AN OVERVIEW OF THE MARRAKECH AGREEMENT

The Seventh Conference of the Parties (COP-7) to the United Nations Convention on Climate Change took place in Marrakech from the 29th October until 10th November. The aim of the Parties was to reach an agreement upon the operational and technical rules for implementing the commitments on reducing emissions of greenhouse gases under the 1997 Kyoto.

The Marrakech Agreement is the final point of the negotiation round launched by the Buenos Aires Plan of Action in 1998. Indeed, the Marrakech Agreement is simply the technical translation of the political declaration that Parties achieved in Bonn during the COP6bis in August 2001. However, the Bonn Agreement did not solve all the political issues concerning the negotiations on climate change. Rather, the Marrakech meeting demonstrated that many Parties tried to re-negotiate and to re-interpret the political decisions reached in Bonn through the negotiation of what at a first glance appeared simply as technical rules.

Generally, the conclusion of the Marrakech Agreement has been welcomed by the majority of the environmental NGO community and by most of the business sector which now can count with more legal security about the rules to be applied on the use of the flexible mechanisms. Yet it is obvious that the deal concluded in Marrakech represented many concessions from the part of the G-77/China and above all from the part of the EU towards the Umbrella Group, namely towards Japan, Russia, Canada, and Australia. The reason for the EU to be so generous was actually a question of necessity given that for the Kyoto Protocol to enter into force the ratification of the Protocol by least by 55 countries emitting 55% of the total greenhouse gases emissions is required. A special mention deserves the role played by Russia, which, aware of its essential role for a future entry into force of the Kyoto Protocol, held an extreme bargaining line on its demand for increasing its credits in sinks (forest and agricultural lands) up to the double of what was fixed in Bonn. Although the EU made sure before the Marrakech meeting that it would not open again the discussions upon this issue, the EU had finally to accept the Russians claims.

The unresolved issues to be settled in Marrakech dealt mainly with the technical rules for the implementation of flexible mechanisms, the compliance system, the land use, land-use change and forestry -known as LULUFC- as well as the accounting, reporting and review under Art.5, 7 and 8. Despite of influencing to a large respect the functioning of the flexible mechanisms, the compliance and the LULUFC activities, the accounting- reporting-reviewing requirements under Art. 5, 7 and 8 are of a considerable technical nature involving less juridical aspects than the three other issues. For such a reason, this short analysis will mainly focus on the compliance regime and the flexible mechanisms rules, offering as well some details of the LULUFC rules.

Compliance

Compliance was indeed one of the last political issues agreed upon during the final stage of the of the COP6bis negotiations in Bonn. Still the compliance regime –deemed by the Parties arrived in Morocco the crunch issue of the negotiations,- was agreed in the technical group just before the arrival of the Environmental Ministers.

The main issue within the compliance regime was the manifested concerns from Australia, Russia, and Japan about the nature and character of the compliance system. The reluctance of those countries was addressed towards the compliance regime proposed by the EU and G-77/China. Both EU and G-77 aimed at establishing a binding compliance system and other additional requirements that parties should fulfil in order to be in compliance and be eligible to take part in the different flexible mechanisms –International Emissions Trading (IET), Joint Implementation (JI) and Clean Development Mechanisms (CDM).

Definitely, no other International Environmental Agreement disposes of a more sophisticated and far-reaching compliance regime as the one settled in Marrakech. First of all, the Marrakech Agreement introduced legal consequences in the case that a Party falls short in reaching its emissions reduction targets within the commitment period. Those consequences are mainly the elaboration of a compliance action plan, the restoring of excess emissions at a rate of 1.3 to 1 and also the suspension of eligibility to participate in international emissions trading as a seller. From an institutional point of view the compliance regime consists of a two-branch system. The enforcement branch is competent for determining compliance with art 3.1 targets, the reporting requirements under Art. 5.2, 7.1 and 7.4. and the eligibility requirements for JI, CDM and IET. On the other hand, the facilitative branch is responsible for reporting on supplementarity and Art. 3.14 (reporting with respect to the efforts undertaken to avoid adverse effects - mainly economic- of Annex I response measures). It should be mentioned as well that the Agreement includes the possibility for Parties to initiate compliance proceedings against other Parties. Likewise, the Agreement contains rules for transparency and public participation. Nevertheless, transparency and public participation provisions were hardly damaged since at the request of Russia the Agreement introduced a clause by which at the request of a Party the enforcement branch can decide that information concerning a pending review of potential non-compliance shall not be made public.

