



## Institutions for global environmental change

The Kyoto Process will always be flawed so long as the United States (US) stands aloof. The absence of the US undermines the resolve of those who believe in and seek to experiment with international environmental agreements, hammered out in good faith over many long hours and late nights. The Marrakech agreements are hugely important because they are real agreements, even in the absence of the US. This is a sign of political commitment, and a basic urge to keep international agreements on the road. There is a huge amount still to be done to make Marrakech work. But the good will

amongst the committed players is there for all to see. The US must recognise this good work and come on board. The political pressure for them to do is growing. Good will amongst all but one is one partner too short to ensure the future well-being of the planet and its peoples.

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## The Marrakech Accords to the Kyoto Protocol: analysis and future prospects

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### 1. Introduction

In October/November 2001, representatives from 172 governments met in Marrakech, Morocco, at the seventh Conference of the Parties (COP-7) to the UN Framework Convention on Climate Change (UNFCCC) to complete negotiations on the operational details for commitments on reducing greenhouse gas emissions, set out in the UNFCCC's Kyoto Protocol. These details are outlined in the Marrakech Accords (UNFCCC, 2002), which represent the legal elaboration

of the political agreement reached in Bonn in July 2001, after several extended months of negotiations, formally known as the Bonn Agreements on the Implementation of the Buenos Aires Plan of Action (UNFCCC, 2001). The Accords provide the necessary closure to negotiations on key issues, which now permits countries to initiate the process of ratification of the Kyoto Protocol. The result at COP-7 represents the finale in what has been a politically, scientifically and legally challenging decade for climate change research and policy.

The Kyoto Protocol, signed in 1997 at the third COP, commits developed countries ('Annex I Parties') to reducing their greenhouse gas emissions according to individual quantified emission limitation or reduction

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commitment percentages, and outlines various mechanisms for achieving this goal. Governments had agreed in 1998, through the Buenos Aires Plan of Action (BAPA) (UNFCCC, 1998), to finalise negotiations on key Protocol ratification issues by the sixth COP, which was held in The Hague in November 2000. COP-6 has been widely described as a failure, as participants were unable to reach agreement, and negotiations had to be continued in July 2001. This COP-6.5 was successful in producing the Bonn Agreements, despite much international controversy and debate in the interim, caused particularly by the March 2001 rejection of the Kyoto Protocol by US President George W. Bush. This policy shift also led to considerable international media attention, raising the stakes of the outcome in Marrakech. But failure was not repeated, and all BAPA decisions intended to be finalised and adopted at COP-6 now shape the Marrakech Accords.

## 2. The political atmosphere

The Marrakech meeting was the first major inter-governmental meeting that was not cancelled after the events of 11 September 2001. After the success of reaching a political deal in the summer of 2001, Parties to the UNFCCC had the apparent easy task of converting the Bonn Agreement into legal text in order to complete the BAPA. However, the continued US insistence on staying out of the Kyoto process and the recent terrorist attacks in that country had cast doubt over the future of the Bonn Agreements. It was in this uncertain atmosphere that the Marrakech talks commenced.

Parties' positions had not changed much since Bonn. The European Union (EU), the self-proclaimed leader of the climate negotiations, was pressing for a deal in order to please its electorate and to advance its environmental agenda (entry into force of the Protocol by the time of the World Summit on Sustainable Development). Members of the Umbrella Group (US, Canada, Japan, Australia, New Zealand, Norway, Iceland, Russia and Ukraine), on the other hand, were seeking maximum flexibility on the fulfilment of their Kyoto commitments. Furthermore, with the US pullout, this coalition retained a considerable amount of leverage since the Protocol only enters into force when ratified by 55 Parties accounting for 55% of 1990 emissions by Annex I countries. Though most developing country issues had been settled at COP-6.5, developing countries were active at COP-7 and stood firmly by their position against taking on any commitments, as well as voicing their discontent over the lack of leadership by developed countries. Each key issue of the Accords is briefly reviewed next.

