

Why we need to save the Kyoto Protocol

by Lim Li Lin

The plot

Some developed countries are plotting the death of the Kyoto Protocol. The stage has been set. Misinformation has been circulated to the media and public that the Kyoto Protocol expires in 2012. The December 2009 UN climate change conference in Copenhagen, so the story goes, is to agree or lay the foundations of a new treaty to replace the Kyoto Protocol – the so-called “post-Kyoto” agreement.

The truth

Nothing could be further from the truth. As one senior negotiator put it, “The Kyoto Protocol is not yoghurt, it does not have an expiry date.” Only the first commitment period of Annex I (developed countries) Parties’ greenhouse gas emission reductions, which began in 2008, ends in 2012. All other provisions and elements of the Kyoto Protocol remain in force. This is the way the Kyoto Protocol is structured. Second and subsequent commitment periods for Annex I Parties are to be negotiated on an ongoing basis.

The truth should come as no surprise. For three years already (since 2006), the international community has been negotiating the next commitment period for Annex I Parties under the Kyoto Protocol in a working group known, quite fittingly, as the Ad hoc Working Group on Further Commitments for Annex

I Parties under the Kyoto Protocol (AWG-KP). These negotiations are scheduled for completion in 2009, so that the second commitment period can enter into force by 2013, thereby ensuring there is no gap between the two commitment periods. The negotiations are not about ending the Kyoto Protocol, but implementing it.

In Bali (December 2007), the international community launched a second track of negotiations in parallel under the Bali Action Plan – the Ad hoc Working Group on Long-term Cooperative Action (AWG-LCA). This working group aims to enhance the implementation of the UN Framework Convention on Climate Change (the framework agreement under which the Kyoto Protocol sets out specifically how much and how Annex I countries should reduce their emissions). The AWG-LCA’s work is to be concluded in 2009, and the agreed action will be for “now, up to and beyond 2012”.

Two tracks, two outcomes

The AWG-KP is a negotiating track under the Kyoto Protocol. The AWG-LCA is a negotiating track under the Convention. There are to be two outcomes in Copenhagen, and they are to be legally and substantively distinct.

For the AWG-KP, the legal outcome is clear – an amendment of the Kyoto Protocol according to

TWN THIRD WORLD NETWORK is a network of groups and individuals involved in bringing about a greater articulation of the needs, aspirations and rights of the people in the Third World and in promoting a fair distribution of world resources and forms of development which are humane and are in harmony with nature.

Address: 131, Jalan Macalister, 10400 Penang, MALAYSIA
E-mail: twnet@po.jaring.my **Website:** www.twinside.org.sg

Tel: 60-4-2266728/2266159 **Fax:** 60-4-2264505

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. Twelve proposals for amending the Kyoto Protocol have been submitted by Parties. These will be discussed in Copenhagen, where an agreed amendment should be adopted at the meeting of the Parties to the Kyoto Protocol.

For the AWG-LCA, the legal outcome is less certain. It is still a matter that is being discussed. The Bali Action Plan only specifies that an “agreed outcome” should be reached and a decision should be adopted in Copenhagen. There are a number of options ranging from a decision of the Conference of the Parties (COP) to the Convention or a set of COP decisions, to another international treaty or Protocol under the Convention. (Note: The term “ratifiable outcome”, sometimes used by the Convention Secretariat and some countries, implies a new international treaty.)

The plan

Some developed countries want to have one single agreement (or lay the foundations for it) in Copenhagen, merging the two negotiating tracks and outcomes. This will mean the termination of the Kyoto Protocol after 2012.

This position has been advocated by a number of developed countries including Japan and Australia. The United States has said it will not become a Party to the Kyoto Protocol.

The Conclusions of the European Union Council on its position 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.

The reason

Initially, it seemed that the main motivation for this position by some developed countries is to force “major economies/emitters” or “advanced developing countries” – i.e., China, India, Brazil, South Africa, etc. – to also take on internationally binding commitments to reduce greenhouse gas emissions, by dismantling the distinction between Annex I and non-Annex I countries and lifting some developing countries to (or towards) the level of commitments taken on by the developed countries. (The Kyoto Protocol only sets quantified targets for Annex I

countries, and the category of Annex I countries is established under the Convention.)