As suggested above, a major issue during the negotiations was the linkage between compliance and mechanism eligibility. The Umbrella group rejected to accept that the binding consequence of non compliance would be the non eligibility for use of the Kyoto flexible mechanisms. According to the member of that group such a proposal would go against the rational behind those mechanisms, namely their capacity to restore compliance. Importantly, it was agreed in the end that imposing such a binding consequence is necessarily the prerogative of the meeting of the parties. Thus, the Marrakech Agreement does not enter into the legal nature of the decisions adopted by the enforcement branch. Rather, it will be up to the Conference of the Parties meeting as the Parties to the Kyoto Protocol after the entry into force of the Protocol, to decide whether the consequences of the non-compliance will be legally binding. Such a fact is to a large extent anchored in the wording of Art. 18 of the Protocol, which requires a separate agreement or amendment by the COP/MOP to adopt legally binding consequences. Thereby in theory it might be the case that a Party decides to join the Kyoto Protocol independently from the decision to accept legally binding consequences.

Finally, the compliance regime includes a clause on the reinstatement for a Party eligibility in order to participate in the International Emissions Trading regime. Under the reinstatement clause a party which was previously suspended from the ability to sell allowances can be re-instated if the enforcement branch is satisfied that on the basis of

its compliance action plan and other relevant information that the party will meet its second commitment period target.

Mechanisms

As for the use of the three flexible mechanisms -JI, IET and CDM-, one should keep in mind that the political Bonn Agreement did not impose quantitative limits on the use of flexible mechanisms by Parties. The Bonn Agreement merely provided that domestic action will constitute "a significant element" of the effort made by Annex I parties to reach their targets. Nevertheless the Marrakech Agreement introduced reporting obligations related to supplementarity by which Parties are required to provide information showing how the use of flexible mechanisms is supplemental to domestic action.

The Marrakech Agreement succeeded in completing all operational rules for each one of the flexible mechanisms. First of all, Parties must have in place an adequate system for tracking and reporting their national emissions to be eligible to use the flexible mechanisms. In general, a Party is eligible to transfer and/or acquire emission reduction units (ERUs), certified emission reductions (CERs), assigned amounts units (AAUs), or removal units (RMUs) if it has the following conditions:

- it has established its assigned amount,
- it is a Party to the Kyoto Protocol,
- it has in place a national system for the estimation of anthropogenic emissions by sources,
- it has in place an national registry,
- it has submitted its recent inventory, and
- it has submitted the supplementary information on the assigned amount.

Thus, being subject to the procedures and mechanisms relating to compliance is no longer an eligibility requirement for Annex I Parties to participate in the mechanisms.

The eligibility conditions for participating in the International Emissions Trading regime have become stricter than for JI and CDM, since the Marrakech Agreement has operationalised what is known as the commitment period reserve -included already in the Bonn Agreement-, which prevents from overselling by establishing a minimum level of emissions allowances that Parties must maintain in their accounts. Under the commitment period reserve condition Annex I parties are required to hold 90% of their allowable emissions or five times its most recently reviewed emissions inventory in the Commitment Period Reserve, the CPR consisting of holdings of ERUs, CERs and/or AAUs and/or RMUs for the relevant commitment period which have not been cancelled. In case that a Party falls short of the required amount in the CPR, it shall be notified by the UNFCC secretariat and within 30 days of notification shall bring its holdings to the required level. Equally, it shall not make transfers which would result in these holdings falling below the required level of the commitment period reserve.

Fungibility was another issue solved in Marrakech. Just after Bonn it was unclear whether all units resulting from the different mechanisms would be fully transferable, which would have limited the interest of the business community in this mechanism. In Marrakech Parties accepted that all units could be transferred multiple times between

Parties and/or legal entities. Still, Marrakech imposed that the reduction of credits resulting from each mechanism should be separately tracked in the central registry of credits. Fungibility also affects the new unit created by the Marrakech Protocol, namely, the RMU, which are emissions credits from sinks projects under Art. 3.3 (forestry management) and Art. 3.4 (agriculture). Thus, RMUs are fungible with credits from other units in such a way that AAUs, ERUs, CERs, and RMUs are fully funglibe within a commitment period.

Regarding banking or the possibility to bank reduction units for future commitment periods, the Marrakech Agreement establishes certain rules. Thus, whereas AAUs can be banked unlimitedly, CERs and ERUs can be banked up to a limit of 2,5% of a Party's assigned amount. In contrast, RMUs could only be used for the compliance period in which they are generated, what excludes banking.

