An Assessment of Montreal COP/MOP 1

Implications for the Kyoto Protocol "Post-2012" of the "First Meeting of the Parties" Weakening Kyoto's Emission Reduction Promises and Prospects for Enforceability

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Preface

There are reasons why some scientists are repelled by the goals and practices of the IPCC establishment and Kyoto officialdom, while others embrace them – and the same could be said of politicians, the media and political activists.

Increasingly, a spectrum of scientists with differing views on the causes, degrees and consequences of global warming are concluding that the UNIPCC's Kyoto regime is more about "climate politics" and less about climate science. That is why a number of former contributors to the science sections of the periodic *Assessment Reports* have opted out of participating in the 4th assessment process – some quite vocally. Unfortunately, this trend will likely facilitate diminished science and enhanced alarmism in the final document – particularly the much quoted *Summary for Policy Makers*.

Others see the process as more about creating schemes for "social justice" and international wealth transfers than about "saving the planet." Or as Al Gore has written, more about population control and resolving our collective "spiritual" crisis through forced societal reeducation and a command/control reorganization of society structured around "environmental principles" – whatever that means.

Some perceive it all as more about bureaucracy-building, lavish social gatherings, economic and political advantage and saving face than about enhancing the health and lives of *Homo sapiens*.

The structure, language and functioning of the Kyoto regime is a lawyer's dream and a layman's nightmare. It doesn't always say what it means and doesn't always mean what it says – a sort of venturing into a legal looking glass. This was again exemplified in the recent proceedings of the Conference of the Parties in Montreal, which is the focus of this paper by Chris Horner, a lawyer and long-time observer of the process.

The comments and conclusions herein are those of Mr. Horner and not necessarily those of the Center. Having said this we believe that considering the distinctions between the science and the politics, and the workable and the broken can only enhance the ability of policy makers to determine whether Kyoto is a viable function or an embarrassing farce embedded with seen and unforeseen negative consequences for the American people. In short, is it a worthy model for US policy?

Robert Ferguson

Executive Summary

The December 2005 Montreal "COP-MOP"[1] Kyoto Protocol negotiation was widely hailed[2] for producing an "historic climate agreement". Such trumpeting was fairly ritualistic[3] from Kyoto's 1997 inception through the "emergency" meeting in Bonn, July 2001, the sole exception[4] to this run being a failed COP-6 which necessitated the Bonn COP-6 *bis*.[5] Reality has subdued reaction to more recent sessions.[6]

The December 2005 Montreal "COP-MOP" Kyoto Protocol negotiation was widely hailed for producing an "historic climate agreement".

Montreal being the first "Meeting of the Parties" since Kyoto attained sufficient ratifications to bring it into future effect, the treaty prescribed that certain actions must be taken there, and the soaring rhetoric resumed. This gathering also served as the "11th Conference of the Parties to the "voluntary" 1992 UNFCCC[7] that spawned Kyoto, and was thus styled a "COP-MOP". The COP-MOP touted two achievements that were, in fact, nothing more than already-agreed promises to meet again later to discuss continued voluntary greenhouse gas (GHG) reduction efforts for the majority of the world that rejects Kyoto's mandatory promises,[8] and a Kyoto second round for those already-bound countries, as previously stipulated in Kyoto.[9]

As these descriptions imply and due to other developments passing without press release or fanfare, both of the agreements and their purported import (a breakthrough advance, and humiliating the US into rethinking Kyoto[10]) struggle to match the heraldic claims.

One substantively important development in Montreal was adoption of the 2001 "Marrakech Accord"[11] penalties. As drafted these sanctions, *inter alia*, disqualify Kyoto Parties that violate their "first round" (2008-2012) quota from employing the mechanisms of "joint implementation" (JI) and emission-trading in any subsequent round of cuts.

While actually constituting Kyoto's long-missing element – something resembling an enforcement mechanism and "teeth" – this Decision "Procedures and mechanisms relating to compliance under the Kyoto Protocol"[12] purporting to adopt Marrakech received little fanfare as compared to the much-touted agreements to merely talk later.

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Upon further inspection this relative lack of celebration is understandable and warranted because the Decision is inherently non-binding. Along with one other item,[13] Kyoto's "Procedures and mechanisms" simultaneously and quietly weakened Kyoto's emission reduction promises and eviscerated Marrakech's mandatory and costly enforcement provisions into at best mere discretionary incentives.

As such, MOP-1 affirmed and ensured Kyoto will remain no more binding *de jure* or in practice than its UNFCCC predecessor.

After eight years and nine negotiations, over 150 states still reject Kyoto's rationing. In order to rescue some perpetuation after its scheduled expiration in 2012, creative mechanisms appear likely to emerge under which the exempt majority receive additional wealth transfers. The most likely would further recast Kyoto as little more than a foreign aid scheme under which cleaner rich countries pay dirtier, fast-growing countries for the right of future economic growth. This scenario portends a split between and among rent-seeking corporations, erstwhile Kyoto-supporting politicians, and their pressure group allies. Signs of this split have already emerged, inviting a workable "Plan B".

Introduction

The Montreal COP-MOP received predictably inaccurate media coverage as producing an "historic climate pact" and changing the dynamic of international climate treaty negotiations. Yet the US did not alter its longstanding position against seeking ratification of the Kyoto Protocol.[14] It merely agreed, with all other 188 Parties to the Rio UNFCCC treaty, to continue discussing voluntary GHG abatement. Also, the Parties to Kyoto agreed to agree later, as already agreed.

Delegates watered down Kyoto's ballyhooed emission reduction promises.

Quietly, the delegates watered down Kyoto's ballyhooed emission reduction promises, as well as the previously agreed penalty language. Finally, delegates openly ignored Kyoto's requirement that these penalty procedures and mechanisms be formally adopted in the form of an amendment requiring ratification, in favor of a non-binding "Decision".

Again, regarding the non-binding penalty language actually agreed,[15] further scrutiny reveals that delegates in fact subverted what were apparently self-executing sanctions of the 2001 Marrakech Accord[16] into discretionary tools. This was done by creating an "enforcement branch"[17] with plenary authority to actually avoid instituting penalties, or to promptly rescind any imposed.

