

# Procedural Rules of the Climate Negotiations<sup>1</sup>

## 1. Introduction

The formal rules for the conduct of the negotiations are contained in the Convention's Rules of Procedure.<sup>2</sup> Article 7.2(k), together with Article 7.3 of the Convention, commended the COP, at its first session, to agree and adopt, by consensus, rules of procedure for itself and for its subsidiary bodies (SBs). The rules were to include decision-making procedures for matters not already covered in the text of the Convention itself. However, the Draft Rules were not adopted at COP1 because the Parties were unable to agree on the voting rule (Rule 42). Since then the Draft Rules have been "applied" at each session of the COP and SBs, except for the disputed draft Rule 42.

Pursuant to Article 13.5 Kyoto Protocol, the Draft Rules apply to sessions of the Meetings of the Parties as well. By contrast, separate, specific rules of procedure apply to some Convention and Protocol bodies such as the Adaptation Fund Board, Compliance Committee or CDM Executive Board.

## 2. Structure and content

The Rules of Procedure<sup>3</sup> cover all aspects of the negotiation process under the climate change regime. Their overall structure is as follows:

Rule 1	Scope
Rule 2	Definitions
Rule 3	Place of sessions
Rules 4-5	Dates of sessions
Rules 6-8	Observers
Rules 9-16	Agenda
Rules 17-21	Representation and credentials
Rules 22-26	Officers
Rule 27	Subsidiary Bodies
Rules 28-29	Secretariat
Rules 30-40	Conduct of business
Rules 41-53	Voting
Rules 54-56	Languages
Rule 57	Sound records of the sessions of the COP
Rule 58	Amendments to rules of procedure
Rule 59	Overriding authority of the Convention

### a) Agenda (Rules 9-16)

A provisional agenda is put together by the Secretariat for each COP and SB session, with the agreement of the President of the COP.<sup>4</sup> It is distributed to Parties at least six weeks before the

<sup>1</sup> This section is based on a presentation by Linda Siegele on 3 April 2013.

<sup>2</sup> Adoption of the Rules of Procedure, Note by the Secretariat, FCCC/CP/1996/2. Available at <http://unfccc.int/resource/docs/cop2/02.pdf>

<sup>3</sup> Whilst technically still in draft form - as they have never been adopted - we hereafter refer to them as the "Rules of Procedure" since their application (except for the voting rule) is not contested.

<sup>4</sup> Rule 9.

session in all six official languages.<sup>5</sup> Rules 10, 12 and 16 dictate what goes into the agenda. This includes items whose inclusion had been decided at a previous session, any item whose consideration was not completed at the previous session, and items proposed by Parties. In addition, Parties may propose additional items to be included in a supplementary provisional agenda, after the agenda has been circulated but before the opening of the session. When adopting the agenda, the COP can, and often does, decide to add, delete, defer or amend items, although items will only be added if considered by the COP to be urgent and important.<sup>6</sup> The practice of the COP and SBs, although this is not specifically required by the Convention or the Rules, has been to adopt the agenda on the basis of consensus.

#### **b) Representation and Credentials (Rules 17-21)**

Parties participating in a session are represented by a delegation consisting of a head of delegation and other accredited representatives. The delegation's credentials evidence its authority to act on behalf of a Party and must be submitted to the Secretariat no later than 24 hours after the opening of a session. The Bureau examines the credentials and submits a report to the COP. Parties are allowed to participate on a provisional basis pending the COP's acceptance of their credentials.

#### **c) The Bureau (Rule 22)**

The Bureau is the governing body of a session. It is made up of eleven members, including the President of the COP, seven Vice-Presidents, the Chairs of the SBs and a Rapporteur. Each of the five regional groups is represented by two Bureau members, and one Bureau member represents the small island states. Officers have a one year mandate that can be extended to a second year. The Bureau's functions are not defined in either the Convention or the Rules. Its principal task is to deal with procedural issues relating to the organisation of the COP. In practice, it has a lot of discretion as to how meetings are run. It also performs an informal advisory role, giving guidance to the President on how to conduct negotiations.