However, it now seems that the motivation may also be for some developed countries to lower the level of their commitments or avoid taking on internationally binding emission reduction commitments altogether. This mirrors the position of the US, which has recently been insisting on taking on emission reduction commitments/actions on a unilateral or domestic basis. By this, it means that it will only bind itself domestically through national legislation to reduce its emissions, and will not commit internationally (as all other countries have) to a multilateral system of emission reductions. It also means that its national target will only be what it determines itself, and is not subject to negotiation with the international community.

The US famously withdrew from the Kyoto Protocol, but it remains a Party to the Convention. Under the Bali Action Plan, which the US agreed to, it is required to take on efforts comparable to other Annex I countries under the Kyoto Protocol. (The details are being worked out in the AWG-LCA negotiations.) This is the concession the international community has already granted to the US, which should really just join the rest of the world in becoming a Party to the Kyoto Protocol, not least because it is the biggest historical emitter of greenhouse gases and continues to be among the most polluting on an absolute and per-capita basis.

It may be that the US position has spurred a race to the bottom – instead of drawing in the US to join the rest of the Annex I countries though the “comparability of efforts” provision in paragraph 1b(i) of the Bali Action Plan, the special treatment of the US may be instigating a “great escape” from the Kyoto Protocol by the other developed countries.

The implications

This has very serious implications. The Kyoto Protocol is the only legally binding international law that sets quantified commitment targets for each Annex I Party to reduce its greenhouse gas emissions. There is an aggregate target, which all Annex I Parties must collectively meet in a given commitment period, and an individual (or joint, in the case of the European Community) target for each country. These specific targets must be met within a specified time period, and there are international compliance measures if the Parties do not meet their targets according to the timetable.

The Kyoto Protocol has many flaws, but the prospect of losing the only international treaty that requires

specific amounts of emission reductions by Annex I Parties, with a binding timetable and compliance measures, is very dangerous, especially since there is no better alternative in place and the prospects of achieving this seem increasingly slim.

A failure to agree on subsequent commitment periods would be a violation of international law. 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).

These are existing treaty 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.

Under the single new agreement that some developed countries are proposing, the nature of the commitments may be different – nationally binding targets, as opposed to internationally binding targets. This would be a drastic downgrading of international disciplines, and would take the international climate change regime many steps backwards.

In addition, the new regime being proposed appears set to lock in very low levels of ambition. In the AWG-KP, Annex I Parties are promoting so-called “bottom-up” pledges which add up to aggregate targets that are far below what science and equity require. Developing countries, on the other hand, are insisting on principled and scientific approaches to determining the level of aggregate emission reductions required. This aggregate figure should then be apportioned among the Annex I Parties. A system of national targets may mean that countries only do what they are politically prepared to do, instead of what science and equity require, and this would not even be legally binding internationally.

If the Kyoto Protocol is abandoned and a single new agreement negotiated, the new international climate change treaty may take many years to enter into force or may never enter into force, if an insufficient number of countries ratify it. The negotiations will be more complicated and controversial, and could also likely take a very long time. This is something that the planet and the poor cannot afford.

The international compliance regime under the Kyoto Protocol also faces an uncertain future. While it can always be further improved, the risk is now

the possibility of no longer having a system of international compliance.

The process

Legally, it is difficult to terminate the Kyoto Protocol because all Parties have to agree by consensus to end it. So what are the other options available to those who are plotting the Kyoto Protocol’s untimely demise?

Procedurally, developed countries are trying to merge the two working groups. They push for this in a step-by-step manner, asking for closer cooperation, coordination and collaboration, and for coherence and comprehensiveness. Rather than advance discussions under the AWG-KP, they seem to be stalling them, while accelerating discussion under the AWG-LCA. At the same time, they are systematically transferring issues of interest to them from the Kyoto Protocol and the AWG-KP into the AWG-LCA.

