THE ODD COUPLE?

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- It is far from certain that a strong, legally-binding climate agreement preferred by the EU will produce better environmental results than the broader and weaker scheme proposed by the USA.
- By ratifying the Kyoto Protocol, countries that are listed in Annex B of the protocol also committed themselves to inscribe new emission reduction targets for the period after 2012. The push by some countries for a single legal outcome to replace the Kyoto Protocol has antagonized developing countries, who see this as an attempt by the developed countries to back out of their commitments.
- In terms of environmental results and the negotiation dynamics there are significant merits to a system where one group of countries takes on legally binding commitments under the Kyoto Protocol for the post-2012 period, and another group of countries take on less binding commitments under the Climate Change Convention.
- Such a system could broaden participation by including countries not yet ready to accede to a legally-binding instrument (i.e. the USA and major developing countries), while preserving the operational detail of the Kyoto Protocol to serve as a benchmark for the development of the climate regime going forward.

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While Copenhagen can be seen as at best one step towards a comprehensive agreement, it did not bring much clarity on how the negotiation process will move forward. Rather than defining a negotiating schedule and agreeing on the nature of the expected outcome, countries barely accepted to continue to negotiate along the two tracks established at Bali in 2007: one track under the Climate Change Convention, and another track under its Kyoto Protocol.

However, countries have very different views whether such a two-track approach should continue. This disagreement marred the negotiations in 2009, and goes a long way toward explaining why the Copenhagen outcome was so ambiguous as to the future of the talks and the agreed legal nature of the eventual outcome.

Due to opposition from developing countries, in the short run it seems impossible to negotiate a strong legally binding agreement that could replace the Kyoto Protocol, as the EU would prefer. Rather, one likely outcome is that countries establish a parallel framework under the Convention that would supplement the Kyoto Protocol, a result towards which the EU has expressed great reservations. This kind of legal "hybrid" could generate broader participation than a single binding treaty for all countries, and ultimately lead to larger emissions reductions.

The Convention versus the Kyoto Protocol

The USA has no intention of ratifying the Kyoto Protocol, and prefers an "Implementing Agreement". Through a set of clear decisions under the UNFCCC, this would formalize and strengthen the existing provisions of the Climate Change Convention for voluntary, non-binding commitments to reduce GHGs and report on emissions. This kind of "pledge-and-review" mechanisms would provide an international platform for a country to pledge an economy-wide emission target, or a policy or set of actions. There would also be transparency mechanisms for reporting and reviewing emissions data, but no sanctions for not meeting the pledge.

The Kyoto Protocol contrasts starkly with such a pledge-and-review approach. The ambition of the Kyoto Protocol was to establish a legally binding, global cap-and-trade scheme. Hence, the protocol establishes a five year period for which tradable emissions allowances are allocated to the countries included in Annex B of the protocol. The protocol also includes the strongest compliance mechanisms established under any international environmental agreement.

By adopting the position that the negotiations should produce a single legal outcome, the EU attempted to push, primarily, the US, but also the advanced developing countries, into taking binding commitments. Hence in EU's view the preferred solution would be that 1) an international target for future global emissions is defined; 2) individual countries' emissions reductions are calculated, and 3) the financial burden of reducing emissions will be distributed through international negotiations. This contrasts with the US view, which put a lot more emphasis on system that will work bottom-up in the sense that it would be nationally agreed policies that form the basis for defining any international commitments.

Element	Kyoto Protocol	Pledge–and–review
Nature of targets	*Legally binding*	*Non–binding*
Targets, coverage	*Industrialized country group Annex I*	*All countries*
Allocation	*Five year allocation*	*One year target*
Emissions trading	*Transfer of allocation*	*Bilateral agreements*
Project mechanisms (JI, CDM)	*Governed internationally*	*Defined domestically*
Emission reporting	*Industrialized country group Annex I*	*All countries*
Compliance mechanism	*Strong*	*None*

Table 1. Differences between a Kyoto–like approach (hard law) and pledge–and–review (soft law)

Table 1 summarizes the key differences between the Kyoto Protocol and a pledge–and–review approach. In essence a pledge–and–review scheme is less binding and leaves countries leeway when it comes to what kind of targets to adopt and how they meet them.