#### **d) Duties of the COP President (Rule 23)**

The position of the COP President is usually held by the environment minister of the host country. His role is to ensure an orderly conduct of business and is therefore critical. The Rules provide that s/he "... shall have complete control of the proceedings and over the maintenance of order...".<sup>7</sup> The specific rights and duties include:

- Declaring the opening and closing of a session, presiding over meetings and ensuring the observance of the rules;
- According the right to speak;
- Putting questions to the vote and announcing decisions;
- Ruling on points of order;
- Proposing the closure of the list of speakers, and limiting their time; and
- Suspending and adjourning a meeting.

Whilst the President has lots of discretionary powers and plays a vital role in bringing Parties together to reach agreement, by for example putting forward compromise proposals and holding consultations, he remains under the authority of the COP.

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<sup>5</sup> Rule 11.

<sup>6</sup> Rule 13.

<sup>7</sup> Rule 23.1.

#### **e) Points of order, motions and proposals (Rules 34-40)**

Parties may raise points of order if they consider that the President has failed to follow a rule of procedure, and the President must rule on the point of order immediately.<sup>8</sup> It is possible for a representative to appeal against the ruling. In this case, the Rules provide that the appeal be put to the vote. The President's ruling will stand unless overruled by a majority of the Parties present and voting. In practice, however, whilst points of order are raised frequently, voting (almost) never happens.

Parties may also raise motions, calling for a decision on the competence of the COP to discuss any matter or adopt a proposal; the suspension or adjournment of a meeting; or the adjournment or closure of the debate on a particular question.<sup>9</sup> Such motions must be put to the vote before discussion on the substance can proceed. Whereas points of order are procedural in nature, motions can be procedural or substantive and be made in writing.

Making proposals involves a formal process. Proposals and amendments to proposals will normally be submitted in writing by the Parties and handed to the secretariat, which will circulate copies to delegations. Proposals submitted during sessions are however often circulated as 'non-papers' to save time and paper. As a general rule, no proposal may be discussed unless copies of it have been circulated to delegations not later than the day preceding the meeting. The President may, however, waive this requirement.<sup>10</sup>

In practice, the fast moving pace of the negotiations makes a strict adherence to the Rules unpractical, and proposals (and amendments to proposals) are often made, in writing and orally, without much advance notice. By contrast, the procedure relating to proposed amendments, annex or protocol to the Convention (and any proposed amendment to an annex) require that the text be communicated to the Parties by the secretariat at least six months before the session at which it is proposed for adoption.<sup>11</sup>

#### **f) Voting (Rules 41 – 53)**

To date, the Parties have been unable to agree on the first paragraph of draft Rule 42 which deals with voting on substantive matters and, as a result, the whole of draft Rule 42 has not been applied. In the absence of agreed voting rules, the practice of the Parties has been to adopt decisions and conclusions by consensus. "Consensus" is not defined in the Convention or the Rules of Procedure. Whilst there are different interpretations of what it means, it is generally agreed that it is distinct from "unanimity". It is usually defined in the negative sense as an absence of stated objections.<sup>12</sup> In practice, it is for the COP President or SB Chair to determine whether, in the circumstances of a particular case, Parties have reached consensus.

The first paragraph of draft Rule 42 contains two alternatives. Alternative A requires Parties to make every effort to reach agreement by consensus. If that fails, and as a last resort, decisions will be taken by a two-thirds majority vote of the Parties present and voting, with certain exceptions (such as the adoption of financial rules and the rules of procedure themselves, which require consensus).

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<sup>8</sup> Rule 34.

<sup>9</sup> Rules 35 & 38.

<sup>10</sup> Rule 36.

<sup>11</sup> UNFCCC, Articles 15(2) and 17(2); Kyoto Protocol Article 20(2); Rule 37.

<sup>12</sup> For a more detailed discussion on the meaning of consensus, see the LRI Briefing Paper 'Issues on Consensus in the UNFCCC Process, 8 December 2011, available through [www.legalresponseinitiative.org](http://www.legalresponseinitiative.org).

Under alternative B, decisions are taken by consensus, except for decisions on financial matters which will be taken by a two-thirds majority vote.

In addition, the Convention itself makes provision for the adoption of amendments and for the adoption of new annexes and amendments to annexes.<sup>13</sup> Article 15(3) calls on the Parties to make every effort to reach agreement on any proposed amendment to the Convention by consensus. If all efforts to reach consensus have been exhausted the amendment can as a last resort be adopted by a three-fourths majority vote of the Parties present and voting at the meeting. Under Article 16(2), the same procedure applies for the adoption and amendments of annexes. Under the Kyoto Protocol, procedures for the adoption of amendments and new annexes, and amendments to these, are set out in Articles 20 and 21 respectively. The requirements are the same as for the Convention.

