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Plan C

The role of the Kyoto Protocol in a legally binding outcome[1]

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The Conundrum of the Willing

There is a realization among many UNFCCC Parties who appreciate the value of a legally binding multilateral climate change regime (call them 'appreciative Parties') that the architecture of the Kyoto Protocol (KP) has to remain a cornerstone of any legally binding outcome of the current UN climate change negotiations. The problem is that there is no agreement among them on how this should be implemented. As witnessed in the recent submission by Australia and Norway,[3] there are currently two alternatives being discussed: should one keep the Kyoto Protocol in more or less its current form, and complement it with a separate LCA-Protocol, covering the relevant key elements of the current negotiations under the AWG-LCA ('Plan A')? Or should one start afresh with negotiating a comprehensive new instrument incorporating the key elements of the KP with the AWG-LCA outcome ('Plan B')? And what exactly should be the content and timetable of non-Kyoto commitments?

This is aggravated by the fact that there is precious little trust between the different camps as to whether concessions once made will be honoured by the negotiating partners. The reasons for this are manifold. For example, the developing country concessions at COP 13 in Bali – including the ones made in paragraph 1.b.ii – that led to the present two-track compromise of the Bali Action Plan, were made in return for agreeing to negotiate a second legally binding KP commitment period (2CP) without introducing internationally binding developing country obligations. Most developing countries therefore see the rejection of a legally binding 2CP, or a demand for simultaneous legally binding developing country obligations, as unacceptably changing the goal posts of the Bali deal. The point is that even among those who wish to strengthen the legally binding international regime (the 'willing Parties') and avoid the default alternative of a global 'pledge and review' world, no one on either side is prepared to risk a leap (of faith) forward without having the negotiating partners safely

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[1] The ideas put forward here are based on discussions at the recent ecbi Oxford Seminar.
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[3] Australia / Norway, Submission under the Cancun Agreements, September 2011, *Enhanced action on Mitigation / AWG-LCA / AWG-KP*,
http://unfccc.int/files/meetings/ad_hoc_working_groups/lca/application/pdf/australia_norway_mitigation_submission_.pdf

handcuffed to them. This poses serious ‘sequencing problems’. What is needed is a ***balanced sequencing*** of the process, with discrete steps that provide comfort zones for both sides, reassuring them that they are not being ‘led up the garden path’, i.e. deceived into taking a step without the other side actually following. This means that neither Plan A (supported predominantly by developing countries), nor Plan B (supported mainly by developed countries) is acceptable to developing countries as part of the Bali Action Plan period (given in terms of a 2CP).

Another factor that has to be kept in mind is that the envisaged LCA Protocol (Plan A), and the New-Unifying-Treaty (Plan B) would be instruments under the UNFCCC. While it is highly unlikely that, say, Least Developed Countries would be asked to take on any binding commitments[4] even in a post-2CP regime, there are other, less than completely appreciative, Parties that would not be able/willing to sign, let alone ratify, *any* treaty that would bind them legally. In short, neither of the two Plans would likely lead to a universal outcome. There would consequently be a need to engage with these unappreciative Parties in other ways if either approach were successful.[5] More worrying, however, is the scenario that because of the failure by some to appreciate legally binding outcomes, a successful legally binding outcome under the Convention might actually not be possible in the first place.

Other reasons which might jeopardize a successful outcome under either approach, even if all Parties to the Convention were in favour, relate to the previously mentioned trust deficit. Take the Plan A two-protocols approach. Even if it were possible to have simultaneous decisions of the COP adopting the envisaged LCA Protocol, and the CMP with regards to a third commitment period of the Kyoto Protocol, there is no way of guaranteeing that countries would always choose to ratify either both or none, which would leave open the possibility of one of them entering into force without the other.[6]

The beauty of Plan B (new-single-treaty) is that it does not permit such ‘ratification cherry picking’. Yet it has other trust deficit problems. Thus many willing and appreciative developing countries are asking themselves, on the one hand, how they could be sure that a completely new deal would actually contain the desired key elements of the Kyoto Protocol and, on the other, whether the binding obligations they would be taking on would still sufficiently reflect the CBDR? These are probably the key reasons why so many of them are opting for Plan A. They are genuine fears which need to be taken seriously, particularly in light of the perceived attempts at shifting the goal posts of the Bali Action Plan.

Fortunately, there is a third way (‘Plan C’) in which appreciative and willing Parties from both the developed and developing world can reach the desired enhanced legally binding regime, namely the unification through enhancements of an existing legally binding framework: the Kyoto Protocol. After all, if one is genuinely keen on keeping the key elements of the KP, why go through the trouble of starting from scratch? Why not keep the KP in an enhanced and improved form (if need be under a different name)? The idea here is simply to amend the KP sufficiently for willing Annex B Parties to agree to both a second and third commitment period, and to introduce an Annex C – with suitable additional structural amendments based on the work that has been carried out under the AWC-LCA –

[4] As witnessed in the Australian and Norwegian submission.

