

## UNFCCC

## Too Many Compromises?

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### Background

Since the adoption of the Kyoto Protocol (KP) at the Third Session of the Conference of the Parties to the United Nations Framework Convention on Climate Change (UNFCCC) held in Kyoto, Japan from 1 to 10 December 1997 (COP 3), Parties to the UNFCCC have been attempting to spell out the implementing details for the KP. (See also *Environmental Policy & Law (EPL)*, Vol. 28 (1998), No. 3-4, at page 160.) While only the Conference of the Parties serving as the meeting of the Parties to the Protocol (COP/MOP) may adopt rules relating to the Protocol, it is necessary to define many of these rules before the first COP/MOP (CMP) to ensure that Parties who are considering the ratification of the Protocol have a clear idea of the responsibilities they will take on as a Party to the Protocol, and to facilitate the smooth transition into the Protocol. A quick survey of the provisions of the Protocol indicates that COP/MOP is expected to adopt an overwhelming number of decisions at its first session, if the Protocol is to be properly implemented. It is only through preparatory work done through the UNFCCC COP and its subsidiary bodies that COP/MOP can hope to adopt many of the decisions it is required to, mainly through the system of draft CMP decisions that COP/MOP will be asked to consider at its first session.

The Buenos Aires Plan of Action (BAPA) adopted at COP 4 in 1998 (Decision 1/CP.4 found in FCCC/CP/1998/16/Add.1) set out priority issues relating to the UNFCCC and the KP that Parties were required to work on, with a view towards adopting decisions on these issues by COP 6 (see also *EPL* Vol. 29 (1999), No. 1 at pp. 2 and 55-59). Unfortunately, agreement on many of these issues could not be reached at COP 6, held at The Hague, Netherlands from 13 to 25 November 2000 (see *EPL* Vol. 31, No.1 (2000) at page 27). In an attempt to move negotiations forward before COP 7, a resumed session of COP 6 (COP 6bis) was held in Bonn, Germany from 16 to 27 July 2001 (see *EPL* Vol. 31, No 4-5 (2001) at pp. 190 and 255).

COP 6bis resulted in the adoption of the Bonn Agreements on the Implementation on the BAPA (Decision 5/CP.6, found in FCCC/CP/2001/5). The Bonn Agreements identify the core elements for the implementation of the Buenos Aires Plan of Action. Two types of decisions had been forwarded to COP 7, *i.e.*, those that were forwarded for adoption (found in FCCC/CP/2001/5/Add.1) and those forwarded for elaboration, completion and adoption (found in FCCC/CP/2001/5/Add.2). The first set of decisions,

although unbracketed, were forwarded to COP 7, since the Parties had agreed on the adoption of *all* decisions as part of a package. These decisions dealt with matters such as capacity-building, development and transfer of technology, and guidance to the financial mechanism. The core elements contained in the Bonn Agreements were intended, among others, to guide the Parties in agreeing on the texts of the second set of decisions, which covered issues such as the mechanisms, compliance and reporting requirements.

### COP-7

From 29 October to 9 November 2001, more than 1,500 persons gathered at the Palais des Congrès in Marrakesh, Morocco to attend the Seventh Session of the Conference of the Parties to the United Nations Framework Convention on Climate Change (COP 7).

Marrakesh was a crucial point for climate change negotiations, a process that many entered with the hope that it would bring to a close two years of intense negotiations on rules that would elaborate on the provisions of the KP. Few, if any, believed that the Parties could afford once again to reach a stalemate at the talks. Momentum had, after all, been built at Bonn during COP 6bis. At Bonn in COP 6bis, the foundation had been laid for further discussions on the details for implementing the KP through the Bonn Agreements. Moreover, with calls for the entry into force of the KP in time for the World Summit on Sustainable Development (WSSD), which will take place from 26 August to 4 September in Johannesburg, South Africa, it was necessary to set out details that would aid countries in deciding whether to ratify the KP. The importance of ratification, especially by developed country Parties ("Annex I Parties") of the Protocol, could not be ignored, and was often used by negotiating blocs to obtain concessions from other groups that did not agree with their positions. Under Article 25 of the Protocol, no less than 55 Parties to the UNFCCC, including Annex I Parties which accounted for at least 55 per cent of the total carbon dioxide emissions of Annex I Parties in 1990, must ratify the Protocol.

It was thus with much relief that climate change Parties and observers, a third of whom were already at the airport when the plenary resumed in the morning of 10 November 2001, learned that night-long, high-level, closed-door negotiations had resulted in the adoption by the COP of a set of decisions known as the Marrakesh Accords (found in FCCC/CP/2001/13, Add.1 to 4). Accompanying the Marrakesh Accords was the Marrakesh Declaration, which will be forwarded to the WSSD for its consideration.

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The set of decisions and annexes which embody the Marrakesh Accords and the Marrakesh Declaration, will be the subject of much discussion and analysis in the months to come. This article sets out some of the highlights of the Marrakesh Accords. Frequent references will be made to the Bonn Agreements, as these set out the basic principles governing the decisions in Marrakesh.

### Land Use, Land Use Change and Forestry

The rule that the implementation of land use, land use change and forestry activities (LULUCF) contributes to the conservation of biodiversity and sustainable use of natural resources was elevated to the level of a principle that should govern LULUCF activities under the Bonn Agreements. The Bonn Agreements also specify which type of LULUCF activities may count towards fulfilment of an Annex I Party's GHG reduction commitments. Forest management, cropland management, grazing land management and revegetation are eligible LULUCF activities under Article 3.4 of the Protocol. Afforestation and reforestation are the only eligible activities under Article 12 of the Protocol, *i.e.*, the clean development mechanism (CDM). In requesting the Subsidiary Body for Scientific and Technological Advice (SBSTA) to develop definitions and modalities for including afforestation and reforestation projects under the CDM in the first commitment period (2008 to 2012), COP requests SBSTA to consider, among others, the issue of socio-economic and environmental impacts.