### **3. Application in practice**

In the past Parties have occasionally used the Rules for strategic gain - for example, refusing to allow an item onto the agenda to avoid public criticism. Recently, at SBI38 (in Bonn in June 2013) Parties could not agree to include an additional issue (procedural and legal issues relating to decision-making by the COP and CMP) proposed by Russia on the agenda. At the end of the two week session, the SBI closed without having adopted an agenda and formally commencing its substantive work.

What happened in Bonn has been a new development in UNFCCC meetings. When there had been disagreement about potential new agenda items in the past, those items were usually rejected or held "in abeyance" which means that it is neither discussed at the session, nor struck off the agenda. The issue can be carried over to the provisional agenda of the next session. This practice has allowed the adoption of the agenda and the substantive work to go ahead. Agenda item 4(b) of the provisional SBI agenda on 'Information contained in National Communications from non-Annex I Parties', for example, has been repeatedly placed in abeyance (because of developing countries' objections).

At COP15 (in Copenhagen), the Copenhagen Accord had to be "taken note of" rather than adopted as a handful of Parties expressly objected to its adoption. At COP16 (in Cancun), by contrast, only one Party (Bolivia) objected to the adoption of the Cancun Agreements. The COP President, however, found that consensus had been achieved effectively overruling Bolivia's objection.

At COP18 (in Doha), during the last CMP plenary, Russia indicated it wanted to make an intervention as it had procedural and substantive issues with the KP Decision. The President, however, gavelled through the CMP decisions and then closed the meeting without giving Russia an opportunity to intervene. It was only in the joint meeting of the COP and CMP that Russia's intervention was heard. But because it was the joint meeting, it was then treated as a point of order with no effect on the adoption of the KP decision. The President merely noted Russia's objection in the report of the session.

### **4. Informal approaches**

In addition to the formal Rules, a number of informal practices have developed over the time. For example, Parties have applied the Rules of Procedure to all inter-sessional meetings, agenda items have been added by way of COP decisions and observers have been included in non-plenary

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<sup>13</sup> Articles 15 and 16, UNFCCC.

sessions.<sup>14</sup> In relation to working groups and other informal groups, a practice has emerged of appointing two Co-Chairs – one each from an Annex I and non-Annex I Party – to ensure that the concerns of all Parties are addressed in a fair and balanced manner.

## 5. Other international convention processes

Like the procedural rules of the UNFCCC process, the voting provisions in the rules of procedure to the Convention on Biological Diversity (CBD)<sup>15</sup> are also contested. All other rules have been formally adopted by the Parties. The practice of the CBD COPs has therefore been to adopt decisions by consensus, too. The interpretation of consensus has also been controversial. At the CBD's sixth COP, for example, "significant consensus" was declared despite the existence of a formal objection by Australia. Following complaints from many delegates that the COP was being "hijacked by a lone delegation", the European Chairman declared that there was "significant consensus" and ruled the decision adopted.<sup>16</sup>

The UN General Assembly requires a two-third majority on important questions, such as peace and security issues, membership of the Security Council and admission of new members, but a simple majority of those present and voting on all other matters.

Consensus is not always required for the adoption of COP decisions in other multilateral environmental agreements. The Montreal Protocol to the Vienna Convention on the Protection of the Ozone Layer requires a two-thirds majority of those present and voting for matters of substance, and a simple majority for procedural matters. This majority decision-making power was incorporated to provide a more flexible and efficient mechanism to address the urgent threat of ozone depletion.<sup>17</sup>

## 6. Conference documents

In order to navigate the UNFCCC meeting process and follow the main strands of the negotiations delegates rely on the various documents issued in advance and during sessions. However, the time to review and study these documents is often limited. The most important ones include the following:

- The annotated provisional agenda: it lists all agenda items with background information on each item, identifies actions to be considered, lists documents and provides links. Each UNFCCC body that meets has its own annotated agenda.
- Note from the Chair: the Chair sets the agenda, so the note will give guidance on how the Chair sees negotiations to be conducted at the meeting. It also provides some insight into the expected debate.
- Draft negotiating text: prepared by the relevant presiding officer this is essentially a compilation of Parties' views expressed either orally during debates or through written submissions. It may first take the form of a "synthesis of proposals", i.e. a simple collation of all proposals into a single document, and then a "consolidated text" in which similar proposals have been merged and square brackets indicate areas of disagreement.