[5] Those Parties who would not be expected to take on binding commitments, such as LDCs, would presumably be willing to sign on and ratify.

[6] As was pointed out to me in some initial feedback by Lavanya Rajamani, this issue could be resolved through linked entry-into-force conditions. Substantively, Plan A with such a linkage could be very similar to Plan C, but procedurally the two are very different. One involves parallel negotiations under two treaties, while the other takes place under the aegis of a single body, the CMP.

which would contain binding obligations of a type that sufficiently reflects the CBDR, so that willing developing countries could sign on.[7] How could this be achieved?

Annex B has at least two key characteristics that could be relevant in this context. First of all, there is the nature of its obligations, namely economy-wide QELROs. Secondly, it works on what might be called a 'carry over' basis, in the sense that once a Party is listed in Annex B, it is meant to stay listed in all amendments, even if it no longer chooses to accept a QELRO (with the implicit 'naming and shaming' effect).

Annex C, by contrast, could allow for obligations in terms of (supported?) NAMAs, and it could work on a genuine 'opt in' basis, in the sense that developing country Party listings would not automatically be carried over from one commitment period to the next. This would not lessen the extent to which the obligations are 'legally binding', once they are opted for, but it would leave the door open to reconsideration of the decision to opt in, once the obligation is carried out.

In short, the idea of Plan C is to shift the focus of negotiations for all appreciative and willing Parties away from the AWG-LCA of the COP to the AWG-KP of the CMP!

Plan C's Balanced Sequencing

December 2011

CMP 7 In addition to an agreement on negotiating a 3CP with legally binding obligations for willing developed (Annex B) and developing (Annex C) countries, Plan C requires – for reasons mentioned above – an agreement on a 2CP with an amended Annex B. There is no need for a new mandate to negotiate the latter, as this is already meant to be the task of the AWG-KP, but it does require a new mandate to negotiate the envisaged 3CP. As a first step in the required balanced sequencing, the willing Parties therefore decide at CMP 7 to:

(i) step up the hitherto lacklustre negotiations under the AWG-KP in order to produce the necessary ***KP amendments for a 2CP*** by CMP 8, and
(ii) start negotiations on ***a mandate for a 3CP***, as envisaged under Plan C, to be completed by CMP 8.

COP 17 AWG-LCA is instructed by the COP to continue its work, focussing on issues that will not be covered under Plan C and on Parties that are unable/unwilling to take on legally binding obligations under it, with a view to concluding a set of draft decisions for adoption at COP 18.

December 2012

CMP 8 (taking into account the outcome of the AWG-LCA) adopts the mandate for the Plan C negotiations, to be concluded by CMP 10 (2014), as well as the amendment for a 2CP. Annex B Parties that have signed up to the 2CP issue a declaration that they will fully implement their

[7] The problem with the current structure of the KP for willing developing countries is that it does not allow for differentiated obligations short of different QELROs. In contrast, the only options countenanced during the original KP negotiations were 'all-or-nothing': the Berlin mandate (1995, 1/CP.1, http://unfccc.int/resource/docs/cop1/07a01.pdf) exempted developing countries from any obligations, while the 1996 'Byrd-Hagel Resolution' of the US Senate (www.nationalcenter.org/KyotoSenate.html) resolved that *the United States should not be a signatory to any protocol to, or other agreement regarding, the United Nations Framework Convention on Climate Change of 1992, at negotiations in Kyoto in December 1997, or thereafter, which would* […] *mandate new commitments to limit or reduce greenhouse gas emissions for the Annex I Parties, unless the protocol or other agreement also mandates new specific scheduled commitments to limit or reduce greenhouse gas emissions for Developing Country Parties within the same compliance period.*

obligations, with a view of ratifying the 2CP amendments as a package together with the Plan C 3CP amendments to be adopted at CMP 10.

COP 18 adopts the set of decisions drafted by the AWG-LCA, and a decision to disband the AWG-LCA, distributing any remaining issues to be handled by the relevant subsidiary bodies.

December 2014

CMP 10 adopts a single amendment to the KP, encompassing the 3CP as well as the 2CP amendment adopted earlier at CMP 8 (so as to avoid 'ratification fatigue'), with a view to the enhanced KP entering into force before the end of the negotiated 2CP (2020?).

Concluding Remarks

There are many developing and developed countries that are willing, in principle, to take on legally binding obligations, provided that they are fair and that the others who say they are willing can be trusted to follow suit. The plan put forward here should be capable of meeting both conditions for all willing sides. As to those who at present are unwilling/unable, it should be clear by now that no Party can be forced to take on a binding obligation. Plan C simply aims to provide a process whereby those who appreciate an enhanced legally binding regime wish, and are able, to join it, and to ensure that this process is not taken hostage.