Intuitively one might assume that hard law—a Kyoto–like agreement that is strict and legally binding—would give the largest emission reductions. However, the extensive literature on international agreements and regimes points out the pros and cons of hard and soft law, but is not conclusive when it comes to which is best in terms of promoting actual reduction of greenhouse gas emissions.

It can be argued that "hard law" gives a higher likelihood for compliance because rules are negotiated more thoroughly; the commitments are more credible; and targets are formulated more precisely[1]. However, there would normally be a trade–off between participation and strictness in international law. In the case of climate policy, developing countries have understandable concerns about committing to binding emissions targets, due to large uncertainties regarding their future growth of emissions and the close link traditionally between emissions levels and economic development. In the case of the US, domestic opposition to any secession of sovereignty greatly limits what the US can commit to internationally. In theory, if the targets are less binding, it could be argued that more countries might be willing to take on commitments. It can also be argued that these might be more ambitious, because they see them as objectives rather than legal commitments. Because of this, strong arguments have been made for a climate change agreement based on a "portfolio of commitments", some of which might be legally binding—others not.[2]

The trade–off between strictness and participation can also be witnessed from the pledges made under the current regime. The emission targets that have been ratified under the Kyoto Protocol cover some 28 % of the global emissions, and not many new countries seem willing to be added to the list of countries that have legally binding targets contained in Annex B of the Protocol. By moving to a less binding format the share of the global emissions that are covered has been significantly increased, e.g. the pledges made in early 2010 under the under the Climate Change Convention/Copenhagen Accord will cover some 90 % of the global emissions.

Having said this, looking at the history of the climate regime, it is reasonable to assume that for some

1 See for example Skjaerseth, J. B., Stokke, O. S., & Wettestad, J. (2006). Soft Law, Hard Law, and Effective Implementation of International Environmental Norms. *Global Environmental Politics*, 6(3), 104–120; Abbott, K. W., & Snidal, D. (2000). Hard and Soft Law in International Governance. *International Organization*, 54(3), 421–456; Underdal, A. & Young, O. (Eds.) (2004) *Regime Consequences: Methodological Challenges and Research Strategies.* (Dordrecht: Kluwer Academic Publishers)

2 Stavins, Robert N. "*A Portfolio of Domestic Commitments: Implementing Common but Differentiated Responsibilities.*" Policy Brief, Harvard Project on International Climate Agreements, Belfer Center for Science and International Affairs, Harvard Kennedy School, October 19, 2009.

countries the fact that the Kyoto Protocol contains legally binding commitments has promoted stronger domestic action than would have been the case with a less binding agreement. As Executive Secretary Yvo de Boar argued, "I think it's important to remember that not a single one of the countries that signed up to a target in Kyoto had the national legislation in place. They all went back home after Kyoto to turn the target into legislation, submitted the legislation to their parliaments for approval, and on the basis of that approval, were able to ratify".[3] Especially for the EU, drumming up support for a regional trading scheme was probably easier because of the binding nature of the Kyoto Protocol. Moreover, Japan's actions to reduce emissions globally would probably have been less significant if the Kyoto Protocol was less binding.

Moreover, it can be argued that the legal ambiguity of the Copenhagen Accord has been one reason why developed countries continue to propose conditional target ranges, and why the domestic debate in some countries, e.g. Australia, has shifted toward the lower end of proposed ranges. Formalizing and clarifying the commitments made under the Copenhagen Accord may, however, give such countries sufficiency certainty to commit to a single target. But without a credible complement to the Kyoto Protocol for the USA and major developing countries, developed countries bound by the Kyoto Protocol will be extremely unwilling to make further commitments. This is especially true e.g. of Russia, with President Medvedev stating recently, "all countries, including developed and developing economies, should reach an agreement, or, if we do not agree on this [the common terms of carbon emissions reduction], Russia will not prolong its participation in the Kyoto agreement—you cannot have it both ways".[4] Certainly, finding a stable political balance between a legally-binding treaty on the one hand, and a less binding pledge and review mechanism, will be a key challenge going forward.

