

Issues on Consensus in the UNFCCC Process

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Introduction – The Issues

1. The concept of “consensus” is important in terms of the decision making process of the Conference of the Parties (COP), Conference of the Parties serving as the Meeting of the Parties to the Kyoto Protocol (CMP) and subsidiary bodies, working groups and committees of the United Nations Framework Convention on Climate Change (Convention) and the Kyoto Protocol.
2. The draft rules of procedure¹ are applied by the COP and its subsidiary bodies except for Rule 42, concerned with voting. Each of the two alternatives (A and B) of the draft rules provides for rules relating to the adoption of COP decisions and includes reference to consensus.
3. Although draft Rule 42 has not been adopted, the COP has adopted the practice of making decisions by consensus.
4. The importance of the concept of consensus was highlighted at Cancun where the principal COP/CMP decisions were taken despite a sustained stated objection by Bolivia.
5. Earlier this year, Papua New Guinea and Mexico submitted a proposal to amend the voting rules, the essence of which is to amend the Convention to allow an exception to the default rule of consensus and permit decisions to be taken by a three-fourths majority. This proposal is being discussed at COP17 in Durban. The implications of the proposal are discussed in a separate briefing paper.²
6. This present paper considers;
 - (A) The meaning of consensus in the UNFCCC process;
 - (B) Precedents for consensus issues in this process;
 - (C) Precedents for consensus in other fora; and
 - (D) Possible future developments in relation to consensus.

¹ FCCC/CP/1996/2.

² See LRI Briefing Paper No.36, ‘Proposal by Mexico and PNG to amend the COP’s voting rules’, 24 November 2011.

The meaning of consensus

7. At its most basic level, consensus means agreement, and the concept in private law of “consensus ad idem” is well known as an element of concluding a binding bipartite agreement.
8. In the context of Multilateral Environmental Agreements it raises a question as to the position where there is agreement, but not by all those entitled to vote.
9. On the one hand, consensus plainly requires more than a majority vote, and indeed it is contrasted in various contexts with 2/3 and 3/4 majorities, showing that a higher degree of agreement than this is required.³ The relative political merits of consensus versus majority decision have been extensively debated and are outside the scope of this paper.
10. On the other hand, consensus is generally accepted to be satisfied by less than unanimity in the sense of positive agreement by all, and indeed it is most commonly defined in the negative sense as an absence of stated objection.⁴ This definition is at least easy to apply, subject only to a possible issue as to whether there is a minimum number of affirmative votes required, in absolute terms or compared to the number of abstainers or non-objectors.
11. The manner in which the Cancun Agreements were reached raises the question of a jurisprudential and practical nature. The most obvious is that if the stated objection of one party does not prevent consensus, then how many objectors are needed to do so? And if a decision can be reached in the face of an objection by a party, can that party claim not to be bound, despite remaining a party?⁵
12. It has been suggested, specifically in the context of the Cancun decision, that a distinction may be drawn between an objection and a purported exercise of a power of veto, in that a party may legitimately prevent consensus by objection but not by veto, which is an abuse of the consensus rule.⁶
13. Whilst the meaning of consensus may be unclear, it has (or should have)⁷ an objective legal definition, even if that definition is in itself elastic in application. Consensus should not simply be what, in the subjective opinion of the chair of the meeting concerned, is a sufficient level of agreement, even if this may be a *de facto* definition utilised pragmatically.
14. However within the UNFCCC process, it has been suggested that the decision of the chair on whether there is consensus may stand, unless objected to and overruled by a majority of the Parties.⁸ This is on the basis that although Rule 42 has not been adopted, Rules 23 and 34 apply as the issue can be described as “a point of order”, and that by analogy with the position under draft rule 42.3 the issue of whether it is such is itself a matter for determination by the chair.
15. Current climate change negotiations in Durban emphasise the uncertainty surrounding the meaning of “consensus”, and whether it is desirable as a voting rule in all circumstances.

³ Articles 15 and 16 of the Convention, concerned with amendments to the Convention, refer to every effort being required to reach consensus, with a ¾ majority being the last resort if consensus cannot be reached, and a similar position pertains under Articles 20 and 21 of the Kyoto Protocol.

