Climate Policy After the Marrakesh Accords: From Legislation to Implementation

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1. Introduction

2001 was certainly a mixed year for the global climate. On the factual side it turned out to be the second warmest year since recording began, only surpassed by 1998 that was to a large extent characterized by an exceptionally strong El Nino phenomenon. While temperatures of the atmosphere were rising steadily, the political developments in 2001 looked more like a roller-coaster: in March 2001 US President Bush had declared his opposition to the Kyoto Protocol and its prospects therefore looked rather uncertain, but in November the Seventh Conference of the Parties (COP 7) to the UN Framework Convention on Climate Change (FCCC) adopted the so-called "Marrakesh Accords" that finally pave the way for the entry into force of the Protocol (the official documents are available from the website of the UNFCCC Secretariat at <http://www.unfccc.de>). COP 7 in Marrakesh thus sent a very strong signal that multilateral diplomacy can be a successful tool for resolving pressing global conflicts.

After the rejection of the Kyoto Protocol by the newly elected executive of the United States, political reactions especially in Europe had taken the issue to the highest levels of Government. At the Gothenburg Summit in June 2001, the EU Heads of State and Government asked - without naming the US - that further progress on the elaboration of the Kyoto Protocol not be blocked. President Bush, who was present at the beginning of the summit, gave his assurance to work constructively at the next conference. This agreement ensured a successful conclusion

of the resumed session of COP 6 from 16 to 27 July in Bonn. The "Bonn Agreement" was not drafted as a legal text and thus not sufficient to fulfil the mandate of the Buenos Aires Plan of Action (COP 4 in 1998). As a political document concluded at Ministerial level, however, it represented a breakthrough in many of the critical questions and was a clear signal that climate change continued to be taken seriously by the world community.

The road from Bonn to Marrakesh, however, was not as smooth as might have been expected after this triumphant breakthrough and in the end "one important passenger was lost" (the US), as an analysis of the European Union put it. The impacts of the terrorist attacks on New York and Washington are still difficult to ascertain, but it may have induced the US to stick to the non-obstructive attitude adopted at the Gothenburg Summit. US negotiators were certainly present at all meetings, but they remained silent and did not interfere. Nevertheless a number of attempts were made by various countries to renegotiate or reinterpret the provisions of the Bonn Agreement immediately after its conclusion. The EU, however, did provide the required momentum to carry the negotiations to a successful conclusion, greatly assisted by a strong alliance with developing countries gathered in the G 77 and China. To the great surprise of most observers, they managed to incorporate almost all of the deals made in Bonn in the "Marrakesh Accords", as the decisions concerning the Kyoto Protocol were finally termed (one important exception being the strict link between a legally binding compliance procedure and eligibility for the flexible mechanisms, see chapter 2).

The Marrakesh Accords thus represent something of a "technical translation" of the Bonn Agreement with a number of additional compromises that could not be reached in Bonn. The 218 pages furthermore mark a qualitative leap in the climate regime: such detailed provisions have so far been found in economic, health or disarmament documents, but not in an environmental agreement. The rather economic character of Emissions Trading and other mechanisms may be partly responsible for this level of complexity. Unnecessary to add, that the full meaning of these decisions are not easily discernible. The "complexity trap" that has been noticed since the adoption of the Kyoto Protocol (see Oberthuer, S. and H.E. Ott (1999), The Kyoto Protocol. International Climate Policy for the 21st Century. Berlin: Springer) has become even more intricate. The text of these 218 pages contains proportionately more possibilities for hidden meanings, ambiguities and "agreements to disagree" than the almost 30 pages of the Kyoto Protocol - and the latter contains a lot of those legal niceties.

Above all it is important to note the legal character of the decisions taken in the elaboration of the protocol. Because of the "prompt start" decision adopted in Kyoto, the Conference of the Parties (COP) to the FCCC serves as an interim body to prepare the first meeting of the Parties to the Kyoto Protocol. Although there is some dispute as to its precise legal position, it is fair to say that the plenary body of the protocol is a distinct body with a different membership from the COP of the FCCC, comprising only those countries that will have ratified the protocol. According to Article 13 of the protocol this body will be called the "Conference of the Parties serving as the meeting of the Parties" to the Kyoto Protocol (COP/MOP). The Secretariat will convene its first meeting in conjunction with the next session of the COP to the FCCC after the entry into force of the protocol. At this first session, the COP/MOP will be presented the Marrakech Accords for adoption because only the Parties to the protocol are in a position to issue authoritative interpretations of the treaty to which they adhere. The decisions taken in Marrakesh, therefore, are framed as draft decisions for the COP/MOP; their legal character is that of a recommendation by the COP of the FCCC. While these decisions are thus not binding on the COP/MOP of the Kyoto Protocol in a legal sense, political considerations and the need to provide certainty for the regime will nevertheless ensure that they will be adopted almost unchanged.

