

The Bonn Agreement to the Kyoto Protocol – Paving the Way for Ratification

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Abstract: This article provides a short account of the international climate negotiations that took place in Bonn from 16 to 27 July 2001. After the Sixth Conference of the Parties to the Framework Convention on Climate Change failed in November 2000, the Parties had decided to suspend the meeting. The ministers present at the resumed session in Bonn successfully adopted the “Bonn Agreement to the Kyoto Protocol”, a set of political compromises for the most contentious issues left open by the Kyoto Protocol. Although many details have been transferred to the Seventh Conference of the Parties, November 2001 in Marrakesh, Morocco, the Bonn Agreement has paved the way for ratification of the Kyoto Protocol and its entry into force.

1. Introduction

If international negotiations have a certain flavour, then Bonn smelled a lot more like Kyoto than like The Hague. In fact, from Saturday night onwards, after the President had released a compromise text for adoption by the conference, it definitely smelled like Kyoto. Maybe this was in part due to the cameras that lined up the hallway towards the plenary rooms late that night. By contrast, the Convention Centre in The Hague during those grey last nights in November 2000 had been dull and empty (see Ott 2001). The cameras indicated that the world's eyes were once again on the negotiators and that every move by any country would be duly noticed.

Maybe, however, the reason for this different flavour was simply the stroke of genius that had touched the resumed session of the Sixth Conference of the Parties to the UN Framework Convention on Climate Change. This stroke was embodied in a beautifully crafted text entitled „Core Elements for the Implementation of the Buenos Aires Plan of Action“. It was compiled by the Secretariat under the authority of President Pronk and built on negotiations conducted in various formal and informal groups. Released at 11 pm on Saturday night, its carefully worded formulations and masterly balanced compromises altered the character of the meeting completely. It came in time to be recognised by the G8-Heads of State and Government in Genoa, although the summit did not provide a formal endorsement of the package. But there was no turning back after this paper had been put on the table.

However, it took another day and a half to finally agree on a slightly amended version of this text. Only specialists that had been working on this particular subject for the last three years were not surprised that the last remaining issue to be resolved was that of compliance. This was an issue that the European Union considered vital, whereas some countries of the Umbrella Group like Canada, Russia and Japan were adamant to get especially the legally binding nature of the agreement off the table. After this question had been deferred to the first COP of the Kyoto Protocol, the „Bonn Agreement for the Implementation of the Buenos Aires Plan of Action“, as it was officially termed, was ready to be adopted by the ministerial segment on Monday 23 July at about noon.

This agreement largely fulfils the Buenos Aires Plan of Action that the Parties had adopted in late 1998 in order to flesh out the Kyoto Protocol. It thus paves the way for ratification and should ensure that the treaty enters into force by late 2002 – in time for celebration by the Johannesburg Summit. If this can be achieved, the severe environmental deficits of this agreement would be outweighed by the political momentum generated by the entry into force of the protocol. However, many details remain to be decided by the seventh Conference of the Parties October/November this year in Marrakech/Morocco. This paper provides a first

assessment and points to some issues that will come up in the implementation of the Kyoto Protocol and its Bonn Agreement. After providing an overall assessment of the negotiations, the article deals with the four major areas of contention respectively: provisions relating to developing countries, the Kyoto mechanisms, land-use, land-use change and forestry (LULUCF) and, finally, procedures and mechanisms relating to compliance under the Kyoto Protocol.

2. Overall Assessment

The slightly bitter flavour of the compromise agreement certainly stems from the fact that the immediate environmental effect of the Kyoto Protocol has been reduced considerably. Article 3.1 of the protocol text commands a reduction of greenhouse gases contained in the so-called „basket“ of at least five percent compared to 1990 levels (Oberthür/Ott 1999; Grubb et al. 1999). Under the Bonn Agreement, however, the overall reduction, if all provisions were used, would lead to a reduction of only about 2.5 percent (Brouns/Santarius 2001). This is mainly due to the large extent to which carbon absorbing activities may be used to reach those commitments contained in Article 3 of the Kyoto Protocol. In addition, the European Union did not succeed to impose a quantitative cap on the use of the economic instruments, namely Emissions Trading, Joint Implementation (JI) and the Clean Development Mechanism (CDM). This will lead to a further decrease in emissions reductions that Parties will have to implement domestically. Furthermore, the abstention of the United State will increase the amount of so-called „hot air“ from Russia and the Ukraine available to the remaining Annex B-countries.