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<sup>14</sup> The rules for the participation of observer organisations are set out in the Convention, the draft Rules of Procedure and the 2003 Guidelines for the participation of representatives of non-governmental organizations at meetings of the bodies of the UNFCCC. Although the latter two are not legally binding, they are followed in practice.

<sup>15</sup> See <http://www.cbd.int/convention/rules.shtml> at Rule 40, which provides for a two-thirds majority.

<sup>16</sup> See note 23, at para.28.

<sup>17</sup> See note 23, at para.25.

- Expert reports on specific subject areas.
- Non-papers: these are informal in-session documents, used to circulate preliminary proposals and progress issues under negotiation. The Chair's summary of the debate's alleged outcomes may, for example, first be produced as a non-paper.
- Other documents that may be useful to have to hand are decisions or drafts from earlier conferences, the texts of the Convention and KP and the (Draft) Rules of Procedure.

Conference documents are available on the UNFCCC website, at <http://unfccc.int/2860.php>.<sup>18</sup> The relevant meeting webpages (accessible from the website) include all documents relating to that meeting (agenda, reports, meeting papers, progress reports, submissions, technical papers etc) in chronological order, Parties' submissions and others such as workshop programmes and presentations. The Daily Programme (link from the UNFCCC website front page) lists the day's meetings, including unofficial side events and media briefings. It also contains information about the status of agenda items and documents.

## 7. Document symbols

Different types of documents have different symbols. For more information, please consult the Introductory guide to Documents, available in English at [http://unfccc.int/documentation/introductory\\_guide\\_to\\_documents/items/2644.php](http://unfccc.int/documentation/introductory_guide_to_documents/items/2644.php).

For example, in "FCCC/AWGLCA/2010/MISC.2/Add.1"

- FCCC refers to the organ group;
- AWGLCA refers to the subsidiary body or working group;
- 2010 refers to the year or session;
- MISC refers to the nature – here miscellaneous – of the document; often contains Parties' submissions; others include "CRP" (conference room papers) and "L" documents (draft reports and draft outcome texts);
- .2 is the number;
- Add.1 indicates modifications.

## 8. Drafting text and interventions

There are different tools at the Parties' disposal for participating in the negotiations. For example, Parties may produce conference room papers - in-session documents containing new proposals or negotiating text, or outcomes of in-session work. A Party may make an oral intervention backed by a written submission for inclusion in the Chair's text or non-paper. Alternatively, it could also focus on sharing views and building consensus with other Parties in an informal context – e.g. through bilateral meetings. Agreed outcomes are captured in COP decisions.

Drafting decision text and interventions is a demanding and technical exercise. Different decisions and interventions will command different requirements. Delegates need to take into account their governments' and regional group's policies and objectives on different issues, decide on how to best articulate those positions and what different options are available. What follows here are a few additional general considerations to think about.

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<sup>18</sup> Some will also be available from the Documents Desk in the conference centre.

## a) Drafting decisions

Draft decisions of COP that frame the agreement of Parties on substantive issues under negotiation usually consist of:

Title	
The Preamble (“Recalling...”, “Noting...”)	Puts the operative part in context Has no binding legal value Is used to guide interpretation of binding paragraphs, or to strategically include language
The Operative Part (or “Decision Text”)	Represents the actual “agreement” between Parties Prevails in direct conflict with preambular language Where ambiguous, preambular language used to interpret the Parties’ intention

When preparing to draft some negotiation text, it may be helpful to first consult some of the following documents:

- Past decisions on similar or complementary subjects;
- Conclusions from inter-sessional meetings;
- Chair’s text ; it is a non-paper with no legal basis, but helps the Parties articulate their ideas;
- Other UN resolutions;
- Suggestions from stakeholders, such as NGOs and other stakeholder groups.