## 3. The Marrakech Accords

### 3.1. Developing country issues

Developing country issues, while traditionally problematic and the source of much debate, were the only issues that were able to produce consensus on decisions already at COP-6.5. The BAPA had specifically highlighted decisions on the financial mechanism, technology transfer, and the implementation of Articles 4.8 and 4.9 of the UNFCCC and 3.14 of the Protocol (adverse effects and impacts of response measures) to be taken by COP-6. Another issue that was under negotiation during COP-6 was frameworks on capacity building for developing countries and for economies in transition. While discussions on technology transfer and frameworks for capacity building were not unproblematic, decisions on these matters were agreed within the first days of COP-6.5. The issues causing the greatest conflict were those of adverse effects/impacts of response measures and financial matters.

Financial matters, thoroughly cross-cutting in nature, have always represented a sticking point for all involved. This may unfortunately have been enhanced by the creation of three new funds to support the actions outlined in the decisions: an adaptation fund under the Protocol, and a special climate change fund and a fund to address the needs of the least developed countries under the UNFCCC. There is considerable scepticism about the potential for such a scattering of funds to comprise amounts substantive enough for assisting all of the 133 G-77/China member countries. In particular adaptation, which is finally gaining recognition for addressing climate change, may be a costly enterprise, and funding should be made available through other channels in the context of sustainable development (e.g., bilateral or multilateral agencies). The structure of the UNFCCC regime, in addition to historical viewpoints, has made funding a difficult political issue. The coming negotiations will need to address the issue of access to the new funds and burden sharing among developed countries.

### 3.2. The Kyoto mechanisms

The Kyoto mechanisms include international emissions trading, Joint Implementation (JI), the Clean Development Mechanism (CDM), and some would argue joint fulfilment ("bubbling"). The most contentious issues regarding these mechanisms were settled in Bonn at COP-6.5. One of the most controversial issues was that of 'supplementarity', i.e., that the usage of the mechanisms should be supplemental to domestic emissions reductions. While the EU argued for a quantitative cap, the Umbrella Group wanted maximum flexibility, which implied no cap. Due to their bargaining power,

the latter position prevailed. In Bonn, Parties decided to ‘refrain’ from using nuclear power in JI and CDM projects. Within the CDM, small-scale projects will be given priority, for example renewables up to 15 MW. CDM projects will be taxed (2%) in order to finance the Protocol’s adaptation fund. In an attempt to avoid overselling of credits by Parties, a commitment period reserve (CPR) was introduced. This CPR requirement stipulates that each Annex I Party must make sure that its emission credit holdings do not drop below 90% of their assigned amount (AA: emissions allocation), or 100% of its last reviewed inventory, whichever is lowest. This should limit the ability of Parties to oversell, i.e. to sell “emission rights” that they would need to cover their own emissions.

While most issues were relatively uncontroversial to translate into legal text, others required more negotiations, such as the eligibility requirements to participate in the mechanisms and the nature of the credits earned from trading (see Section 3.5). Eligibility requirements criteria that were agreed in Bonn included: being a Party to the Protocol; having satisfactorily established AAs; and having a national accounting system and registry in place. For different reasons, Parties wanted to add the following to the list: annual sinks inventories; linkage to the CPR; linkage to compliance; reporting on supplementarity; and reporting on Article 3.14 activities. After protracted negotiations agreement on these issues was reached with a prevalence of Umbrella Group positions. Annual sinks inventories will have to be submitted, but the quality of these was made irrelevant to eligibility in order to accommodate Russia, the biggest supplier of emissions credits. The link to the CPR was deleted, as were the reporting requirements on supplementarity and Article 3.14, but the crux of the quarrel between Parties was the link with the compliance system. Japan, Russia, Canada and Australia did not want any explicit link to the compliance regime—a “ratification issue” they argued—opposed by the EU and G77/China. This was one of the last issues to be resolved by the ministers in Marrakech, who avoided any meaningful link to compliance in order to secure an agreement.