Mere temporary suspension from buying GHG credits or formalizing a JI or similar contract is in practice meaningless and, as such, Kyoto's erstwhile *raison d'etre* – emission quotas – is now effectively voluntary.

Further diminishing the odds that any Party could ever find itself declared in violation, this same Decision also effectively diluted the annual emission reduction promises of Kyoto's Parties by 20%, granting Parties an automatic sixth year in which to meet their 5-year quota.[18] This could be accomplished by purchasing credits retroactively applying to the 2008-2012 compliance period or pouring money into the exempt majority for equally retroactive JI/CDM credit.

As such, the "historic pact" actually did no more than affirm two prior agreements and institute mechanisms gutting all pending, mandatory provisions containing any teeth.

This is not surprising. Even more so than Kyoto host-country Japan, the European Union has staked tremendous political capital on claiming the treaty a success.[19] Already, loud proclamations of triumph ritually emerge in the face of obvious failure. Despite looming Kyoto violations[20] by most countries covered by Kyoto's rationing, it seemed unlikely that the UN establishment would allow any obstacle to asserting Kyoto's triumph (real or imagined), and/or moving toward a second round, to remain.

Consistent with such expectations, future talks to develop a "post-2012" Kyoto regime seem increasingly likely to culminate in an agreement under which the exempt majority continue to refuse joining the covered few in promising actual emission cuts. At the same time, those charged with reductions will likely deepen their promises without actually cutting emissions. Penalties will be eschewed and a scheme developed by which the exempt nations accept something akin to a voluntary emission quota that if met enables them to sell GHG "credits" to the Kyoto 34.[21]

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Along the road to this point, "pragmatist vs. purist" splits will deepen among the pressure groups, rent-seeking industry and within the NGO community itself. This is because failure threatens the enormous rents promised to particular industries vested in the process. For the greens such an outcome would be nothing short of an existential crisis and threat to a profitable cottage industry verifying reductions, credits and trades.

A Cold Day in Hell, or Overheated Claims?

Two decisions in Montreal, one each by the COP and MOP, received great media reception.

The first, "Dialogue on long-term cooperative action to address climate change by enhancing implementation of the Convention"[22] was an agreement among the 189 Parties to the United Nations Framework Convention on Climate Change (UNFCCC) described by media outlets as a humbling climb-down by the US. This is a curious conclusion.

The 1992 UNFCCC remains in effect today, with annual meetings (such as Montreal) and requirement for countries to engage in and discuss voluntary efforts to reduce greenhouse gases (GHGs). COP Parties agreed in pertinent part as follows (*italics* in original, **bold** added):

> *The Conference of the Parties…*
> 1. *Resolves* to **engage in a dialogue**, **without prejudice to any future negotiations**, commitments, process, framework or mandate under the Convention, **to exchange experiences and analyse strategic approaches** for long-term cooperative action to address climate change …

> 2. *Further resolves* that the dialogue will take the form of an open and **non-binding exchange of views, information and ideas** in support of enhanced implementation of the Convention, and **will not open any negotiations leading to new commitments**.[23]

This reaffirmation of the voluntary nature of relevant efforts, yet with a new caveat proscribing these talks from leading to binding Kyoto-style commitments, is the language widely reported as representing a capitulation and reversal of the United States' position.

Second, in its Decision "Consideration of commitments for subsequent periods for Parties included in Annex I to the Convention under Article 3, paragraph 9, of the Kyoto Protocol",[24] the MOP of 34 countries covered by Kyoto's mandatory and binding emission reductions (joined by 100+ free-riders) agreed to meet later to discuss a second round of cuts *by those already having promised a first round*.

The half-page text stated, again in pertinent part (*italics* in original, **bold** added):

> *The Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol, at its first session,*
> *Guided by* Articles 2 and 3 of the Convention,
> *Pursuant* to Article 3, paragraph 9, of the Kyoto Protocol,
> 1. *Decides* to **initiate a process to consider further commitments** for **Parties included in Annex I** for the period beyond 2012 in accordance with Article 3, paragraph 9, of the Protocol.

Thus, despite the headlines of an historic breakthrough, all of this had already been agreed to by Kyoto's ratifying Parties in 1997, Article 3.9 stating:

> 9. Commitments for subsequent periods for Parties included in Annex I shall be established in amendments to Annex B to this Protocol, which shall be adopted in accordance with the provisions of Article 21, paragraph 7. The Conference of the Parties serving as the meeting of the Parties to this Protocol shall initiate the consideration of such commitments at least seven years before the end of the first commitment period referred to in paragraph 1 above.[25]

The "first commitment period" expires 31 December 2012. As a consequence, Kyoto Article 3.9 mandated that the future talks – agreed in Montreal to begin in May 2006 – already have been undertaken "at least seven years before" this, that is, *by December 2005*. Montreal therefore demonstrated that in the context of climate treaties, even a refusal by the rest of the world to join and agreeing to miss an already agreed deadline by only 6 months constitute historic achievement.

No Press Releases, Please: The Undoing of Marrakech

The Marrakech Accord as agreed in 2001 clearly states that entities[26] are not permitted to "transfer and/or acquire" credits post-2012 toward complying with any reduction promises if they violate Kyoto's first commitment period.

Although some Kyoto advocates accepted and even boasted about this obvious prohibition on selling *and* buying,[27] back-tracking by others began immediately. The UNFCCC, for one, oddly stated that this merely impedes a country violating Kyoto from *selling* credits – that is, from participating in Kyoto only to the implausibly brazen extent of capitalizing on a "Kyoto market" to sell its way into deeper violation of its subsequent, deeper promise:

> "If, at the end of this [2008-2012] period, a Party's emissions are still greater than its assigned amount, it must make up the difference in the second commitment period, plus a penalty of 30%. It will also be barred from *selling* under emissions trading and, within three months, it must develop a compliance action plan detailing the action it will take to make sure that its target is met in the next commitment period." (emphasis added)[28]

Of course, no legitimate argument exists to support the UNFCCC claim that "transfer and/or acquire" actually means just "transfer." While this sophisticated take is non-binding, it betrays the widespread yet rarely stated awareness that buying massive amounts of credits is the sole chance for most countries to comply.

