIMATECONVENTION/THEKYOTOPROTOCOL/COMPLIANCE/Sider/Forside.aspx >.

5.2. Conclusions regarding LCA track

As explained above, the AWG-LCA mandate is to launch a comprehensive process to enable the full, effective and sustained implementation of the Convention through long-term cooperative action, now, up to and beyond 2012.

The AWG-LCA has no pre-judged legal outcome. The Bali Action Plan only specifies that an "agreed outcome" should be reached and a decision should be adopted in Copenhagen. Several options exist, including a new international treaty/Protocol under the Convention, and a decision of the Conference of the Parties (COP) of the UNFCCC or a set of COP decisions, or another international treaty or Protocol under the Convention.

At this point, Aprodev maintains that the set of COP decisions would be suitable and preferable to the other options under discussion for a number of equity, justice and adequacy considerations[17].The main arguments for these options are summarised below.

1. 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).

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. There are a wide range of views among legal scholars. 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' (Vienna Convention on the Law of Treaties, 1969). A decision is a formal agreement between Parties to a legally binding international treaty that creates a variety of obligations on Parties. Its operational effect is to lead to various concrete implementation actions. The future work of the COP is then guided by the Convention text as well as the COP decisions.

4. 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.

5. 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

[17] Other options such as a 2-protocol approach combined with a set of COP decisions could also potentially fulfil some of these criteria. However the political conditions for this are currently non-existent.

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.

6. A decision or a set of decisions offers a viable means for ensuring the full, effective and sustained implementation of the Convention, with a focus on action commencing "now" through appropriate enhanced actions and institutional arrangements as proposed by the G77 and China.

7. Proceeding through decisions avoids the risks and delays associated with re-opening the Convention, extending the Kyoto Protocol, 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 (including Article 4.7) 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 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 manner 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 mitigation commitments/targets under a new protocol.

9. There is some concern that a set of COP decisions would not be sufficient to address mitigation targets for Annex 1 Parties or for that matter, to strengthen compliance regimes under the UNFCCC. These points must be clarified since mitigation targets for Annex 1 Parties are only being addressed in the KP track where it is clear that nothing less than a legally binding amendment to Annex B of the KP would suffice. Mitigation targets for Annex 1 countries must not be addressed in the LCA except as regards the comparability of efforts

for the US, which is not a Party to the KP. It is important to emphasize that at COP-13 in Bali, the US explicitly agreed to assume comparable obligations to Annex 1 countries under the Kyoto Protocol.

10. 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 commitmetns under the LCA track and fail to comply, could be a way to enhance the attractiveness of remaining in the KP.

11. Another related concern is whether sufficient compliance regimes could be created through COP decisions. Once again it is important to point out that there are two distinct compliance regimes, one under the Kyoto Protocol and the other under the UNFCCC. Under the LCA track, it is the UNFCCC compliance regime that is under discussion, not the Kyoto Protocol compliance regime. There is a concern that a COP decision may not be sufficient to strengthen the UNFCCC compliance regime. However it is important to note that States have in fact previously adopted non-compliance procedures COP decision, notably the non-compliance procedure adopted pursuant to Article 8 of the Montreal Protocol and the compliance regime established under the Kyoto Protocol.[18][19]

12. Given the current climate politics and developed country efforts to weaken the current regime, COP decisions (combined with the amended KP) appear to best be able to meet the essential equity, justice and adequacy considerations related to the challenges of enhancing implementation of the UNFCCC. However, significant political developments may require a new evaluation of the options at hand, particularly the 2-protocol + COP decisions option.

[18] Brunnée, Jutta. "COPing with Consent: Law-Making Under Multilateral Environmental Agreements." 15 Leiden Journal of International Law, 2002. Footnote 128.

[19] The Montreal Protocol non-compliance procedure subjects the performance of the parties to the scrutiny of an implementation committee and exposes them to findings of non-compliance as well

6. APRODEV MESSAGES TO CLIMATE NEGOTIATORS

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. Strong efforts must be directed towards aggressively advancing work in the AWG-KP and ensuring ambitious mitigation action for Annex 1 countries under the post-2012 agreement.

It is critical for the legal instruments coming out of the two 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; and*

- *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-emissions 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 and has the potential to provide scientific rigidity and long-term viability. It also builds on the equity principles outlined in the UNFCCC and makes a clear distinction between developed and developing country obligations. 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 other alternative in place that is better.