Limits in space prevent an exhaustive treatment of the complex agreement reached in Marrakesh and this contribution must therefore be rather cursory. This article will first provide a short account of the provisions contained in the Marrakesh Accords relating to the Kyoto Mechanisms, compliance, land-use, land-use change and forestry (LULUCF), developing countries and other decisions. Finally, it will attempt a first assessment of the accords and provide a short outlook.

2. Decisions on the Kyoto Mechanisms

The so-called "Kyoto Mechanisms" (Emissions Trading, JI and the CDM) were probably the most important part of the package negotiated after the adoption of the Kyoto Protocol, at least as regards the potential for its entry into force. After the Bonn Agreement had already solved the most crucial political choices, the Parties to the FCCC at COP 7 established quite a detailed

international regulatory framework that renders the Kyoto Mechanisms operational. This is as detailed as it can get at the international level; although some gaps remain that have to be filled in the years to come.

One of the most contentious issues throughout the negotiations on the mechanisms was the demand of the EU, many developing countries and most environmental NGOs to place an absolute cap on their use for the fulfilment of commitments. The aim was to ensure that enough pressure would remain on countries to develop progressive and effective national climate policies. The attempt was not successful, but the wording of the decision allows for some political pressure should a country rely solely on flexibility mechanisms for the fulfilment of its obligations: it stipulates that "the use of the mechanisms shall be supplemental to domestic action and domestic action shall thus constitute a significant element" of implementing Article 3.1 of the protocol (Decision 15/CP.7, Preamble). On the other hand, another key demand of the EU and most G 77 countries was successful and nuclear power is banned from activities under the CDM or JI (Decision 16/CP.7 and 17/CP.7, see respective Preamble).

Participation in the mechanisms is dependent on the ratification of the Kyoto Protocol, compliance with the rules on reporting and monitoring, the adoption of a national system for inventories and the adherence to the compliance procedure (Decision 15/CP.7). A strict link between acceptance of a compliance agreement under the protocol and eligibility for the Kyoto Mechanisms was, however, not established due to strong resistance by especially Japan and Russia. This is one of the very few cases where a provision of the Bonn Agreement was not transferred into the Marrakesh Accords. Should the Parties to the protocol at their first meeting adopt legally binding consequences in the form of an additional agreement or amendment to the treaty, its ratification will thus not be a requirement for participation in the mechanisms.

As a safeguard against overselling by participating countries, the Parties adopted a mandatory duty for all potential sellers in Emissions Trading to keep a so-called "Commitment Period Reserve" at all times (Decision 18/CP.7, Annex, para.6). This consists of either 90 percent of the originally assigned AAUs or five times the emissions of the most recently reviewed emissions inventory, whichever is lower. Should a Party drop below this threshold it will loose its ability to sell, but it may still buy in order to bring its amounts up to the required level.

As regards the Clean Development Mechanism under Article 12 of the Kyoto Protocol (Dec.17/CP.7), the Parties agreed on a "prompt start". Projects that started from 2000 onwards may thus be credited retroactively. These rules are sufficiently clear and provide enough certainty for investors to start project activities. The determination whether a CDM project is sustainable lies with the host country. This was a condition of developing countries in order to fend off what many of them saw as interference in internal affairs by industrialised countries.

Further decisions include the permission to use afforestation and reforestation activities in the CDM up to a ceiling of one percent of a party's 1990 emissions (Decision 17/CP.7, para.7). The definitions and modalities for use of these activities will be adopted at COP 9 in 2003. An Executive Board established in Marrakesh has been charged with the elaboration of a simplified procedure for small-scale activities under the CDM to be adopted by the next conference of the Parties. This latter provision satisfies some demands of environmental NGOs, who originally sought to restrict the use of the CDM to renewable energy projects excluding large hydro projects.

The composition of the Executive Board to oversee the CDM was one of the most contentious issues. The Executive Board will have ten members, five from the five regional groups, one from a small island state and two from Annex I and non-Annex I countries respectively (Decision 17/CP.7, Annex, section C). This formula combines the demand for equal geographical distribution by developing countries and the 50:50 composition preferred by most industrialised countries. The board held its first meeting already on 10 November 2001, immediately after COP 7 had concluded. Since the Executive Board may take decisions with a three-fourths majority vote, the four Annex I countries constitute a blocking minority.

