

Towards a Binding Climate Agreement: Lessons From Other Regimes

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The Evolution of International Regimes: Implications for Climate Change

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Overview

- Multilateral regimes rarely emerge fully formed – they evolve over time
- Climate regime marked both by evolution and step-change; but now at increasing risk of backsliding and fragmentation
- What would an evolutionary path toward a comprehensive binding agreement look like?

Why Regimes Evolve

- Evolutionary/incremental process allows:
 - Political consensus to emerge over time
 - Experimentation, trial and error > allows learning and reduces policy risk
 - Responsiveness to new information, scientific understanding
 - Confidence-building > greater willingness to accept stronger regime
- But evolution is not inevitable
 - Forward progress depends on many factors
 - Retrogression is also possible

Dimensions of Evolution

- Deepening (“bindingness”)
- Broadening
- Greater integration

Dimension 1: Deepening

- Institutional evolution
- Legal form
- Precision
- Compliance/
dispute settlement

- Existing institutions gain greater authority
 - E.g. European Court of Human Rights
- New institutions created
 - E.g., CITES Standing Committee

Dimension 1: Deepening

- Institutional evolution
- Legal form
- Precision
- Compliance/
dispute settlement


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- Some regimes start with non-legal agreements
 - Lower sovereignty costs > easier to negotiate
 - Become basis for legal agreements
 - Examples:
 - Prior informed consent regime for hazardous substances
 - North Sea regime

Dimension 1: Deepening

- Institutional evolution
- Legal form
- Precision
- Compliance/
dispute settlement

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- Start with general standards
> greater precision over time
 - E.g., “wise use” of wetlands in Ramsar Convention
 - Precision is independent of legal form – can have:
 - Precise rules in non-legal agreements
 - Vague standards in legal agreements

Dimension 1: Deepening

- Institutional evolution
 - Legal form
 - Precision
 - Compliance/
dispute settlement
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- Stronger reporting requirements and review mechanisms
 - “Judicialization”: evolution from political to legal dispute settlement
 - Independent decision-makers
 - Compulsory jurisdiction
 - Binding decisions
 - Stronger sanctions for non-compliance

An Aside: What is “Binding”?

- Elements of “bindingness”
 - Legal form
 - Treaty, not political agreement
 - Mandatory quality of provisions
 - “Shall” not “should”
 - Precise rules
 - ... not vague standards
 - Stronger compliance review

Dimension 2: Broadening

- Broadening of
 - Membership
 - Start with limited group of states
 - More like minded
 - Small group negotiations easier
 - Broaden participation over time
 - Examples:
 - Antarctic Treaty System
 - European human rights system
 - Substantive scope
 - Add new issues

Dimension 3: Integrating

Fragmented regime initially

- Issue addressed by different agreements, institutions or procedures
- Allows greater flexibility: states can determine pace and focus of commitments

> Consolidation or linkages

- Promotes closer coordination, efficiency
- Greater reciprocity possible

Evolution Along All 3 Dimensions

- Trade regime
 - Deepening
 - Institutional: Ad hoc secretariat > WTO as an international organization
 - Legal form: GATT Protocol of Provisional Agreement > WTO Uruguay Round agreements
 - Precision: greater precision through side agreements
 - Legalization of dispute settlement
 - Broadening
 - Many more members added
 - Substantive scope expanded to include trade in services, intellectual property
 - Integration
 - GATT a la carte > WTO single undertaking

Evolution of the Climate Regime

- UNFCCC
 - Starts broad (in participation and GHG coverage)
 - Contemplates open-ended evolutionary process
- In 350+ decisions, COP and CMP have taken incremental steps including:
 - Establish/strengthen review processes
 - Establish/operationalize funds
 - Operationalize CDM
 - Facilitate National Adaptation Programs of Action (NAPAs)

Evolution of the Climate Regime

- Kyoto was a rapid deepening
 - UNFCCC left open pledge-and-review vs. targets-and-timetables
 - Immediately on entry into force, chose the latter, in binding form
 - Kyoto negotiated in just 2 years
- Developed/developing country differentiation
 - UNFCCC contemplates evolution
 - Kyoto applies a rigid definition

Evolution of the Climate Regime

- However, since Kyoto's entry into force, no consensus for new binding commitments
- Meantime:
 - Copenhagen Accord appears to resurrect pledge-and-review
 - Regime “complex” becomes more fragmented (or diversified)
 - G-20, Major Economies Forum, ICAO, IMO, Montreal Protocol

Pathways Forward: Evolution within UNFCCC

- Set objective of binding outcome(s), but focus now on incremental regime-building
 - Stronger support for developing country mitigation and adaptation:
 - New multilateral climate fund
 - Adaptation framework
 - Technology mechanisms
 - REDD+ mechanism
 - Stronger transparency by elaborating system of MRV/ICA
 - Anchoring mitigation pledges

Pathways Forward: Evolution within UNFCCC

- Strengthening the architecture:
 - Strengthens UNFCCC's role as forum for action
 - Delivers stronger resources, action in near term
 - Builds parties' confidence in regime, one another
 - Lays stronger foundation for future binding agreement(s)
- Does not require agreement now on future legal form
 - Set objective of binding outcome(s), but leave all options including Kyoto on the table

Pathways Forward: Evolution outside UNFCCC

- Continue to use G-20, Major Economies Forum, etc. as forums for building political consensus
- Where possible, pursue particular issues through other established regimes
 - International transport in ICAO, IMO
 - HFC's in Montreal Protocol
 - Short-lived GHGs in LRTAP, Arctic Council
 - Phasing out fossil fuel subsidies in WTO
- Pursue opportunities for like-minded initiatives
 - Sectoral approaches
 - Linking trading systems

Bringing the Elements Together

- Over time, work within and outside UNFCCC should become more integrated, i.e.
 - MRV of non-UNFCCC initiatives
 - Facilitating a global trading system
- Ultimate goal should be a comprehensive binding agreement
 - Greater coordination and coherence
 - Stronger reciprocity > greater incentive for stronger action

Conclusions

- For 15 years, primary thrust of UNFCCC has been establishing and extending a legally binding regime
 - Has overshadowed and perhaps precluded other forms of multilateral cooperation within UNFCCC
 - Present stalemate unlikely to end in near future
- Cancún is a tenuous moment – calls for:
 - Affirming the importance of a binding framework, while appreciating that its achievement is an evolutionary process
 - Safeguarding the legitimacy of the UNFCCC, so it remains the forum of choice

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