Other novelties of the Marrakech Agreement rests on the recognition of proposals from certain developing countries such as South Korea that pushed for the introduction of the "unilateral CDM" mechanism. A unilateral CDM project would allow a developing country to work with private entities or undertake itself a qualifying project in its own jurisdiction, and then take credits to the international market place.

Regarding the functioning of the flexible mechanisms, differences appear between JI and CDM. There are two ways to participate in Joint Implementation. The fast track or track I allows a host Party when it is eligible to participate in IET to issue ERUs and to check out the additionality of the project. The second track is reserved to cases in which the host Party does not meet the eligibility requirements of Track I due to shortcomings in its monitoring and reporting requirements. In this case ERUs will not be issued by the host but by the JI Supervisory Committee, this authority having the competence to verify the additionality of the project. Regarding CDM, the most relevant aspect is that projects already initiated as of the year 2000 can generate certified emissions reductions provided that they are registered before 31st December. Furthermore, the Marrakech Agreement contains a CDM levy which is two percent of CERs issued for a CDM project and should be transferred to the Adaptation Fund to be sold in the market to assist developing country Parties that are particularly vulnerable to the adverse effects of climate change. In order no to disadvantage CDM projects in less developed countries, CDM project activities in those countries should be exempted from the share of proceeds to assist with the costs of adaptation.

From an institutional point of view, the Marrakech Agreement put in place a considerable architecture on the regime regulating the CDM Executive Board and the JI Steering Committee. The differences between both Committees rest on the diverse nature of CDM and JI projects. Whereas JI projects agreed between two Annex I parties –with a strong interest in an accuracy account- simply involve a transfer of existing tonnage allowances, the CDM projects in non Annex I countries produce credits which are net additions to the total amount of allowable tons. The eventuality that the CDM damages the environmental integrity of the Protocol imposes further safety measures so as to ensure that credits derived from CDM projects are really contributing to sustainable development and reducing emissions from what otherwise would have been expected. That is why the CDM guidelines and procedures are quite detailed and precise giving the CDM Executive Board large supervision and control competences.

Land use, land use change and forestry

The Marrakech Agreement solved many of the outstanding issues related with land use, land use change and forestry activities (LULUFC). For instance, sinks under the CDM are restricted to afforestation and deforestation, and crediting is limited to 1% of a Party's assigned amount. Nevertheless, Marrakech did not provide for the exact definitions and rules for the inclusion of afforestation and reforestation under the CDM, what should be decided in a next COP. The Agreement also establishes separate inventories for forest activities and agricultural soils. Furthermore, and as for the reporting requirements under Art. 7 (land use, land use change and forestry), sink inventories reporting will not be an eligibility condition for the use of flexible mechanisms during the first commitment period

Importantly, the Marrakech Agreement compels Parties to report on their legislative arrangements and administrative procedures for ensuring that domestic land use and forestry activities contribute to the conservation of biodiversity and sustainable use of natural resources. Yet the scope of this clause is rather limited since parties only need to list respective national laws, not actual measures and results for biodiversity protection in LULUFC.

Unfortunately, the main issue during the LULUFC negotiations was the Russian requirements for increasing its sinks credits. Although Bonn settled an Agreement on the sinks credits that each Annex I country would be allowed to count against the target, Russia always considered too low its assigned target of 17 megatones of carbon per year. In the very last moment of the Marrakech negotiations Russia obtained an increase of their sink allowances from 17 to 33 megatones.

Next steps

After Marrakech, the next task will be the ratification of the Kyoto Protocol. Such a goal is not an easy one considering that the USA declared during the year its refusal to ratify the protocol. That leaves the weight under the shoulders of the EU, Japan and Russia. The objective would be to have the Protocol ratified and entered into force by 2002.
In a strategic movement the EU issued just one week before the Marrakech meeting a package of climate policy measures –among them a Directive Proposal on Emissions Trading- as well as a ratification proposal of the Kyoto Protocol by the EU and its member states by June 2002. But ratification should be also accompanied by national measures ensuring the implementation of the Kyoto commitments.
If the adequacy of commitments and the future commitment periods will be on the agenda of the next COPs, for the time being the EU should lead an exemplary role by showing a firm implementation of its commitments. Furthermore, the EU should establish mechanisms and gates in order to attract the USA towards a future participation in the Kyoto Protocol.