### 3.3. Carbon ‘sinks’

The issue of carbon sinks has been controversial ever since its surprise inclusion in the Kyoto Protocol (Article 3.3 and 3.4). Together with the issue of supplementarity, sinks proved to be one of the major rifts between the EU and the US at the failed Hague conference. Most sinks provisions were settled in Bonn to the benefit of the Umbrella Group. Forest management, cropland management, grazing land management and revegetation are all eligible as sinks activities. Each Annex I Party has a forest management cap (included in an annex in the Accords), but no cap was set for

agricultural management. Afforestation and reforestation projects are allowed in the CDM, but only during the first commitment period, up to a ceiling of 1% of the fivefold amount of a Party’s 1990 emissions. The translation of these compromise provisions into legal text was straightforwardly performed in Marrakech. The outstanding issues included the reporting of sinks activities, mentioned above, and the nature of sink credits, which is addressed in Section 3.5 below. Many methodological issues, such as non-permanence, additionality, leakage, uncertainties and socio-economic and environmental impacts, etc., remain to be tackled by the UNFCCC’s Subsidiary Body for Scientific and Technological Advice and the IPCC in the years to come.

### 3.4. Compliance

The compliance regime of the Kyoto Protocol stands as unique in the world of international environmental law and at the forefront of multilateral environmental agreements. When the initial text of the Bonn Agreements was approved on Monday, July 23, negotiations had carried on through the Sunday night in order to reach agreement. It was disagreement over the text on compliance, as the final “stumbling block”, that was one of the reasons for this marathon negotiation session. In fact, even after the Bonn Agreements had been adopted, different interpretations over what had been agreed emerged as decisions were being finalised. However, at COP-7, agreement over the compliance system was reached before the arrival of ministers. Surprisingly, it was the first breakthrough on any of the issues under negotiation. One of the main concerns voiced at COP-7 was whether the final decisions would reflect the political deals of the Bonn Agreements. The decision on compliance does this, but in this discussion the US withdrawal from the Protocol was the most obvious. The US had traditionally been a proponent of a strong, legally binding compliance system. Their withdrawal left remaining “key ratification” countries, Australia, Japan and Russia to throw their weight around so that the final decision over whether or not the system would be legally binding will be taken at the first meeting of the Parties after the entry into force of the Protocol.

The Marrakech Accords established a Compliance Committee that will function through a facilitative branch and an enforcement branch. The facilitative branch will assist all Parties in their implementation of the Protocol, through the facilitation of financial and technical assistance. For example, this branch will act as an early-warning system and deal with issues of supplementarity and Article 3.14. The enforcement branch will determine if an Annex I Party is in non-compliance with its assigned amount, methodological and reporting requirements, and the mechanisms’ eligibility requirements, and apply the agreed

consequences, which include: restoration of 130% of the AA in the next commitment period, preparation of a compliance action plan and suspension of emissions trading. The members of the Committee will be based upon equitable geographical representation. This achievement was no small feat and represents a victory for the developing countries, as the Annex I favoured a majority composition, seeing as they would be the subject of the enquiries of the enforcement branch. Further elements of the compliance regime include taking into account the principle of common but differentiated responsibilities, provision for the reinstatement of the eligibility to use the mechanisms and that final decisions will be made public, as will any relevant and non-confidential information, and non-governmental organisations will be entitled to submit technical and factual information.

### 3.5. *Monitoring, reporting and verification*

Articles 5, 7 and 8 of the Kyoto Protocol deal with monitoring, reporting and verification of greenhouse gas emissions. These articles epitomise the ‘Kyoto engine’, which cross-cuts all other issues, and without which the frameworks addressing the other elements of the Accords would collapse. It is surprising how little discussion and negotiation had occurred on these articles until Marrakech. Though it was considered a technical matter, it quickly became politicised, dividing Parties over the smallest of details. The remaining “crunch” issues were the truly cross-cutting and difficult ones present in discussions in other places. These had been set aside, particularly so that agreement could be reached on sinks and mechanisms. In fact, discussions on Article 7.4, which establishes the accounting of AAs, had never been held prior to COP-7.

The Marrakech Accords set out decisions on reporting whereby Parties are required to report annually on sinks activities, including how these activities are directly human-induced, but failure to meet the quality thresholds will not endanger eligibility to participate in the mechanisms. Sinks estimates should include information on how inventory methodologies have been applied, as well as information to allow units and areas of land to be identifiable. On mechanisms eligibility, the Accords reflect Japan’s proposed expedited review procedure for reinstating eligibility to employ mechanisms, so that Annex I Parties who have been suspended from using mechanisms do not have to wait until the next review of compliance before they can begin to use mechanisms again. Parties also agreed on methodological and reporting requirements for mechanism eligibility (see Section 3.2 above).