⁴ *Yamin and Depledge*, ‘The International Climate Change Regime’, p. 433, *Rajamani*, ‘The Cancun Agreements, Reading the Text, Subtext and Tealeaves’ [2011] ICLQ 499 at 515. See also *The Limitations of Consensus* (2011), a Field publication (available at www.field.org.uk).

⁵ The answer appears to be yes: *Brunnee*, ‘COPing with Consent’, p. 10, n.36, and see *Rajamani*, p. 518.

⁶ *Rajamani*, p. 517.

⁷ *Brunnee*, pp 8-9.

⁸ *Yamin*, p. 444, by reference to draft procedure rules 23, 34 and 42.

With many Parties to the Convention adopting opposing interpretations of the term, the one point of agreement is that consensus is important and should be the primary goal. It is when efforts at reaching consensus have been exhausted that some Parties propose a majority voting rule.

16. This was seen clearly in the informal consultations in Durban on the proposal from Mexico and Papua New Guinea to amend Articles 7 and 18 of the UNFCCC, where Parties held strongly opposing views on whether there was a need to change the way the COP has traditionally taken decisions. On the one hand, a number of Parties believed that to allow a majority vote when all efforts to reach consensus had failed would allow for a more effective decision-making procedure. On the other hand, however, one Party expressed a view that in a regime where Parties cannot formally 'reserve' their positions in relation to a decision, the existence of the consensus rule preserves the sovereign rights of each state to decide whether it wants to consent to that decision.

Issues of consensus arising in the UNFCCC process

17. Issues of consensus arose from the outset of climate change negotiations, before the UNFCCC even came into being. Although not a COP decision, the decision of the Intergovernmental Negotiating Committee adopting the Convention⁹ itself was gavelled through with members of OPEC and Malaysia requesting the floor.¹⁰
18. Despite the contentious nature of the process, the need to address the nature of consensus has often been avoided due to the skill of the chair and by use of devices short of outright objection. For example, a party may be permitted to make a statement of concerns which is formally recorded as part of the record of proceedings, as happened in the case of the Berlin Mandate.¹¹
19. A distinction may be drawn between imminent but not express opposition, which is no bar to consensus,¹² and actual objection, which in normal circumstances is. A precedent for overcoming the difficulties in achieving a decision by consensus occurred at COP 2 (Geneva), when the Geneva Ministerial Declaration (which endorsed the IPCC's findings that human activities were changing the world's climate) was "noted" rather than adopted by the COP. This step was taken because it was clear that a small number of key States objected to its content. At the final plenary meeting, the president proposed to "take note" of the Declaration, meaning that while states could make qualifications or object to the Declaration, they could not prevent its formal recognition by the COP. The Declaration, together with the objections raised by the States, was reproduced in the COP 2 report.¹³
20. The issue of a lack of consensus arose again at the negotiating session before COP 3 (Kyoto). The Chairman ruled that there was consensus in favour of one negotiating option despite the fact there were three Parties that objected to that decision. These delegations challenged the Chairman's ruling. In response, the Chairman made it clear that he intended to put his ruling

⁹ INC/1992/1, contained as Annex II in A/AC.237/18 (Part II)/Add.1.

¹⁰ *Rajamani*, p. 515.

¹¹ See FCCC/CP/1995/7/Add.1, Decision 1/CP.1, the Berlin Mandate; also see FCCC/CP/1995/7, paras 55-61 for statements made in connection with the adoption of Decision 1/CP.1, the Berlin Mandate.

¹² *Rajamani*, p. 516.

¹³ See FCCC/CP/1996/15/Add.1, Annex, the Geneva Ministerial Declaration; also see FCCC/CP/1996/15, Annex IV, Statements made in connection with the Geneva Ministerial Declaration.

to a vote. In light of this, the objectors withdrew their challenge and no vote was called: the Chairman's ruling that there was a consensus stood.¹⁴

21. At COP 15 (Copenhagen) consensus could not be achieved on the Copenhagen Accord, as there was express opposition by some Parties. Therefore, this was another case where there could not be formal adoption under UNFCCC rules, the result being that the Parties merely "took note" of the Copenhagen Accord.
22. At COP 16 (Cancun) it was a case of declared consensus despite a lack of actual, formal consensus. The principal COP/CMP decisions in Cancun were therefore taken despite sustained objections from Bolivia, where Bolivia was effectively overruled and consensus declared.