The institutional framework for Joint Implementation (Dec.16/CP.7) between Annex I countries under Article 6 of the Kyoto Protocol is less elaborate than the CDM framework. The Parties did, however, establish a supervisory committee that shall be elected immediately after the entry into force of the protocol. It shall be composed of ten members, of which three should come from Eastern European countries with economies in transition (CEIT), three from other Annex I countries, three from developing countries and one from a small island developing country. Since the supervisory committee may take decisions with a three-fourths majority vote, the four developing countries hold a blocking minority as well.

The decisions on JI do not provide for "early crediting", as demanded by some Annex I countries: projects under Article 6 of the protocol may begin as of the year 2000, crediting, however, will only take place in the commitment period after 2008. The Marrakesh Accords provide two tracks for host countries: a Party that meets all the eligibility requirements set out in the accords may verify its own emission reductions (Dec.16/CP.7, Annex para.21 et seq.). Should a Party not fulfil these requirements, it may still host JI projects but emission reduction must be verified according to a verification procedure under the supervisory committee that is comparable to the CDM procedure (Dec.16/CP.7, Annex para.30 et seq.).

3. Procedures and Mechanisms relating to Compliance

Compliance was the last and most contentious issue in the night before the Bonn Agreement was finally adopted. Expectations of a fierce battle in Marrakesh were thus not completely unfounded. Nevertheless to almost everybody’s surprise the drafting group of experts at COP 7 managed to agree on a final compromise within a couple of days, even before the ministers arrived (Decision 24/CP.7).

The annex to this decision contains the main operational elements of a procedure that is unprecedented in international environmental law, both as regards stringency and detail. The Marrakesh Accords establish a Compliance Committee with two branches: First, a "facilitative branch" will support a party's efforts to comply with its obligations. Second, an "enforcement branch" has been set up to monitor compliance with the most important obligations. There are various measures available to the enforcement branch for bringing about compliance. A party may, for example, be prohibited from selling under the Emissions Trading regime. Additionally, for every tonne of emissions by which a Party exceeds its target, 1.3 tonnes will be deducted from its assigned amount for the subsequent commitment period. The non-compliant party will be required to submit a compliance action plan that will be reviewed by the committee. An appeals procedure provides for a review of decisions by the Conference of the Parties serving as the meeting of the Parties to the protocol. During the appeals procedure the decisions by the Compliance Committee remain in force - an important detail that strengthens

the position of the committee. Overturning a decision of the Compliance Committee by the COP/MOP requires a three-fourths majority.

The composition and voting procedure of the Compliance Committee should ensure an effective functioning. It is similar to the composition of the Executive Board of the CDM and thus leads to a small majority of developing countries. The two branches of the committee will be composed of ten members each, one from the five regional groups, one member of the small island developing countries and two from Annex I and non-Annex I countries respectively. Decisions of the facilitative branch require a three-fourth majority vote, should consensus not be reached. A double-majority voting requirement for the enforcement branch provides for credible and authoritative decisions: should the committee resort to voting, a majority of at least three-fourths is required and, additionally, a simple majority of Annex I as well as non-Annex I countries.

The main obstacle for an adoption of the procedure already in Bonn had been a dispute over its legal character. Throughout the negotiations the EU had insisted that a compliance procedure should be legally binding and adopted as an amendment to the Kyoto Protocol. Environmentalists and economists alike supported this, since a credible enforcement procedure is indispensable for the establishment of a functioning market for Emissions Trading. Before Bonn, this position also had the support of the US, but after this country had become silent, opponents to a binding procedure, especially Japan and Russia, increased their efforts to soften the legal nature of the procedure. Finally, in Bonn and afterwards in Marrakesh, the EU agreed to postpone a decision on this matter until further consideration by the first Conference of the Parties to the Kyoto Protocol.

A compliance procedure embedded in an amendment to the protocol would of course provide for enhanced legal certainty. On the other hand, a significant advantage of an adoption by way of a decision is the fact that it assumes validity for all parties to the protocol upon adoption. A good example for a viable procedure has been established under the Montreal Protocol, which was also adopted by way of a decision of the Meeting of the Parties. There are different degrees of "bindingness" in international law. A procedure, adopted by a decision and supported by a strong political will could in fact lead to a similar degree of bindingness for a non-compliant party than a procedure contained in a formal treaty.