Decision 11/CP.7 on LULUCF reiterates the provisions of Bonn Agreements and elaborates on them. Thus, the Decision includes a draft CMP Decision with an annex that defines the pertinent LULUCF activities, provides quantitative caps for the use of these activities, and spells out basic accounting rules that will require greater elaboration through the work of SBSTA and the Intergovernmental Panel on Climate Change (IPCC). In addition, Decision 15/CP.7 on the principles, nature and scope of the mechanisms emphasizes that environmental integrity is to be achieved, *inter alia*, through "sound and strong principles governing land-use, land use change and forestry activities."

The manner in which LULUCF activities can contribute to the conservation of biodiversity and sustainable use of natural resources, and the parameters to be used for measuring that contribution, will be a rich area for discussion, especially in light of the requirement under the draft CMP Decision on guidelines for the preparation of the information required under Article 7 of the KP (annex to Decision 22/CP.7). The annex to this draft Decision requires Annex I Parties to provide a description of any national legislative arrangements and administrative procedures that seek to ensure that the implementation of LULUCF activities "also contributes to the conservation of biodiversity and sustainable use of natural resources."

### Compliance

Undoubtedly one of the greatest achievements of COP 7 is the agreement on the rules governing the compliance system. Decision 24/CP.7 on procedures and mechanisms relating to compliance defines the composition of the Compliance Committee, which has two branches, the facilitative branch and the enforcement branch. It also lays out the general procedures for cases brought before the Committee, including an expedited procedure that will apply when a question of implementation relates to eligibility requirements under Articles 6 (joint implementation), 12 (CDM) and 17 (emissions trading) of the KP.

The expert review teams, a Party with respect to itself, or any Party with respect to another Party, supported by corroborating information, may raise questions of implementation. Draft provisions on a Party's right to raise a question of implementation with regard to another country proved to be one of the most difficult points of negotiations on compliance, but was retained.

Consequences to be applied by both branches of the Compliance Committee are also indicated. These consequences include a deduction of 1.3 times of an Annex I Party's emissions in excess of its assigned amount for the first commitment period, to be taken from the assigned amount for the second commitment period. The enforcement branch may adopt a decision only with the assent of a majority

of at least three-quarters of the members present and voting, including a majority of Annex I Parties and a majority of non-Annex I Parties.

A Party against whom a final decision is taken may appeal to the COP/MOP if the former believes it has been denied due process. Such a decision stands pending decision on appeal, and may be reversed upon a three-quarters majority vote by the COP/MOP.

A strong area of disagreement during negotiations was the binding nature of the compliance system. Article 18 of the KP states, in part, that "[a]ny procedures and mechanisms under this Article entailing binding consequences shall be adopted by means of an amendment to the Protocol." Parties have chosen to deal with this issue by noting, in the eighth preambular paragraph of the Decision on compliance, that "it is the prerogative of the Conference of the Parties serving as the meeting of the Parties to the KP to decide on the legal form of the procedures and mechanisms relating to compliance."

Compliance was linked to the issue of mechanisms, with Parties disagreeing on whether acceptance of the compliance system should be a requirement for eligibility under the mechanisms. In the end, the Parties tackled this issue in an indirect manner. They agreed to recommend to the COP/MOP, via the draft CMP Decision which is annexed to the general mechanisms Decision, that eligibility to participate in the mechanisms will depend on compliance with methodological and reporting requirements under Articles 5.1, 5.2, 7.1 and 7.4 of the KP. The



enforcement branch of the Compliance Committee will exercise oversight of compliance with these provisions. Since the COP/MOP may decide not to adopt the procedures, there is the question of how eligibility for participation in the mechanisms would be determined in the absence of a compliance system, or an alternative to it.

In viewing the compliance system, one must note that the procedure links up with at least two other provisions of the KP, namely, the multilateral consultative process (MCP) referred to in Article 13 of the UNFCCC and Article 16 of the KP, and Article 14 of the UNFCCC and Article 19 of the KP, the dispute settlement procedure. With regard to the MCP, on which discussions have been relegated to the background as negotiations on the compliance mechanism intensified, no rules have yet been adopted, and it is unclear whether work on this issue will resume in the near future. The relationship among these various procedures, as well as the links to the expert review teams and the review of national communications, would be an interesting area for legal experts to explore.

### **Synergies Among the Rio Conventions**

The Marrakesh Ministerial Declaration calls for the continued exploration of the synergies between the UNFCCC, the Convention on Biological Diversity (CBD),

and the United Nations Convention to Combat Desertification in those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa (CCD). In this regard, a joint liaison group is being formed with the CCD and CBD “to assess linkages across conventions and to promote cooperation and coherence.” (Input to the World Summit on Sustainable Development: Note by the secretariat, found in FCCC/CP/2001/10.) An important aspect of exploring these synergies will be analysing the legal and institutional arrangements that will help promote the complementarities that are sought.

### **Conclusion**

There are mixed reactions about what was achieved in Marrakesh. On the one hand, there is relief that a set of rules have been agreed upon by the Parties at COP 7. On the other hand, many are dissatisfied with the actual rules adopted, pointing out the many compromises that had to be made, compromises that extended to revising what had been agreed upon in Bonn. Regardless of how one sees the results, the fact is that the players in the climate change arena now have a set of binding decisions with which to proceed to map out their work for future years, and a concrete basis for recommending engagement, or non-engagement, in the climate change process.