Issues of consensus arising under other international conventions

23. It should be noted that consensus (howsoever formulated) is not always required for the adoption of COP decisions under other international environmental conventions. The following paragraphs analyse the COP voting mechanisms under several international conventions, and is not intended to present an exhaustive analysis.
24. First, rule 40 of the rules of procedure for meetings of the parties to the Montreal Protocol¹⁵ provides that:

Unless otherwise provided by the [Convention] or by the Protocol, decisions of a meeting on all matters of substance shall be taken by a two-thirds majority vote of the Parties present and voting.....

25. The rules of procedure to the Montreal Protocol were adopted at the first meeting of the parties to the Montreal Protocol.¹⁶ In the specific context of the Vienna Convention for the Protection of the Ozone Layer and its Montreal Protocol, it was agreed that COP decisions should be adopted by a two-thirds majority (as opposed to consensus), save for where either provided otherwise. This majority decision-making power was incorporated to provide a more flexible and efficient mechanism to address the urgent threat of ozone depletion.
26. Second, a similar, lower threshold of two-thirds majority exists in the rules of procedure to the Basel Convention.¹⁷ These rules were also adopted at the first meeting of the parties to the Basel Convention.¹⁸
27. Third, the rules of procedure to the Convention on Biological Diversity (CBD)¹⁹ also specify a two-thirds majority. It should be noted however that, reflecting the difficulties that the UNFCCC COP have had in adopting the rules of procedure, the CBD COP has similarly failed to formally adopt their rules. The CBD COP has thus also resorted to consensus decision-making.²⁰
28. The CBD's sixth COP provides an example of where "significant consensus" was declared

¹⁴ Yamin, p. 444.

¹⁵ See http://ozone.unep.org/Publications/VC_Handbook/Section_3_Rules_of_Procedure/Rules_of_procedure.shtml at Rule 40.

¹⁶ Note that this can be contrasted with the Rules of Procedure to the UNFCCC which the COP have failed to formally adopt owing to a dispute over Rule 42 on voting.

¹⁷ <http://basel.int/meetings/rules-e.pdf> at Rule 40.

¹⁸ http://www.saicm.org/documents/gsp/exboard_2/2nd%20QSP%20EB%20INF6%20RoP%20examples.pdf.

¹⁹ <http://www.cbd.int/convention/rules.shtml> at Rule 40.

²⁰ Young, T.R. (2002) *Brief Thoughts on COP-6*, 32 Environmental Policy & Law 133 at 133.

despite the existence of a formal objection. In that instance, Australia lodged a formal objection to the adoption of certain *Guideline Principles on Alien Invasive Species*, arguing that they represented unacceptable trade restrictions. 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.²¹

Possible developments

29. As stated above, the political and practical implications of a formal change in voting procedures is explored elsewhere.²²
30. The expansion of the zone of uncertainty surrounding the meaning of consensus has similar potential consequences, although they are less significant, as nobody has suggested that consensus could be achieved with a significant (but less than one quarter) minority objecting.
31. The Cancun precedent and the reasoning underlying attempts after the event to justify it²³ opens the way up for the introduction of a highly subjective element in the COP decision making process; what *Rajamani* has variously described as “consensus by general agreement”, “consensus as consensus minus one”, “quasi consensus” or “terror by applause”.
32. This in turn may lead to exploitation of the uncertainty for tactical purposes. On the one hand, parties may be encouraged to press for proposals to which only one state, or a very small number of states, opposes strongly, on the basis that consensus may be declared despite such objection being maintained. On the other, some of the less politically powerful states may be able, with justification, to complain if consensus is declared not to be satisfied when only one (and perhaps a politically powerful) State objects, citing the Cancun precedent to the effect that consensus is broader than “no expressed objection”.

²¹ Gardener, R.C. (2004) *Perspectives on Wetlands and Biodiversity: International Law, Iraqi Marshlands, and Incentives for Restoration*. Colorado Journal International Environmental & Policy.

²² See Note 2.

²³ *Rajamani* p. 515-516.