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Equally contrary to UNFCCC claims, the Marrakech language is unambiguous on this issue: "Legal entities *may not transfer and/or acquire* under Article 17 during any period of time in which the authorizing Party does not meet the eligibility requirements."[29]

Ultimate authority on whether this selective, unilateral revision impermissibly distorts Marrakech or not falls to the "Enforcement Branch," with its plenary authority. Such authority apparently liberated MOP delegates to mutate Marrakech from mandatory prohibition to discretionary threat.

Airbrushing Away the Inconvenient Agreement at Marrakech

In addition to these two celebrated Decisions, the MOP produced two critical documents neutering the adopted penalties and making a mockery of grandiose claims that Kyoto is a "legally binding, enforceable" agreement to cut emissions by specific numbers and date certain.

According to the UNFCCC, the Marrakech Accord to Kyoto is "the compliance regime for the Kyoto Protocol…the 'teeth' of the Kyoto Protocol, facilitating, promoting and

enforcing adherence to the Protocol's commitments".[30] Official Europe even celebrated Marrakech as having "saved" Kyoto.[31] However, given Europe's projected failure to comply, enforcing it as written and intended would certainly doom any second compliance round.

Even if the 2005 G-8 communiqué[32] and/or the Asia-Pacific Clean Development Partnership[33] prove to relegate Kyoto to the dustbin of history, they do not liberate Europe from its own domestic enactment of Kyoto-style commitments. This leaves the EU-15 as the one Kyoto Party upon whom its promises is in some sense binding. Yet in the name of keeping things rolling, Europe advocated a course ensuring Kyoto will never become binding for others.

Kyoto Article 18 requires that any binding consequences, specifically those "procedures and mechanisms" found in Marrakech, be adopted at this "MOP-1" in Montreal, and that in order to be binding they must be adopted as amendment(s) to the Protocol.[34]

Recognizing that expressly eschewing amendment in favor of merely adopting a "Decision" does not satisfy this requirement, some Parties urged adoption of an amendment but one openly softening Kyoto's mandates. As one government-funded monitoring service, IISD,[35] reported, "Highlighting the need for a legally binding system, Saudi Arabia had proposed an amendment to the Protocol (FCCC/KP/CMP/2005/2). Japan and New Zealand opposed an amendment, emphasizing their preference for a facilitative approach to compliance."[36]

The Pew Center on Global Climate Change offered the following take:

> *Kyoto Compliance*
>
> The only element of the Marrakesh Accords revisited by the COP/MOP was the legal means by which to establish the Protocol's compliance mechanism. Under Article 18 of the Protocol, any compliance procedures entailing binding consequences must be adopted as an amendment to the Protocol. Prior to the meeting, Saudi Arabia proposed such an amendment. After discussion, however, the COP/MOP decided to initially at least establish the compliance mechanism by decision rather than amendment, and referred the Saudi proposal to the Subsidiary Body on Implementation, which is to report back at COP/MOP 3.[37]

That is, a Party facing no sanctions from non-compliance [Saudi Arabia] advocated following Kyoto's rules and adopting strict enforcement of the terms of Kyoto and Marrakech against violators (admittedly, this particular oil-dependent Party also stands to lose should Kyoto's hydrocarbon rationing go into effect). Covered Parties, facing consequences for non-compliance, sought a more "facilitative" enforcement mechanism. As a compromise, others successfully advocated instead an illegitimate one.

Specifically, Europe cautioned that the required ratification process might take some time and offered a curious solution to the peril of delay: to put consideration off for two more years, until mere days before Kyoto is to take effect.

Ultimately, the Parties decided against adhering to Kyoto's Article 18, instead adopting a mere Decision, which states in pertinent part:

> *Noting also* the proposal by Saudi Arabia to amend the Kyoto Protocol in this regard,
> *Emphasizing* the need for Parties to do their utmost for an early resolution of this issue,
> 1. *Approv[ing] and adopt[ing]* the procedures and mechanisms relating to compliance under the Kyoto Protocol, as contained in the annex to this decision, without prejudice to the outcome of the process outlined in paragraph 2 of this decision;
> 2. *Decid[ing]* to commence consideration of the issue of an amendment to the Kyoto Protocol in respect of procedures and mechanisms relating to compliance in terms of Article 18, with a view to making a decision by the third session of the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol [NB: December, 2007];[38]

Why a compromise patently ignoring an unambiguous condition precedent to making the treaty binding? This actually presents a stalemate at a critical juncture. Per IISD, "Noting that an amendment requires ratification, Canada cautioned that the outcome was unpredictable, possibly creating two categories of parties."[39]

Kyoto's own long and tortured path to approval manifests that enthusiastic rhetorical support for its regime is not matched by a desire to codify it. As such, any provision making Kyoto-posturing somewhat binding for those with interests at stake is by no means a guarantee for ratification. Canada's caution hinted that reluctant Parties with lesser political investment have the ability to strand the EU with its promises.

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Further, why did Europe drive the effort to avoid following Kyoto's requirement for "binding" enforcement procedures and modalities? Europe, after all, is the sole entity that inarguably has made the unenforceable Kyoto enforceable at the domestic level through its own enactments.[40] It also seems driven above all to claim Kyoto a success.

IISD, again: "The EU emphasized the need to operationalize the compliance system and proposed its adoption by a COP/MOP 1 decision, after which an amendment could be considered."[41] That is, it sought to avoid the delay and potential damage should some Parties not ratify actual penalties, as Canada alluded was likely.[42] This approach was seconded by those with a financial stake in ensuring the pace of wealth transfers and/or that CDM activity picks up: "AOSIS, the Africa Group, China and others also supported

the adoption of the compliance mechanism by a COP/MOP 1 decision combined with the consideration of an amendment process."[43]

IISD continued regarding the original Saudi proposal to follow Kyoto's requirements:

> On the final day of SB 22, delegates found text from Saudi Arabia being circulated from the document counter. The 14-page document (FCCC/KP/CMP /2005/2) sets out a Saudi proposal that Parties take the Protocol amendment approach to operationalizing compliance. The Saudi proposal deals with the procedures and mechanisms relating to compliance under the Kyoto Protocol e.g. the Compliance Committee, the Facilitative and Enforcement Branches, appeals and consequences. *Champions of the Protocol fear that the amendment approach using*[44] *Protocol Article 18 and 20.1, as opposed to adopting a COP decision, will delay significantly the implementation of the compliance procedures, because an amendment would require ratification by all the Parties.* Moreover, opening the Protocol up for an amendment would establish a precedent, which could take the process down some unanticipated roads. (*italics* added)[45]

While unofficial, the IISD account is accurate, and revealing. Given Kyoto's history, arguably the appropriate, required course was rejected in favor of expediency not merely to allow continued claims of victory over select non-players, but also proves that a race against time is on in the minds of some who fear that delay could prove deadly to Kyoto.