4. Land-use, Land-use Change and Forestry (LULUCF)

How to account for carbon storing activities was the question that ultimately led to the failure of The Hague and these so-called "LULUCF" activities took also centre stage in Bonn and Marrakesh. Canada, Australia, Japan and the US had pushed for the widest possible inclusion of carbon storing activities, because taking them into account will proportionately decrease the national obligations to reduce emissions of greenhouse gases. The formula finally agreed upon (Decision 11/CP.7) will add up to about three percent of 1990 emissions of industrialised countries and lead to reductions in emissions of only about 2.2 percent maximum for all industrialised countries as compared to the 5.17 percent originally agreed in Kyoto.

In addition to the human induced activities relating to afforestation and reforestation that are regulated already under the Kyoto Protocol (Article 3.3), the Parties will be allowed to take "forest management", "cropland management", "grazing land management" and "revegetation" into account for their national emission inventories under Article 3.4. A numerical cap on forest management has been established for each country in an Appendix Z to this decision. Russia, in the days following the adoption of the Bonn Agreement, questioned the validity of its numbers in Appendix Z. According to Russia's own calculations, carbon-absorbing activities added up to 33 MtC (megatons of carbon per year) instead of the 17.63 MtC inscribed in the appendix. In order to avoid an unravelling of the accords, the EU and G 77 (and China) finally gave in. Russia's numbers were changed to the figure it had demanded (Decision 12/CP.7).

Apart from this cap on the accounting of forest management activities, a number of safeguards have been introduced to prevent an abuse of carbon absorbing activities. The Parties agreed that consistent methodologies be used for these activities, that the mere presence of carbon stocks be excluded from accounting and that the implementation of activities must contribute to the conservation of biodiversity and the sustainable use of natural resources. In order to provide for enhanced transparency, the Parties at COP 7 created a new unit: in addition to the Assigned Amount Units (AAU) generated under Emissions Trading, Emission Reduction Units (ERU) generated under Joint Implementation and Certified Emission Reductions (CER) generated under the CDM, LULUCF activities included in the emission inventories according to Article

3.3 and 3.4 will generate so-called "Removal Units" or RMUs (Decision 19/CP.7). These units may not be transferred into subsequent commitment periods. In practice, however, this may be largely irrelevant, since RMUs might be used to comply with the reduction obligation of Article 3.1, while AAUs are transferred into the next commitment period.

LULUCF projects under the CDM were limited to afforestation and reforestation and the use of such credits (Certified Emissions Reductions, CER) by Annex I countries is limited to one percent of their assigned amount. The rules for such projects will be elaborated by the SBSTA of the FCCC with a view to their adoption by COP 9 (and recommendation to the COP/MOP of the protocol) in 2003.

5. Issues Relating to Developing Countries

Almost all decisions relating to developing countries had been prepared already in Bonn and did not require further negotiations at COP 7 in Marrakesh. Besides of the decisions on funding transferred from Bonn, several provisions regarding least developed countries (LDCs) have been adopted to provide for capacity building, especially as regards adaptation to the inevitable impacts of the changing climate. Most importantly, the Parties adopted guidelines for the preparation of National Adaptation Programmes for Action (NAPAs, Decision 28/CP.7).

A Least Developed Country Expert Group was established, whose tasks are to facilitate the preparation of NAPAs and to promote the exchange of best practices (Decision 29/CP.7). The composition of this group is unconventional, comprising nine members from LDCs and 3 from Annex II countries. The Parties further strengthened the provisions for capacity building and set up an expert group on technology transfer (Decision 4/CP.7 and Appendix).

The decisions taken in Bonn and Marrakesh establish three new funds for developing countries, two under the FCCC and one under the Kyoto Protocol. Under the Convention (Decision 7/CP.7), a "special climate change fund" complementary to GEF funding shall provide finances for adaptation, technology transfer, and the mitigation of greenhouse gases. A further provision relates to countries that are heavily dependent on the export of fossil fuels and encourages activities to assist these countries in diversifying their economies. A second fund under the

Convention is reserved for least developed countries. The Marrakesh Accords provide guidance to the GEF on the LDC Fund, which will finance the preparation of the NAPAs. Canada has made a pledge to the LDC Fund of CAN $ 10 million.

The adaptation fund established under the Kyoto Protocol (Decision 10/CP.7) is to be financed by voluntary contributions and by a share of two percent of proceeds from certified emission reductions generated by the CDM under Article 12 of the Kyoto Protocol (see Decision 17/CP.7). This provision represents a major breakthrough in environmental law and international law in general, because it is the first time that a levy has been established on business transactions for the financing of environment and development activities. The European Union together with Canada, Iceland, New Zealand, Norway and Switzerland made a political commitment in Bonn to provide 450 million Euro (US$ 410 million) per year by 2005 to the fund, with the level to be reviewed in 2008.