For developed countries, there are a number of possible scenarios (which are not mutually exclusive). One is to formally collapse the AWG-KP into the AWG-LCA track, thereby effectively ending the negotiations for a second commitment period for Annex I Parties under the Kyoto Protocol and continuing with negotiations under the AWG-LCA track.

A second scenario is to fail to agree a further commitment period under the Kyoto Protocol. This would be a breach by all Parties of their obligations under Article 3.9 of the Kyoto Protocol to establish subsequent commitment periods for Annex I Parties. In this case, the Kyoto Protocol remains on the books but risks becoming an “empty shell”.

A third scenario is to seek a legally binding outcome under the AWG-LCA with the goal of superseding the Kyoto Protocol. If the elements of the Kyoto Protocol are moved into the AWG-LCA, and are discussed and concluded as part of a legally binding instrument under the Bali Action Plan process, then the Kyoto Protocol may effectively be rendered dead or meaningless. The developed countries would have effectively cherry-picked the elements of the Kyoto Protocol that they like, such as the market mechanisms, and transposed them into a new legal instrument.

On “Termination or suspension of the operation of a treaty implied by conclusion of a later treaty”, Article 59 of the Vienna Convention on the Law of Treaties (1969) states:

“1. A treaty shall be considered as terminated if all the parties to it conclude a later treaty relating to the same subject matter and:

(a) it appears from the later treaty or is otherwise established that the parties intended that the matter should be governed by that treaty;”

This means that a later treaty on the same subject matter could have the effect of terminating the earlier treaty.

The US?

The vexing question of the US, which is not a Party to the Kyoto Protocol and which does not therefore have a quantified emission reduction commitment, is addressed in the Bali Action Plan in paragraph 1b(i) – there should be “comparability of efforts” between what it does under the Convention and what other Annex I countries do under the Kyoto Protocol.

Developing countries have been insisting that the Annex I Parties’ quantified emission reduction commitments must be determined in the AWG-KP, as this is an issue under the Kyoto Protocol. The AWG-LCA should only then discuss efforts by the US comparable to the commitments determined in the AWG-KP for Annex I Parties.

The conclusion

The continued survival of the Kyoto Protocol is of the utmost importance, especially since there is no better alternative in place. In this regard, Copenhagen must deliver a legally binding outcome in the form of an amendment to the Kyoto Protocol for the second commitment period for Annex I Parties. This would be the single most important component of the Copenhagen outcome.

Failure by Annex I Parties to agree to deep and binding targets under the Kyoto Protocol would signal a departure by them from its legally binding provisions, from the agreed negotiating mandate and from the legitimate expectation of all countries that have participated in good faith. It risks a “race

to the bottom” towards a climate regime that lacks a scientifically sound aggregate target for Annex I Parties, internationally binding individual targets and an international compliance system. All indications are that a far less robust climate regime is being drawn up by the developed countries.

At a time when the world needs and demands a fair and effective response to climate change, developed countries are walking away from the Kyoto Protocol, the only legally binding international law that sets quantified commitment targets to reduce greenhouse gas emissions in aggregate and for each Annex I Party. At the same time, they are passing the burden of climate change mitigation and adaptation onto developing countries, denying their historical and current responsibilities. This is neither effective nor fair.

The Climate Convention calls on developed countries to exercise leadership in tackling climate change. For success in Copenhagen, developed countries must do so by honouring their legally binding commitment for a second commitment period under the Kyoto Protocol, and by honouring their other commitments under the Convention relating to adaptation, finance and technology. They must implement their existing commitments, not shy away from them.

Success in Copenhagen and beyond requires an effort to bridge the implementation gaps that have undermined effective action and left a legacy of mistrust among the Parties. Nothing less than full implementation by developed countries will be required to secure success in Copenhagen and to provide the foundation for a genuine partnership among all countries to curb climate change and to achieve the ultimate objectives of the Convention.

Lim Li Lin is a researcher with the Third World Network. An earlier version of this paper was distributed at the UN climate change talks held in Barcelona on 2-6 November 2009.