Yet, accepting the EU proposal to abandon Kyoto's requirements and merely "decide" penalty provisions as opposed to amend the treaty raises serious questions as to whether such legitimately "operationalizes" the system. Formal agreement does not universally require ratification beyond the Executive agreeing to its terms, although some, for example the United States[46] and Australia clearly do require legislative approval. Legislatures approving Kyoto did so on the express condition that any such "binding consequences shall be adopted by means of an amendment to this Protocol," requiring their subsequent, specific approval for the penalties to bind their nations.

It will be up to the individual Parties' legislatures whether to find offense in delegates appointed by another branch of government presuming to take it upon themselves to eschew this requirement, and adopt penalty procedures purporting to bind their countries under this agreement despite a condition stating otherwise.

Regardless, the UNFCCC which spawned Kyoto sets a specific target for GHG emissions – a Party's 1990 levels – and is universally accepted as being a voluntary agreement, although that is found nowhere in its text. The distinction appears to be that it uses "shall" a mere 118 times, in comparison with Kyoto's 158. After Montreal and until its treatment of enforcement and penalty provisions per Article 18 is changed, Kyoto is no more mandatory or binding than the Rio UNFCCC.

Details, Details

The substance of what was agreed by MOP delegates possibly moots the illegitimacy of adopting the enforcement mechanism outside of Article 18's requirements because, in its critical Decision "Procedures and mechanisms relating to compliance under the Kyoto Protocol",[47] the Montreal MOP arguably undid them.

Section "V" of the Decision creates the compliance branch, which under Section V.4 determines a Party's compliance with Kyoto's a) emission quotas (Article 3), b) reporting requirements (Articles 5.1, 5.2; 7.1 and 7.4), and c) eligibility requirements under Kyoto Articles 6 (JI), 12 (CDM) and 17 (emission trading).

The latter signals the Decision's key achievement in that Marrakech requires no determination of ineligibility to trade beyond a determination of Article 3 non-compliance: "Legal entities *may not transfer and/or acquire* under Article 17 during any period of time in which the authorizing Party does not meet the eligibility requirements."[48]

A Party that violates its quota is ineligible to trade, period. Yet V.6 asserts that:

> The enforcement branch shall be responsible for applying the consequences set out in section XV…. The consequences of noncompliance with Article 3, paragraph 1, of the Protocol to be applied by the enforcement branch shall be aimed at the restoration of compliance to ensure environmental integrity, and shall provide for an incentive to comply.[49]

This certainly appears to soften what was agreed at Marrakech. The threat of prohibition from "transfer[ing] and/or acquir[ing] under Article 17 during any period of time in which the authorizing Party does not meet the eligibility requirements" was the incentive: fail to comply and your plight is ever more expensive. By adopting this Decision, Montreal abandoned not only the mandatory nature and meaningful duration of the prohibition, but the prohibition itself in favor of forgiveness. Clearly, delegates saw the potential for an onerous Kyoto to drive away its few remaining adherents.

Section VI of this Decision, "Submissions," further sets forth how Marrakech's ostensibly self-executing prohibitions are not only discretionary, but must emerge as a result of discord within a Kyoto community that prizes "consensus" above all else. The Decision states that "questions of implementation" may be received from "Any Party with respect to itself" (1.a), and "Any Party with respect to another Party, supported by corroborating information" (1.b).[50]

Section VII, "Allocation and preliminary examination", asserts that the relevant branch (facilitation or enforcement) makes the preliminary examination to ensure a violation is not, *inter alia*, "*de minimis*" (2.a; no guidance or parameters provided).[51] Further, this Section establishes the discretion of the compliance branch and its option to simply make

a "decision not to proceed" even in the event it receives a question of implementation, and does not or cannot credibly dismiss it as *de minimis*.

As such, not only are the sanctions now not self-executing, but must be prompted by a complaint upon which this panel of insiders is permitted to reach a "decision not to act," or actually waive the intended consequences of violation. Similarly, the panel can dismiss a violation as *de minimis*, even though there is no indication whether this means by a matter of tons or a percentage point – the latter which can be thousands of metric tons of greenhouse gases.

Should a Party actually be designated a violator, instead of being banished from using "mechanisms" for the compliance period subsequent to that which it violated it may seek near-immediate reinstatement with little more than a promise not to do it again. This is because Section X, "Expedited procedures for the Enforcement Branch", seeks (as its title indicates) to further ensure vitiation of Marrakech's agreed prohibition under Article 17 by mandating a decision on reinstatement "as soon as possible", thus making sanctions, if they must be invoked at all, as temporary as possible.[52]

Section X.3 continues along the lines of X.2, but specifically focusing on ensuring that violating Parties can obtain reinstatement in the all-important emissions trading scheme. This section states that if a Party's ability to buy emissions is suspended it may request reinstatement "[o]n the basis of the compliance action plan submitted by the Party…and any progress reports submitted by the Party including information on its emissions trends."[53] Such reinstatement shall be granted unless the enforcement branch determines that the Party has not demonstrated that it will meet whatever "subsequent commitment period" promise is at issue.

It is worth noting that Kyoto Articles 5, 7 and 10 *already* require annual reports amounting to the required compliance plan and information on emission trends.

Section XI, "Appeals," asserts that the Party at issue may appeal decisions on grounds of denial of due process.[54] Given that no Party is going to appeal a decision *not* to proceed against it, such decisions are in effect final regardless of whether the panel reviewed the question of compliance upon a complaint, or on its own initiative.

