

The limitations of consensus¹

Despite Bolivia's objection, decisions at the Climate Change Conference in Cancun were adopted by consensus. This short paper offers some observations on the legality of the process and possible future conflicts.

Early in the morning of 11 December 2010, the UN Climate Change Conference in Cancun ended with the adoption of a package of decisions. These decisions – referred to as the Cancun Agreements – were accepted by all Parties still present with the exception of Bolivia. Despite the Bolivian delegation's vocal objections, the President and other Parties took the view that there was consensus to adopt the decisions.

Consensus

The term consensus is not defined in the UN Framework Convention on Climate Change (UNFCCC) or the rules of procedure applied by its Parties. Although consensus is the primary decision making tool in international negotiations its precise content and scope are not always clear.²

There is general agreement that consensus does not equal unanimity.³ A decision can be reached even though it may not have the full positive support of all Parties. This is reflected in the language of several international agreements that define consensus as “the absence of any formal objection”⁴ – or more precisely: “the absence of any formal objection made at the time the decision was taken”.⁵

The UN Office of Legal Affairs has previously advised that consensus describes “a practice under which every effort is made to achieve unanimous agreement; but that if it could not be done, those dissenting from the general trend were prepared simply to make their position or reservations known and placed on record”.⁶

More recently, in relation to the Biodiversity Convention's rules of procedure, the Office of Legal Affairs held that “the concept of consensus is understood to mean the practice of adoption of resolutions or decisions by general agreement

without resort to voting in the absence of any formal objection that would stand in the way of a decision being declared adopted in that manner”. The legal analysis further suggests that an objecting Party needs to formally object post-adoption, with the intent to nullify the decision. A mere expression of “grave concerns” about the legality of the process may not be sufficient.⁷

Hence, the current UN practice indicates that if a state is clearly not satisfied by merely placing its concerns related to a decision (or parts thereof) on record, formally protests and actively opposes its adoption before and after the decision is taken, this may prevent consensus.

Objection

Before the Cancun Agreements were formally adopted, Bolivia restated substantive concerns it had previously voiced during the course of the preceding negotiations. This included, for example, the lack of sufficiently ambitious emission reduction and limitation commitments, and the need to clearly determine sources of funding for adaptation and technology transfer.

In the final session of the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol (CMP) the Bolivian delegation therefore asserted that “...we clearly stated, and would like to reiterate, that we are opposed to this decision. And we feel there is no consensus for its approval.” Bolivia further stated that “[w]e are not in agreement with this decision and we wish to clearly state for the record that there is no consensus for the approval of this decision”.

Despite the Bolivian contention, the President of the Conference declared the decision adopted by consensus. She confirmed that the Bolivian position would be duly reflected in the records of

the conference. In addition, the President endorsed the comments of some delegations which had previously maintained that the rule of consensus does not give one delegation a right to veto decisions.⁸

Climate negotiations

To date, the Parties to the UNFCCC and the Kyoto Protocol have followed the UN practice and taken their decisions by consensus. Considerable effort is made to accommodate the concerns and positions of all Parties. Formal objections raised by country delegations have previously blocked and delayed decisions.⁹ In the media and parts of the academic literature it has therefore been contemplated that progress in the climate negotiations could be blocked by a single Party.¹⁰

There is some precedent for reaching consensus decisions despite the formal objections of a Party in other international processes.¹¹ However, it appears that never before in the UNFCCC process has a single Party opposed a decision in the same formal and persistent manner (unaided by other Parties) as Bolivia did in Cancun.

While the Cancun climate conference has generally been described as a success that restored faith in the multilateral climate change process it could also signify the dawn of more controversial international debates. The split between industrialised and developing countries remains wide open, and the time to agree meaningful emission targets is running out fast. Once the impacts of climate change become even more tangible affected countries may give up some of their diplomatic restraint.

In international law legality and power often operate side by side. As such one can only speculate about the possible consequences if the persistent

objector had not been Bolivia - but maybe China, Japan, India or Brazil. But what else could Bolivia or another country delegation that finds itself in a complete minority position have done?

Rules of procedure

The COP and the CMP have not formally adopted their rules of procedure. However, at all sessions since 1995 a set of draft rules have been applied consistently – with the exception of the disputed rule 42 on voting.¹² To date, Parties have been unable to agree whether decisions on matters of substance should be taken by consensus only; or if after Parties have exhausted all effort to reach consensus a decision may be taken by a two-thirds (three fourths, seven-eighths or other) majority vote.¹³

The UNFCCC and the Kyoto Protocol stipulate that each Party shall have one vote.¹⁴ Consequently, the draft rules of procedure contain various provisions that address the right to vote – possible instances, eligibility and procedures. An undisputed part of draft rule 42 provides that “[d]ecisions of the Conference of the Parties on matters of procedure shall be taken by a majority vote of the Parties present and voting”.¹⁵ The President has the mandate to “put questions to the vote and announce decisions”.¹⁶

Draft rule 34 further states that “[d]uring the discussion of any matter, a representative may at any time raise a point of order which shall be decided immediately by the President in accordance with these rules. A representative may appeal against the ruling of the President. The appeal shall be put to the vote immediately and the ruling shall stand unless overruled by a majority of the Parties present and voting.”