6. Other issues

Some of the most contentious decisions concerned rather technical questions like the procedures to account for emissions and the transferability and banking of credits. The agreement on guidelines under Articles 5, 7 and 8 for the monitoring, reporting and review of emissions was certainly one of the most difficult, because these guidelines have implications for all other issues of the Kyoto Protocol (Decision 20-24/CP.7).

The decision concerning the elaboration of Article 7.4 (Decision 19/CP.7) introduced a new type of credit, called the "Removal Unit" for the credits generated by carbon absorbing activities in the inventories (see Chapter 4). While these units may not be transferred into the next commitment period, AAUs may be transferred without a limit and credits generated by JI and CDM activities may be transferred up to the level of 2.5 percent of the originally assigned AAUs. This does not sound very impressive; it is, however, quite a considerable amount that will probably never be tested by any Party.

A further decision requests industrialised countries to minimise adverse effects of developing countries arising from measures to protect the climate (Decision 9/CP.7). Those countries

should give priority to activities at removing environmentally unsound subsidies and other "perverse incentives". The decision on the Kyoto Mechanisms furthermore contains an ethical element that might serve as a leitmotif for the further development of the climate regime (Decision 15/CP.7, Preamble): emissions should be reduced "in a manner conducive to narrowing per capita differences between developed and developing country Parties". This formulation aims at a process of contraction and convergence that might lead to a more equitable distribution of emissions in the long term.

7. Conclusion

The Marrakesh Accords represent the final breakthrough of the Kyoto Protocol and its co-operative approach to global climate policy. After the near death of the protocol at The Hague (see Ott, H.E.: Climate Change - an Important Foreign Policy Issue; in: International Affairs 77(2) 2001, pp. 277-296), its resurrection in Bonn and Marrakesh is certainly one of the biggest victories for international environmental policy ever. It has also been hailed as evidence that international co-operation to solve pressing global problems can be successful. This effect is probably as important as the impact on climate policy as such. It was mainly a result of the informal alliance between Europe and the G 77 and China that has allowed this result.

The adoption of the Marrakesh Accords also marks the end of an era: the end of the legislative phase and the beginning of a phase of implementation. This does not mean that legislation will no longer play an important role. The inclusion of developing countries into the commitments, the design of targets for the second commitment period after 2012, and the further elaboration of the Kyoto Mechanisms will certainly require tremendous creativity, political will and legal drafting skills.

After the entry into force of the Kyoto Protocol, however, the regime will shift into the implementation phase. The focus of attention will lie on the translation of the protocol into national climate policies, the co-operation in the implementation of those commitments and, if necessary, the enforcement of obligations. One of the biggest challenges will be the implementation of an emissions trading regime, both at the international level between states and, as in the case of the EU, at the national or regional level for companies.

The immediate environmental effect of the Kyoto Protocol, however, has been reduced considerably. Article 3.1 of the protocol text commands a reduction of greenhouse gases of at least five percent compared to 1990 levels. Under the Marrakesh Accords the overall reduction, if all provisions were used, would lead at a maximum to about 2.2 percent reduction. This is due to the large extent to which carbon-absorbing activities may be used to reach those commitments contained in the Kyoto Protocol. The abstention of the United States will lead to a further decrease in global emission reductions.

On the other hand, the provisions concerning the transfer of technologies and financial resources to developing countries will ensure broad participation of those countries. The composition of the various bodies overseeing the implementation of the protocol's provisions has been treated rather imaginatively and will provide compelling blueprints for inevitable future conflicts. The compromise for the compliance procedure is viable as well. Despite the uncertainty regarding its legal nature, the procedure is the strongest environmental compliance procedure ever adopted and contains most elements necessary for its facilitative and enforcement functions.

The overall assessment of the results of Bonn and Marrakesh is thus positive. Ratification processes in the European Union at the beginning of 2002 are well advanced, as are those in Eastern Europe. Japan appears to be determined to ratify as well and Russia will follow suit. The Kyoto Protocol should thus enter into force in early 2003 and the first session of the COP/MOP will be arranged in conjunction with COP 9 of the FCCC at the end of the same year. This is a sound success, especially in the face of outright opposition from the US. Probably no other treaty with such enormous economic implications would have survived rejection by the most important actor. The new millennium, at least as regards environmental policy, has thus started with a very positive signal: the end of the (dubious) freedom to pollute the atmosphere, because pollution soon will have a price.

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