Section XIII, "Additional period for fulfilling commitments", states (emphasis added):

> For the purpose of fulfilling commitments under Article 3, paragraph 1, of the Protocol, *a Party may, until the hundredth day after* the date set by the Conference of the Parties serving as the meeting of the Parties to the Protocol for the *completion of the expert review process* under Article 8 of the Protocol for the last year of the commitment period, *continue to acquire*, and other Parties may transfer to such Party, *emission reduction units, certified emission reductions, assigned amount units and removal units under Articles 6, 12 and 17 of the Protocol, from the preceding commitment period*, provided the eligibility of any such Party has not been suspended in accordance with section XV, paragraph 4.[55]

This is an important revision of Kyoto's deadline and five-year compliance period (Article 3, specifically 3.1, 3.7). Pursuant to Kyoto Article 7, incorporating by reference the requirement of the UNFCCC, Parties must submit annual GHG inventories.[56] Pursuant to Kyoto Article 8:

> 1. The information submitted under Article 7 by each Party included in Annex I shall be reviewed by expert review teams pursuant to the relevant decisions of the Conference of the Parties and in accordance with guidelines adopted for this purpose by the Conference of the Parties serving as the meeting of the Parties to this Protocol under paragraph 4 below. The information submitted under Article 7, paragraph 1, by each Party included in Annex I shall be reviewed as part of the annual compilation and accounting of emissions inventories and assigned amounts. Additionally, the information submitted under Article 7, paragraph 2, by each Party included in Annex I shall be reviewed as part of the review of communications…
>
> 3. The review process shall provide a thorough and comprehensive technical assessment of all aspects of the implementation by a Party of this Protocol. The expert review teams shall prepare a report to the Conference of the Parties serving as the meeting of the Parties to this Protocol**,** assessing the implementation of the commitments of the Party and identifying any potential problems in, and factors influencing, the fulfilment of commitments.[57]

Section XIII adds 100 days, after whatever day is established by a later COP for the completion of the "thorough and comprehensive technical assessment of all aspects of the implementation by [Parties] of this Protocol" (Kyoto Article 8.3), for violating Parties to purchase GHG credits or conclude agreements for credits *e.g.*, through JI and/or CDM.[58]

In other words, Section XIII adds another year to each and every Party's deadline to comply with Kyoto, effectively reducing its annual reduction requirement by 20%. Kyoto and its requirements are now inarguably a far cry from "as advertised."

Section XIII effectively decreases annual reduction requirements by 20%.

Section XV, "Consequences applied by the Enforcement Branch," asserts that where the enforcement branch determines a Party is not in compliance with eligibility requirements for JI or emission trading, "it shall [sic] suspend the eligibility of that Party" but, "[a]t the request of the Party concerned, eligibility may be reinstated" if the Party so requesting it claims that, although it failed to comply with its prior, more forgiving quota, it will comply with its subsequent-round promise, using the otherwise prohibited mechanisms.[59]

Again per Section XV and specific to violating its Article 3 emission quota, in such case the enforcement branch "shall declare that that Party is not in compliance…and shall apply the following consequences:

> (a) Deduction from the Party's assigned amount for the second commitment period of a number of tonnes equal to 1.3 times the amount in tonnes of excess emissions;
> (b) Development of a compliance action plan[60] …and
> (c) Suspension of the eligibility to make transfers under Article 17 of the Protocol until the Party is reinstated…[61]

As a result of the Montreal COP-MOP, Kyoto has been reduced to yet another voluntary climate treaty of the sort its champions rail against.

In sum, it appears that the worst likely sanction emerging from the Marrakech prohibition – "Legal entities may not transfer and/or acquire under Article 17 during any period of time in which the authorizing Party does not meet the eligibility requirements" – is a three-year probationary period under which a Party may still avail itself of the ostensibly banned "mechanisms" with the possible exception of a month or so during which the administrative processes work their gentle ministrations.

The Marrakech penalties adopted amid much self-congratulation offer no hint of such intentions as drafted. Yet, as a result of the Montreal COP-MOP, Kyoto has been reduced to yet another voluntary climate treaty of the sort its champions rail against.

Further Details: Supplementarity[62]

One other way in which Montreal may have taken Kyoto further away from its professed ideals is by thinning the meaning of the term "supplementarity". The meaning of such Kyotophile terminology can be challenging.

"Supplementarity", for example, is the principle that obtaining emission credits through Kyoto "mechanisms" shall be "supplemental" to actual domestic reductions below its 1990 baseline.[63] This seemingly implies that domestic reductions, not obtaining emission credits, must constitute the bulk – presumably the majority – of a Party's efforts to reduce emissions.

However, as of COP-11/MOP-1, "supplementarity" means that the use of the mechanisms actually can constitute the bulk of emission reduction efforts, and that instead "domestic action shall thus constitute *a significant element* of the effort made by each Party included in Annex I to meet its quantified emission limitation and reduction commitments." (*italics* added)[64]

The weakest reading of the phrase is that *actual* emission reductions must be achieved in order to participate in mechanisms. Instead, it does appear fair to presume no condition precedent exists of even achieving actual emission reductions below a Party's 1990 baseline to participate in mechanisms, given the continued refusal to define the term "supplemental to domestic action", as well as the guidance offered that "domestic action" – not even the more specific "emission reductions" – must be a "significant element" of a Party's "effort".

Paragraph 5 of this Decision leaves the matter to the Enforcement Branch of the Compliance Committee, which as demonstrated, *supra*, has plenary authority to *not* act or to waive violations *despite* the obvious intent that the Marrakech penalties as drafted be mandatory. Thus, compliance is in the eye of the beholder, and in this case the beholder has every reason to ensure the least burdensome implementation.

Kyoto not only was not strengthened with the purported addition of penalties, but actually was gutted by the Montreal COP-MOP.

It Gets Worse

Paragraph 5 of the Decision "Principles, nature and scope of the mechanisms" offers further indication that Kyoto not only was not strengthened with the purported addition of penalties, but actually was gutted by the Montreal COP-MOP. It seemingly marginalizes emission reductions even such that eligibility to engage in mechanisms in any second round no longer hinges on compliance with a Party's Article 3 quota. Instead, "eligibility to participate in the mechanisms by a Party included in Annex I shall be dependent on its compliance with methodological and reporting requirements under Article 5, paragraphs 1 and 2, and Article 7, paragraphs 1 and 4, of the Kyoto protocol."[65]

Suddenly Kyoto intends, certainly under the presumably applicable canon of construction *expressio unius est exclusio alterius,*[66] that whether and how well a Party fills out its paperwork – not whether it meets its vaunted reduction quota – determines whether it can trade or gain credit under JI and/or CDM.