On the other hand, the provisions concerning the transfer of technologies and financial resources to developing countries provide for a substantial improvement and will most probably ensure broad participation of those countries. Apart from the level of funding, the

composition of those bodies overseeing the implementation of these provisions proved to be most contentious. The formula finally found builds on the successful practice in the convention's bodies so far and will most probably ensure a successful implementation. 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 major outcome of the resumed session of COP 6 is the Bonn Agreement, a package of political decisions framed in binding language incorporated in an Annex to Decision 5/CP.6². This Annex contains the „Core Elements for the Implementation of the Buenos Aires Plan of Action“ on developing country issues, the Kyoto mechanisms, LULUCF activities and the compliance procedure. However, the high spirit that prevailed on Monday 23 July when the package was adopted did not persist very long. The remaining four days of the conference were supposed to flesh out the details of the Bonn Agreement, but instead almost lead to an unravelling of the compromise. The Umbrella Group, notably Canada, Australia, Japan and Russia fiercely intervened in the working groups afterwards. Therefore, apart from the working group on finances, no further agreements were reached.

Consequently, all remaining contentious issues were transferred to COP 7 later this year for further consideration and adoption. Participants noted that the US in the run-up to COP 7 might be tempted to give up its rather restrained attitude. This would lead to a standstill and achieving progress will thus require continued political pressure from the top levels of government. Or, as Greenpeace put it in a press release: the work has just begun!

3. Issues Relating to Developing Countries

A core demand of developing countries in the run-up to COP 6 had been some mandatory language on additional funding. This was not achieved, although the Bonn Agreement establishes three new funds for developing countries, two under the FCCC and one under the Kyoto Protocol. Under the Convention, 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. Both funds rely on voluntary contributions and the European Union together with Canada, Japan and Switzerland has made a political commitment to provide US\$ 410 million per year to the funding mechanisms.

The adaptation fund established under the Kyoto Protocol 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. This decision actually represents a major breakthrough in environmental law and international law in general: a levy on business transactions that finances environment and development activities has been unheard of so far. Further decisions in this part of the package request industrialised countries to minimise adverse effects of developing countries arising from measures to protect the climate. Interestingly, those countries should give priority to activities at removing environmentally unsound subsidies and other „perverse incentives“. This provision should strengthen efforts to harmonise policies and measures, urgently required in order to foster common approaches to implement the Kyoto Protocol commitments.

4. Kyoto Mechanisms

Although some work still remains to be done on many technical questions, the progress achieved in clarifying the role and status of the so-called Kyoto Mechanisms is remarkable. The parties in Bonn managed to reach agreement on the most crucial political choices regarding Emissions Trading, JI and the CDM. What's more, the Bonn Agreement contains for the first time an ethical element that might serve as a leitmotif for the further development of the regime. The COP agreed that emissions should be reduced „in a manner conducive to narrowing per capita differences between developed and developing country Parties“ – a first hint at a process of contraction and convergence that might lead to a more equitable distribution of emissions in the longer run.

The EU did not succeed in its attempt to place a quantitative cap on the use of those mechanisms for the implementation of commitments. However, the wording will allow for some political pressure should a country rely solely on provisions for geographical flexibility: 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 of the protocol. Furthermore, because of resistance from the European Union and many developing countries, nuclear power is not an option for activities under the CDM or JI (Annex I-Parties „are to refrain from“...). Participation in the mechanisms is not only dependent on compliance with the rules on reporting and monitoring, but also upon acceptance of a compliance agreement under the protocol. On the other hand, the determination whether a JI or CDM project activity is sustainable lies solely with the host country. This was a key demand of developing countries in order to fend off what many of them see as “unreasonable demands” by industrialised countries.

As in the case of the Compliance Committee, the composition of the Executive Board (EB) to oversee the CDM was one of the most contentious issues. The EB according to the Bonn

Agreement 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. This formula combines the demand for equal geographical distribution by developing countries and the 50:50 composition preferred by most industrialised countries. No decision was taken concerning the supervisory committee verifying the generation of emission reduction units under Article 6 of the Kyoto Protocol (JI).

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 and the establishment of a simplified procedure for small-scale activities under the CDM. This latter provision satisfies some demands of NGOs, who originally sought to restrict the use of the CDM to renewable energy projects excluding large hydro projects. As regards Emissions Trading, the parties agreed to introduce a commitment period reserve, which will force potential sellers to retain the largest part of their assigned emissions in order to protect against overselling.

5. 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. 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 (Oberthür/Ott 1999, 130). The formula finally agreed upon will add up to almost three percent of 1990 emissions of industrialised countries and lead to reductions in emissions of only about 2,5 percent for all industrialised countries (Brouns/Santarius 2001). 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 the numbers in Appendix Z. In order to save the process from unravelling, a provision was introduced that provides for a reconsideration of the numerical values upon request of a country.