3 "*UNFCCC chief: 'Cancún must deliver climate finance architecture'*", *UNFCCC chief: 'Cancún must deliver climate finance architecture'*, 25.03.2010, http://www.euractiv.com/en/climate-environment/unfccc-chief-no-climate-treaty-agreement-what-legally-binding-means-interview-37

4 *Medvedev threatens Russian withdrawal from Kyoto agreement*, RIAN Novosti 13 April 2010, http://en.rian.ru/Environment/20100416/158607110.html

The Kyoto Protocol and future commitment periods

The Kyoto Protocol does not contain a sunset clause, so unless countries actively terminate it, the protocol's modalities and commitments will remain. At the moment it seems unlikely that the parties to the climate negotiations will agree to terminate or replace the protocol, and hence it is worth noting what it says about the period after 2012.

According to the Protocol's Article 3.9 "Commitments for subsequent periods for Parties included in Annex I shall be established in amendments to Annex B to this Protocol". It is hard to see this differently than that when the Annex B countries ratified the Kyoto Protocol they also committed themselves to inscribe new targets into Annex B for the period after 2012.

In practice, continuing a two track approach could involve, firstly, Annex B parties inscribing new targets into Annex B of the Kyoto Protocol. Secondly, the existing mechanisms for recording and reporting on actions under the Convention would be strengthened by establishing a formal platform for recording pledges and monitoring their fulfillment. This might be adopted through a set of decisions by the Conference of the Parties and might develop into a stronger legal agreement at a later stage. Some have even argued that the Copenhagen Accord already forms such a "proto-registry" for countries' commitments, although it remains to be seen how this could be brought under the aegis of the UNFCCC and the modalities for their monitoring and verification developed.

The merits of two-tracks

There could be significant merits to such a two track approach, compared to negotiating a completely new agreement—a "single legal outcome". Firstly, it could dramatically expand the share of the global emissions subject to internationally announced reduction commitments and international reporting, i.e. from 28 % to some 90 %. A single legal outcome that would be anywhere near to have the stringency of the Kyoto Protocol would most likely have a far lower coverage.

Secondly, by honoring their commitments and inscribing new targets, Annex B countries could remove some of the most contentious issues from the

negotiation table. This could help to reduce the current mistrust that among developing countries with regard to the commitments by developed countries. Leaving the more ideological aspects aside, historically the developing countries have some reason to be skeptical that developed countries will fulfill their obligations under a future international agreement.

Thirdly, it would maintain the only legally binding framework that exists—the Kyoto Protocol. Although its emissions coverage is limited, and might even be falling in the future, there are merits to maintaining, supporting and developing further this framework—merits that have both a strategic and practical character. The strategic reasons are that over time the Kyoto Protocol could be a basis for a more comprehensive legally binding agreement and scrapping it would mean that the institutions that it has established will be lost; any new legally binding agreement would have to be built from scratch.

Practically, the Kyoto Protocol's strictness would promote compliance in the countries that are bound by the protocol, as argued above. Moreover, the fact is that Joint Implementation projects, trading with Assigned Amount Units and the compliance mechanisms under the Kyoto Protocol are all dependent on new Annex B targets. There are good arguments for continuing these mechanisms to realize emission reductions in Eastern European countries.

Finally, a two-track approach would not necessarily be very hard to get in place; much of the required institutional framework already exists. The text that would be needed for extending pledge-and-review under the Convention reached an advanced stage in Copenhagen. Supposedly the Copenhagen Accord goes a long way in resolving the thorniest outstanding issues. By integrating the accord into the draft text from the Convention track, one could get a result that could probably be realized without the lengthy ratification process that is likely to be required before a completely new agreement can enter into force. If countries agree amending Annex B of the Kyoto Protocol, it would not be very difficult from a technical perspective.

In contrast, to negotiate a single legal outcome that is anywhere near the Kyoto Protocol is likely to take years, and then additional years will be needed to make it operational and ratified by a sufficient number of countries to bring it into force.