Where Does Kyoto Go From Here?

Given Kyoto's history, the exempt majority's unyielding position and that several key countries among the covered few desire that *some* agreement billable as "Kyoto" continues, it appears that developments are likely to unfold along the following lines:

- The Kyoto-34 will continue, and break, their 2008-2012 mandatory reduction quotas, and quite possibly follow through on promises to deepen them.
- The 155 "no" countries will maintain their exemptions, although some may secure a voluntary "not to exceed" number as long as it carries further financial benefits.
- At first those parties heavily vested in the current dynamic – the EU and green pressure groups – will oppose this. Understanding their equal investment in having the process continue, in whatever form may be agreed and still called "Kyoto", however, they will accept compromises. These will likely include:
    - The "voluntary" countries will receive no penalties for exceeding their figure, but may sell credits if they fall below their voluntary quota.
    - This ensures the EU can buy plentiful credits, saving face by complying.
    - The EU avoids real cuts, which they understand are not possible.
    - They merely pay others for the rights of future growth.

- This would revive "Kyoto", if by retooling it into little more than expanding existing foreign aid programs.
- A benefit to those interests that oppose extending the Kyoto dynamic is the shift this represents from projecting and demanding mandatory, real cuts in the rich world to a focus on voluntary reductions in the developing world.
- The key is what "shall not exceed" numbers are offered
  - The exempt majority, those 155 "No" countries, will not accept real cuts.
  - It must be a number well above levels projected from significant economic growth, *i.e.*, designed to merely supply credits for sale to the covered 34.

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Discussions in Montreal briefly addressed the touchy subject of adding new parties to Kyoto's "mandatory" scheme.[67] Here is how "IISD" reported the relevant discussions:

> "Japan's proposal recognized that the Protocol is only a first step. Noting that emissions in non-Annex I countries are growing rapidly, it proposed initiating further consideration of Annex I commitments and preparing a review under Article 9, and recommended that COP 12 starts a review of the UNFCCC to construct an effective framework in which all parties participate to take action."[68]

How does the exempt majority (as represented by the "G-77 plus China") feel about that? As always, that global warming is the greatest threat facing mankind and therefore rationing is a great idea – so long as it only means for other people:

> "Reaffirming that no new commitments shall be introduced under the Protocol for non-Annex I Parties, the G-77/China proposal called for an open-ended *ad hoc* group to consider further commitments from Annex I countries with a view to adopting a result at COP/MOP 4."[69]

The focus will remain on ways to claim that the exempt emitters have joined Kyoto in some meaningful capacity, resulting in no global emissions reductions, but only in political claims of victory.

Given this, and that other proposals will doubtless emerge -- heretically deviating from the original Kyoto scheme but proffered in the name of pragmatically rescuing Kyoto from death inflicted by adhering to its own formula – the focus will remain on ways to claim that the exempt emitters have joined Kyoto in some meaningful capacity.

That scenario-in-sum is a "give" by the exempt majority for the "get" of selling GHG "credits" post-2012 if they fall below some future cap. Again, as this will yield no global reductions but in only political claims of victory (and a "reason" why catastrophic warming never arrives). While much of the Green establishment will be very noisy in opposition those parties crucial to how this plays out are the pragmatic policymakers, NGOs, and the rent-seeking businesses who give the agenda its cover.[70] Ultimately, all will realize that if the game dies after 2012, they killed the golden goose, which prospect will doubtless clarify their collective thinking.

Conclusion

The Montreal COP-MOP not only weakened Kyoto from its advertised status as a "legally binding" treaty mandating specific emission reductions among 34 countries by date certain, but also undid the one accomplishment of any substance achieved there.

Delegates accomplished this by a) adding an extra year for covered Parties to purchase or otherwise obtain GHG credits to retroactively apply toward the previous compliance period, effectively reducing Parties' annual emission reduction requirements by 20%; b) permitting the enforcement branch to simply decide *not* to proceed with a complaint or "inquiry" about possible violation of a Party's quota and possible, erstwhile mandatory resulting sanctions; and c) permitting a violator whose performance is subjected to scrutiny to avoid the prohibition on trading and JI by *promising* to come into compliance, thereby averting the prescribed sanctions with a possible exception of a brief period – meaningless given that compliance periods are measured over an average of a span, *e.g.*, five-years, and the grace period grants even more time to make up for lost credit purchases, if any.

Most important and as affirmed by these schemes, by ignoring the Article 18 condition that MOP-1 formally adopt, by an amendment requiring ratification, enforcement and penalty mechanisms, Montreal manifested the first of what likely appears to be a long string of occasions for the Kyoto establishment willfully ignoring clear requirements in the name of avoiding Kyoto's many inherent burdens.

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As such, Kyoto as billed is no more. Criticisms of alternatives, such as the Asia-Pacific Partnership for Clean Development, as "unenforceable", are not credible. The Montreal COP-MOP legacy will not be the one written to date. It will be as the beginning of the end for Kyoto, when Parties realized they could not, and would not try, to match rhetoric with action.