Apart from the overall cap on the accounting of these additional 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. Nevertheless, much work remains to be done in order to ensure the ecological viability of the Kyoto Protocol. In any case, this decision marks another step towards total carbon accounting – a world in which each activity, however small, may be valued in terms of its impact on the carbon balance.

6. Compliance

For most observers it came as a surprise that compliance was the last issue of contention in the night from Sunday to Monday when the Bonn Agreement was finally adopted.

Throughout the negotiations the EU had insisted that a compliance procedure should be legally binding. This was supported by environmentalists and economists alike, since a credible enforcement procedure is indispensable for the establishment of a functioning market for Emissions Trading. Before Bonn, this position had the support of the US, but after this country had become silent, opponents to a binding procedure like Australia, Japan and Russia stepped up their efforts to soften the legal nature of the procedure. Finally, the EU agreed to

postpone a decision on this matter until further consideration by the first Conference of the Parties to the Kyoto Protocol (COP/MOP 1).

However, despite this setback the main operational elements of the procedure are in place. The Bonn Agreement thus establishes 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 provide the "sticks" that will induce countries to comply with their most important obligations. There are various measures available to the Compliance Committee for bringing about compliance. A party may, for example, be prohibited from engaging in selling activities 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. Overturning a decision of the Compliance Committee requires a three-fourths majority.

The composition and voting procedure of the Compliance Committee, originally the subject of fierce debates, has been resolved in an effective manner. It follows the rules established for 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, one from each of the five regional groups, one member of the small island states and two from Annex I and non-Annex I countries respectively. A double majority voting requirement should provide for credible and effective decisions: the committee should try to reach decisions by consensus, failing which a majority of at least three-fourths will suffice. Additionally, decisions by the enforcement branch require a simple majority of Annex I as well as non-Annex I countries.

The evaluation of this unprecedented procedure is dependent on the importance one attaches to its legal nature. No doubt, a process embedded in an amendment to the protocol would have provided for enhanced legal certainty. This is especially important for the Emissions Trading regime, since potential buyers demand this kind of 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 as well 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 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. The Bonn Agreement thus presents a progressive achievement that may well fulfil the functions assigned to it.

7. Conclusion

In short, the Bonn Agreement on the Implementation of the Buenos Aires Plan of Action is a significant step forward in the global effort to combat climate change. Another failure to come to an agreement would probably not have meant the death of the Kyoto Protocol and certainly not the death of climate policy as such. It might have been a severe blow, however, sending the wrong signal to industry and consumers and delaying the process for a couple of years. Time is short, since the first commitment period starts in 2008 and domestic implementation as well as the elaboration of the flexibility mechanisms on the national and international levels will require time. A first promising indication that the message from Bonn was well understood by industry became known in Bonn on the day after the adoption of the Bonn Agreement: values of renewable energy companies at Spanish stock markets rose by five percent.

The success in Bonn, therefore, has paved the way for the ratification of the Kyoto Protocol by the EU, Eastern Europe, Russia and hopefully Japan. It will be of paramount importance to keep the issue as high up on the world's agenda as it was in the last months. Neither the Kyoto Protocol nor the Bonn Agreement would have been adopted without the involvement of the world's leaders and without the immense media coverage this usually implies. In Bonn, the US largely fulfilled the promise made by G. W. Bush in Gothenborg: to refrain from obstruction as much as possible. To be sure, the US's invisible hand was noticeable on various occasions, but all in all it was a fair game. To keep it this way will be decisive for the success of COP 7.

The European Union has, for the first time, taken a leadership position on a vital global issue that was deserted by the United States. Potentially equally important, the adoption of the Bonn Agreement has proven that multilateral diplomacy actually works, as in the case of the Landmines Treaty or the Statute of the International Court of Justice. The climate negotiations in Bonn and the G8-Summit in Genoa thus represent two possible responses to a globalising world (Athanasίου/Baer 2001). The world today is probably best described as a "uni-multipolar world", as Samuel Huntington once remarked. It is not a unipolar world, since the US cannot solve global problems alone, but on the other hand it is not truly multipolar because the world needs this superpower to solve global problems successfully (Huntington 1997). Bonn has indicated, however, that the world appears to be at least able to start tackling a global problem without the US. This tastes like a faint scent of the future, a very special flavour indeed.

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² The official documents are available from the website of the UNFCCC Secretariat at <http://www.unfccc.de>. For other accounts see Athanasίου/Baer 2001; Lohmann 2001, Brouns/Santarius 2001.