The arguments against two tracks —and their counter-arguments

One of the arguments made for replacing the Kyoto Protocol with a "single legal outcome" has been that the situation today is very different than was the case when the Kyoto Protocol was ratified. But the ratification by the EU, Japan etc. happened more than two years after US President Bush publically stated that he would withdraw from the negotiations under the Kyoto Protocol and had no intention of ratifying it. Hence, it can hardly be claimed that the circumstances today with respect to the USA are very different from what was the case when the other Annex B countries ratified the Protocol; it was well known that the US was not going to be a party to the Kyoto Protocol. Nevertheless, although they knew this, the EU, Japan, Russia etc. confirmed that they accepted to inscribe new targets into Annex B by ratifying the protocol. And this commitment was made without any conditions that new countries, e.g. developing countries, would have to be added to Annex B to secure a second commitment period.

Another argument brought forward against the two track approach as it is sketched above, is that that it would not be fair and hence not sustainable in the long run. That the approach is not fair is a valid argument. Except for pragmatic reasons, it is very hard to see why the USA should be subject to less stringent regime than for example the EU. But will it be unsustainable? In the longer-term, precise and binding commitments and stronger actions from the USA and emerging economies will be needed to remove the free-rider problem and achieve the necessary scale of emissions reductions; in that sense a hybrid approach may be unsustainable in the longer-term. But in the short-term a single legally binding treaty looks unattainable, as argued above. For that reason, a hybrid approach seems the best way to expand and strengthen global mitigation policy in the shorter term. A hybrid option as a bridge to a more coherent climate regime also seems to have been mooted on the agenda of the up-coming meeting of the BASIC (Brazil, India, China and South Africa) block, which floated the question: How long will the Kyoto Protocol survive? Could we envisage a shorter second commitment period designed solely to secure carbon markets".

A third argument is that if there is an alternative framework that is less binding, no new countries will

adopt Annex B commitments and some of the current Annex B countries will refuse to inscribe post-2012 commitments. This might be right for some countries. For example the current government in Canada seems unlikely to adopt new Annex B targets, and Russia has recently explicitly stated that it will withdraw from the Kyoto Protocol if no global agreement would take—not stating, however, what form for such an agreement may be acceptable. But eventually the number of countries that will take on legally binding commitments under the Kyoto Protocol depends on how the future debate is played out.

At the moment, it is only the developing countries that push for new Annex B targets. In order to change the momentum, some of the Annex B countries would need to start pushing in the same direction. Obviously, it is hard to predict whether a combination of political pressure, as well as a formalization of a transparent and robust pledge and review mechanism for non-Annex be countries, would be enough to induce the latter to inscribe new targets. But one should not rule out that the majority of the Annex B countries could be persuaded. For some countries it would be a strong argument that inscribing new Annex B target is an international commitment, and if multilateral agreements are going to be effective, countries need to honor their commitments. For other countries, more practical concerns could be persuasive: there are benefits from being able to participate in AAU-trading and Joint Implementation, and potentially also the governance of the Kyoto mechanisms if this was to be linked to whether countries fulfill their obligations under article 3.9. Further research and consultation should be conducted to scope Annex B parties' willingness to adopt new commitments under the Kyoto Protocol, and their conditions around this in the post-Copenhagen world.

In an ideal world one should set a target for future global emissions, and distribute the burden of achieving the target through international negotiations that would translate the target into strong and legally binding commitments for all countries. In the real world, however, this is not possible. Hence, continuing two tracks in the international framework to combat climate change, where some countries will have strong international commitments and other will have much looser commitments has significant merits. It might not be fair and possibly not sustainable in the long run, but it is a pragmatic approach that brings together a number of good elements from the Kyoto Protocol and from the Climate Change Convention. It will provide a strong legal framework for the countries that have accepted legally binding emission targets, while at the same time dramatically expanding the coverage of the system. Hence, continuing a two track approach seems likely to bring forward larger emission reduction than what a completely new single legal outcome would achieve. A completely new framework, with legally binding emission targets, would take a number of additional years to negotiate, and we will probably end up with a scheme that has lower coverage and without any guarantees that countries eventually take more drastic action to reduce their emissions.

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