It is important to be careful with wording (and punctuation) when drafting texts. There are many phrases and words whose precise meaning can be relevant. For example:

- “May” – permissive and discretionary
- “Should” – not required but advised
- “Shall”, “Will”, “Must” – almost always binding unless combined with a weaker word, e.g. “shall endeavour”
- “And” – all connected clauses or provisions must be satisfied
- “Or” – only one of the connected clauses or provisions must be satisfied
- “As appropriate” / “If necessary” – gives Parties discretion
- “To the extent feasible/practicable” – to take action within the limits set by the Party taking action
- “Consider” – think about further without necessarily making a decision
- “Towards” – allows approximating a goal without getting there
- “To organize a workshop” – often used as a fallback when agreement cannot be reached, and usually a delaying tactic

Note also the use of similar words and expressions (underlined) in the following two extracts:

“Defines a new market-based mechanism, operating under the guidance and authority of the Conference of the Parties, to enhance the cost-effectiveness of, and to promote, mitigation actions, bearing in mind different circumstances of developed and developing countries, which is guided by decision 1/CP.16, paragraph 80, and which, subject to conditions to be elaborated, may assist developed countries to meet part of their mitigation targets or commitments under the Convention;” (Decision 2/CP.17, para 83)

*“Appreciates* the need to explore a range of possible approaches and potential mechanisms, including an international mechanism, to address loss and damage, with a view to making recommendations on loss and damage to the Conference of the Parties for its consideration at its eighteenth session, including elaborating the elements set out in decision 1/CP.16, paragraph 28(a–d);” (Decision 7/CP.17, para 5)

## **b) Oral interventions**

If you believe the Chair has not followed the Rules of Procedure, you may indicate it by making a point of order stating, for example: “I would like to make a point of order”. For more details on when points of order can be raised see above.

Parties may provide input on how the Chair should deal with an issue (whether procedural or substantive) by making a motion. This can also be used as a tactical tool to deflect attention from substantive issues.

Country representatives present national positions after the negotiation blocs have taken the floor. When presenting country positions delegates often seek to follow a few basic steps:

- Raising country flag and waiting to be called
- Acknowledge President/Chair: “Thank you, Madame Chair”
- Associate with a larger group or announce their affiliation: “Madame Chair, I would like to associate myself with the remarks made by.... I present the following remarks on behalf of...”
- Remain positive and focus on positive aspects of the negotiation
- Making a clear, concise, and focused statement: “Madame Chair, my intervention will be brief. My delegation would simply like to highlight two concerns...”
- Diplomatically offer a different viewpoint to other interventions: “Madame Chairman, my colleague from Germany has eloquently raised some very important points... However, one area where her approach might prove problematic is...”
- Conclude by suggesting their view is most reasonable
- Thanking the President/Chair

## **9. Practical exercises**

### **a) Words**

Read the following 3 sentences:

(1) “The Parties decide to request that the secretariat organize a workshop on the provision of scaled up funding to developing country Parties...”

(2) “Scaled up predictable, new and additional, and adequate funding shall be provided to developing country Parties ....”

(3) “Developed country Parties shall consider taking steps, as appropriate and to the extent practicable, towards scaled up... funding for developing country Parties.”

Then (1) decide on the weakest and strongest version and (2) in the underlined version replace “and” with “or”, “should” with “shall” and delete “adequate”. Discuss the effect of the resulting revised sentence.

Sentence (2) reflects the strongest and most far reaching commitment while sentence (1) only initiates a process without a significant value statement. While 'shall' indicates a strong willingness and commitment "should" merely states that it is not required but advised. In the case of "and" both criteria (new and additional) must be satisfied – not just one ("or"). Without "adequate" funding is further qualified and even vaguer.

#### **b) Text**

Find decision 1/CP.17 and summarize the main content with relevance for the ongoing negotiations.

Decision 1/CP.17 on the establishment of the ADP is available at <http://unfccc.int/resource/docs/2011/cop17/eng/09a01.pdf#page=2> It

- launches a process to develop a protocol, another legal instrument or an agreed outcome with legal force under the Convention (ADP),
- establishes the Ad hoc Working Group on the Durban Platform for Enhanced Action (ADP),
- which is to complete its work no later than 2015,
- by adopting a protocol, another legal instrument or an agreed outcome with legal force to come into effect in 2020, and
- launches a workplan on enhancing mitigation ambition to identify and to explore options for a range of actions that can close the ambition gap.

How would such a new Protocol come into being?

It would be adopted under Article 17 of the UNFCCC by consensus - because there is no voting rule for a protocol in the Convention, and the Rules of Procedure (on voting) were not agreed. Rules for ratification and entry into force of the protocol would be found in the Protocol itself (e.g. 55% of the Parties accounting for a specific amount of emissions). To be agreed by 2015 it might have to be quite a simple text.