Negotiations on Article 7.4 included discussions on: fungibility, i.e., equal treatment of credits under all three Kyoto mechanisms; banking, i.e., carry-over of credits

into the next commitment period; and a new unit, called Removal Unit (RMU) which specifically addresses credits for sinks activities. The final decision outlines that RMUs cannot be banked into the second commitment period while credits from JI and CDM projects are limited to 2.5% of the AA, and that all credits may be used for complying with the Kyoto emissions targets. Finally, the transfer of credits between developed countries will be unrestricted. In practice, this means that these non-bankable credits will be used up to comply with the first commitment period and the bankable AA units will be carried over into the next commitment period.

## 4. Beyond Marrakech

In essence, the Marrakech Accords have established an effective and functional climate management regime. The neo-liberalist school in International Relations argues that once established, regimes are difficult to eradicate or drastically rearrange (Keohane and Nye, 1977). Furthermore, the laboriousness of an extra year of tough and complex negotiations will surely prove difficult to challenge in any meaningful fashion. The US, however, appears to be putting the regime to the test by proposing an alternative to the Accords based on greenhouse gas intensity, i.e., emissions per unit of economic activity. Swift ratification of the Protocol by key countries such as the EU, Japan and Russia will prove essential to keep the UNFCCC regime together. The Accords have created an institutionally strong, but complex regime, whose environmental effectiveness was curtailed in order to accommodate key ratification countries. This has led to the conclusion of the Kyoto architecture, for ratification purposes, with a few outstanding BAPA details remaining, such as the final agreement on the legally binding nature of the decisions adopted by the compliance system, details regarding Articles 5, 7 and 8, and scientific and methodological issues surrounding carbon sinks.

The Marrakech Accords are not just about the implementation of the Kyoto Protocol, but also the fulfilment of Convention commitments, some of which have been relatively unexplored up until COP-7, e.g., adaptation. Mentioned only in five places in the UNFCCC text, and fewer in the Protocol text, adaptation has now gained recognition as a necessary element in the package of actions to minimise the impacts of climate change. This is noticeable in the Accords, where it is now given some prominence, thus ‘mainstreaming adaptation’ into the UNFCCC process, which has been traditionally dominated by mitigation concerns. The question of equity has been ever-present in the adaptation discourse, although perhaps not so much in substance as in name. However, in light of the 10-year anniversary of the Rio “Earth” Conference, many agree

that sustainable development and equity issues have a place in the climate change negotiations, and this offers hope for streamlining assistance to developing countries on several fronts, and potentially increasing it as well. Adaptation, which currently has only one COP decision to address it (decision 11/CP.1), is intrinsically linked to development issues, has also been receiving attention from supporting multilateral agencies, and an Adaptation Policy Framework is in development supporting the next stage of adaptation (Burton et al., 2002). The implementation of the three funds created by the Marrakech Accords, mainly for adaptation purposes in developing countries, will have to be agreed upon in the years to come.

Threatening from an ever-shrinking distance is the thorny and potentially explosive issue of second commitment period targets. With negotiations having to be finished by the start of the first commitment period, it is likely that discussions will start as early as 2003. The Marrakech Accords have complicated matters further due to credits being bankable, i.e., surplus credit will be carried over to the next commitment period. Vast amounts of sink and 'hot air' credits could give an advantage to Annex I Parties against newcomers to the regime. More worrisome, however, is if the US remains outside the Marrakech regime or develops policies inconsistent with it. In this situation, it would be extremely hard to get developing countries to take on commitments, even on a voluntary basis, since developed countries are supposed to take the lead in combating climate change, as enshrined in the Convention. Different frameworks will have to be explored,

such as the Brazilian proposal based on distributing the burden of emission reductions based on the effect of cumulative historical emissions (Meira Filho and Miguez, 2000), and per capita entitlements (Baer et al., 2000; Meyer, 2000). The problem of climate change still requires much human ingenuity to be solved because of the scientific, technical and ethical issues it raises. The Marrakech Accords are a considerable step in a long journey that will continue for decades.

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