Endnotes

[1] See http://unfccc.int/meetings/cop_11/items/3394.php
[2] See, *e.g.*, http://www.indymedia.ie/newswire.php?story_id=73421&fontsizeinc=2
[3] See *e.g.*, http://www.cei.org/gencon/019,02222.cfm
[4] See, *e.g.*, http://news.bbc.co.uk/1/hi/sci/tech/1040091.stm
[5] The collapse of those talks at the EU's hands prompted curious intra-European squabbling. See, *e.g.*, http://news.bbc.co.uk/1/hi/uk_politics/1043430.stm
[6] See, *e.g.*, http://unfccc.int/files/press/releases/application/pdf/041218pr_cop10.pdf
[7] Found at http://unfccc.int/essential_background/convention/background/items/1349.php.
[8] http://unfccc.int/files/meetings/cop_11/application/pdf/cop11_00_dialogue_on_long-term_coop_action.pdf
[9] Kyoto's Article 3.9 reads "Commitments for subsequent periods for Parties included in Annex I shall be established in amendments to Annex B to this Protocol, which shall be adopted in accordance with the provisions of Article 21, paragraph 7. The Conference of the Parties serving as the meeting of the Parties to this Protocol shall initiate the consideration of such commitments at least seven years before the end of the first commitment period referred to in paragraph 1 above." [NB: that period ends 12/31/2012, meaning such initiation must begin by 2005] http://unfccc.int/essential_background/kyoto_protocol/items/1678.php
[10] See, *e.g.*, http://news.independent.co.uk/environment/article332384.ece
[11] http://unfccc.int/cop7/documents/accords_draft.pdf
[12]http://unfccc.int/files/meetings/cop_11/application/pdf/cmp1_23_7_procedures_and_mechanisms_compliance.pdf
[13] "Principles, nature and scope of the mechanisms pursuant to Articles 6, 12 and 17 of the Kyoto Protocol", found at http://unfccc.int/files/meetings/cop_11/application/pdf/cmp1_14_principles_nature_and_scope_art6_12_17.pdf
[14] See July 1997 Byrd-Hagel Resolution, e.g., at http://www.nationalcenter.org/KyotoSenate.html.
[15] "Procedures and mechanisms relating to compliance under the Kyoto Protocol," found at http://unfccc.int/files/meetings/cop_11/application/pdf/cmp1_23_7_procedures_and_mechanisms_compliance.pdf
[16] http://unfccc.int/cop7/documents/accords_draft.pdf
[17] "The Enforcement Branch, for its part, is responsible for determining whether an Annex I Party is not complying with its emission target or reporting requirements, or has lost its eligibility to participate in the mechanisms." http://unfccc.int/kyoto_mechanisms/compliance/items/3024.php
[18] Kyoto Article 3 provides that covered Parties must meet their promised emission reduction, *e.g.*, 8% below 1990 for the collective EU-15, through a figure averaged over the five-year span 2008-2012.
[19] See generally, Horner, "The Gambler's Dilemma: Europe and Kyoto, A post-Gleneagles, post-Laos assessment of the truth -- and consequences -- surrounding the EU and Kyoto post-2012." European enterprise Institute, October 2005 http://www.european-enterprise.org/public/docs/policy_paper.pdf
[20] See discussion of Europe's projections at http://www.999today.com/environment/news/story/2529.html, Japan's numbers at http://unfccc.int/resource/docs/natc/cannce3.pdf, and Canada's performance at http://pqasb.pqarchiver.com/thestar/751559401.html?did=751559401&FMT=ABS&FMTS=FT&date=Dec+3,+2004&author=&pub=Daily+Mercury&desc=Missing+mark+on+Kyoto.
[21] Russia actually expended great energy seeking to initiate a process along these lines, ensuring its role in future talks. See the Pew Center, "The final negotiations on the decision went through the night as Russia…continued to argue in plenary for a procedure allowing non-Annex I countries to take 'voluntary commitments.' As a compromise, Russia accepted text in the COP/MOP conclusions referencing its proposal and inviting the President to undertake consultations and report back at COP/MOP 2."
[22] Found at http://unfccc.int/files/meetings/cop_11/application/pdf/cop11_00_dialogue_on_long-term_coop_action.pdf
[23] Id. at pp. 1-2.
[24]Found at http://unfccc.int/files/meetings/cop_11/application/pdf/cmp1_00_consideration_of_commitments_under_3.9.pdf
[25] http://unfccc.int/essential_background/kyoto_protocol/items/1678.php

[26] That is, nation Parties and/or, per Kyoto Article 4, the EU-15 if it fails to meet its collective burden.
[27] See for example the contemporaneous statement by the European Council for an Energy Efficient Economy: "However, the EU won a condition that countries may only use the protocol's vital 'flexible mechanisms' of meeting targets through emissions trading and funding climate gas-cutting projects abroad if they accept its compliance regime. *This means* that if they fail to comply with the Protocol's strict monitoring and reporting provisions, or *if they exceed emissions targets at the end of the first commitment period, they will be ineligible to trade*" (emphasis added).
http://www.eceee.org/latest_news/2001/news20011113.lasso
[28] http://unfccc.int/kyoto_mechanisms/compliance/items/3024.php
[29] Marakech, Annex: Modalities, rules and guidelines for emissions trading, Para. 5 (p. 99) (emphasis added). See http://unfccc.int/essential_background/kyoto_protocol/items/1678.php for Article 17, Kyoto's provision allowing for trading of emission credits toward a Party's quota. The deliberate phrase "during any period of time" is noteworthy, for reasons discussed, *infra*, for its implication that a violation of the first period precludes emission trading in the subsequent period.
[30] http://unfccc.int/kyoto_mechanisms/compliance/items/3024.php
[31] For example, "'The Kyoto protocol is saved,' chief EU negotiator Olivier Deleuze, the Belgian energy minister, said." http://www.climnet.org/COP7/cop7%20news.htm
[32] Found at http://www.fco.gov.uk/Files/kfile/PostG8_Gleneagles_CCChapeau.pdf.
[33] See, *e.g.*, http://www.dfat.gov.au/environment/climate/ap6/charter.html.
[34] Article 18 specifically demands, "The Conference of the Parties serving as the meeting of the Parties to this Protocol shall, at its first session, approve appropriate and effective procedures and mechanisms to determine and to address cases of non-compliance with the provisions of this Protocol, including through the development of an indicative list of consequences, taking into account the cause, type, degree and frequency of non-compliance. Any procedures and mechanisms under this Article entailing binding consequences shall be adopted by means of an amendment to this Protocol."
[35] http://www.iisd.ca/
[36] http://www.iisd.ca/vol12/enb12291e.html. See Saudi proposal at http://unfccc.int/resource/docs/2005/cmp1/eng/02.pdf.
[37] http://www.pewclimate.org/what_s_being_done/in_the_world/cop11/index.cfm
[38] "Procedures and Mechanisms," at p. 1.
[39] http://www.iisd.ca/vol12/enb12291e.html
[40] Europe's national allocation plans (NAPs) determine how much C02 a covered state may emit and the number of allowances - essentially certificates for the right to emit, or use "fossil fuels" - that each covered installation receives. Under the scheme, companies exceeding their quota can buy credits on a market, and those that come in below can sell the difference.
[41] http://www.iisd.ca/vol12/enb12291e.html
[42] Canada's warning now appears even more prophetic, with the conventional wisdom being that its new government plans not to withdraw from Kyoto but merely ignore its emission reduction promise. See, *e.g.*, "Will Kyoto die at Canadian hands?" http://news.bbc.co.uk/2/hi/science/nature/4650878.stm.
[43] Id.
[44] "Using" as employed here is euphemistic for "complying with".
[45] http://www.iisd.ca/vol12/enb12291e.html Delegates agreed to try and resolve the amendment question by MOP-3, or December 2007, by which time Kyoto will be mere days from actually being in effect, and the window effectively closed to comply with Articles 18 and 20 and adopt binding enforcement and penalty procedures in accordance with Kyoto.
[46] U.S. Constitution, Article II, Section 2: "[The President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur."
[47] "Procedures and Mechanisms,"
http://unfccc.int/files/meetings/cop_11/application/pdf/cmp1_23_7_procedures_and_mechanisms_compliance.pdf
[48] Annex: Modalities, rules and guidelines for emissions trading, Para. 5 (p. 99) (emphasis added).
[49] "Procedures and Mechanisms," at p. 5.
[50] Id.
[51] Id., at p. 6.

[52] Id. at pp. 8-9. "Where the eligibility of a Party included in Annex I under Articles 6, 12 and 17 of the Protocol has been suspended under section XV, paragraph 4, the Party concerned may submit a request to reinstate its eligibility, either through an expert review team or directly to the enforcement branch. If the enforcement branch receives a report from the expert review team indicating that there is no longer a question of implementation with respect to the eligibility of the Party concerned, it shall reinstate that Party's eligibility, unless the enforcement branch considers that there continues to be such a question of implementation, in which case the [expedited procedure] shall apply. In response to a request submitted to it directly by the Party concerned, the enforcement branch shall decide as soon as possible, either that there no longer continues to be a question of implementation with respect to that Party's eligibility in which case it shall reinstate that Party's eligibility, or that the [expedited procedure] shall apply." X.2. Whether there is no longer a question of implementation with respect to eligibility is discretionary. Id.
[53] Id. at p. 9.
[54] Id.
[55] Id. at p. 10.
[56] Typically, these inventories are required within four months (April 15), or by the end of the first third of the subsequent year, yet are typically filed much later (if at all) such that the UNFCCC has found it necessary to remind Parties of their obligation (see http://unfccc.int/files/parties_and_observers/notifications/application/pdf/notice_050912_kyoto_reports.pdf).
[57] Kyoto, found at http://unfccc.int/essential_background/kyoto_protocol/items/1678.php.
[58] "Procedures and Mechanisms," at p. 10.
[59] Id. at pp. 11-12.
[60] Again, such reports are already required pursuant to Kyoto Articles 5, 7 and 10.
[61] "Procedures and Mechanisms," at p. 11-12.
[62] Like "operationalize, *supra*, this is one of many words requiring, in order to write about Kyoto, one to add to one's computer dictionary, with subsidiarity, supplementarity, additionality, and so on.
[63] Kyoto Article 6, reading in pertinent part, "1. For the purpose of meeting its commitments under Article 3, any Party included in Annex I may transfer to, or acquire from, any other such Party emission reduction units resulting from projects aimed at reducing anthropogenic emissions by sources or enhancing anthropogenic removals by sinks of greenhouse gases in any sector of the economy, provided that:
(d) The acquisition of emission reduction units shall be supplemental to domestic actions for the purposes of meeting commitments under Article 3."
[64] Decision-/CMP.1 Principles, nature and scope of the mechanisms pursuant to Articles 6, 12 and 17 of the Kyoto Protocol, found at http://unfccc.int/files/meetings/cop_11/application/pdf/cmp1_14_principles_nature_and_scope_art6_12_17.pdf.
[65] Id.
[66] "The inclusion of one is to the exclusion of all others".
[67] This is according to Kyoto, Article 9, paragraph 1 reading "The Conference of the Parties serving as the meeting of the Parties to this Protocol shall periodically review this Protocol in the light of the best available scientific information and assessments on climate change and its impacts, as well as relevant technical, social and economic information. Such reviews shall be coordinated with pertinent reviews under the Convention, in particular those required by Article 4, paragraph 2(d), and Article 7, paragraph 2(a), of the Convention. Based on these reviews, the Conference of the Parties serving as the meeting of the Parties to this Protocol shall take appropriate action."
[68] http://www.iisd.ca/vol12/enb12291e.html. IISD continued, "While there was no separate text issued on Protocol Article 9, parties agreed to President Dion's proposal to include in the report of the meeting an invitation for parties to submit relevant information and views on how best to proceed under Article 9, by September 2006." Id. Regarding adding more Parties – but not really, only as "voluntary" credit spigots – IISD saw "The Russian Federation's last-gasp push to have a reference to voluntary commitments in the decision on Article 3.9 [as suggesting] that they have joined the group of countries that may not be willing to take on commitments unless large developing countries are part of a future deal." Id.
[69] Id.
[70] See, *e.g.*, "Labor's left-wing powerbroker Martin Ferguson has urged the party to renounce the Greens and support the Howard Government's Asia-Pacific climate partnership. Mr. Ferguson, who also reiterated

his support for nuclear power, opened a split in the party and the Left after acting Labor leader Jenny Macklin yesterday criticised the six-nation Asia- Pacific Partnership on Clean Development and Climate talks in Sydney." The Australian, 13 January 2006, found at http://www.theaustralian.news.com.au/common/story_page/0,5744,17808347%255E601,00.html. See also Ferguson, "It's time to abandon the political correctness espoused by the green movement. Let's be real: without getting business on board we cannot achieve anything." 13 January 2006, found at http://www.theaustralian.news.com.au/common/story_page/0,5744,17808345%255E601,00.html.

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