Thus, the President’s determination that there was consensus to adopt the Cancun Agreements could have been challenged as a procedural matter. There is some precedent for such a challenge. At the eighth session of the Ad Hoc Group on the Berlin Mandate, the Chair ruled that there was consensus to move forward on a matter despite the objections of the US, Canada, and Australia. Venezuela challenged the Chair’s ruling and he resolved to put it to a vote. Subsequently

the objections were withdrawn and the ruling of consensus stood.¹⁷

By fully exhausting the available options under the Draft Rules of Procedure a country could indicate that it was not merely prepared to make its position (or reservations) known and placed on record but that it does not, to any degree, tolerate the decision. Even if the vote was lost or the President did not allow for it to take place, the request alone would underline the importance a country attributes to the matter in question – and thus the seriousness and formality of an objection.

The Bolivian position

Following the adoption of CMP decisions despite Bolivia’s vocal objections, the COP resumed its meeting on 11 December just after 3 am. Faced with the criticism of imposing a veto on the conference the Bolivian delegation tuned down its language significantly.

For example, they stated that they “... have not opposed the views of other Parties – we have requested the opportunity to discuss them.” They explicitly distanced themselves from the use of a veto, expressed their respect for other Parties’ positions and described as their main grievance the COP decision’s failure to sufficiently reflect previous discussions and Bolivia’s arguments.

Veto

In the UN Security Council all of its five permanent members have a veto right. The UN Charter (in Article 27 paragraph 3) explicitly provides that Security Council decisions shall be made “by an affirmative vote of nine members including the concurring votes of the permanent members”. However, in 1950 when the Soviet Union did not attend a meeting several resolutions were passed which lead to the involvement of the UN in the Korean War. Despite the wording of the provision requiring an affirmative vote, abstention has ever since been interpreted as an affirmative vote.

However, for an objection to stand it should also be maintained after a decision has been taken.¹⁸ Although Bolivia initially threatened to take legal action in the International Court of Justice, it appears that to date it has not undertaken further procedural steps – within or outside the UNFCCC regime – to challenge the validity of the Cancun Agreements.

Endnotes

- 1 By Christoph Schwarte and David Wei at the Foundation for International Environmental Law and Development (FIELD) with Josh Roberts.
- 2 Chen Wang, ‘Issues on Consensus and Quorum at International Conferences’, Chinese Journal of International Law, 9(4), 2010, pp.717-739.
- 3 UN Economic and Social Council resolution of 14 May 1974.
- 4 1984 UN Convention on the Law of the Sea (UNCLOS), Art.161, para.8 (e); 1988 Convention on Regulation of Antarctic Mineral Resources Activities (not in force) in relation to decisions by the Antarctic Mineral Resources Commission, Art.22 para.5.
- 5 2009 Convention on the Conservation and Management of High Seas Fishery Resources in the South Pacific Ocean (not in force), Article 16 para.1; 2006 Southern Indian Oceans Fisheries Agreement (not in force), Art.8 para.1.
- 6 Statement by the Director of the General Legal Division, UN Office of Legal Affairs, Official Records of ECOSOC, 56th session, Supp. No.3A, UN Doc. E.5462 (6 March 1974), para.64 summarised in Use of the term ‘consensus’ in UN practice, UN Juridical Yearbook 1974, Chap. VI A.12., pp.163-164.
- 7 Letter from Hans Corell, Under-Secretary-General for Legal Affairs, Office of Legal Council, United Nations, to Hamdallah Zedan, Executive Secretary, Convention on Biological Diversity 1 (June 6, 2002); see also Royal C. Gardner, ‘Perspectives on Wetlands and Biodiversity: International Law, Iraqi Marshlands, and Incentives for Restoration’, Colorado Journal of Int’l Env’tl Law and Policy, 2003, pp.2-4.
- 8 For example: Colombia and Gabon.
- 9 As a result the Geneva Ministerial Declaration or Copenhagen Accord were only noted.
- 10 Farhana Yamin and Joanna Depledge, The International Climate Change Regime: a guide to rules and procedures, Cambridge University Press, 2004, p.444.
- 11 Australia in the six meeting of the COP to the Convention on Biological Diversity with regard to the Guiding Principles for the Prevention, Introduction and Mitigation of Impacts of Alien Species that Threaten Ecosystems, Habitats or Species.
- 12 The draft rules are contained in document FCCC/CP/1996/2 entitled ‘Adoption of the Rules of Procedure’.
- 13 Ibid, draft rule 42 alternatives A and B which also provide for certain exceptions.
- 14 UNFCCC, Art.18 para.1 and Kyoto Protocol, Art.22 para.1.
- 15 Draft Rules of Procedure, rule 42 para.2.
- 16 Ibid, rule 21 para.1.
- 17 See: Yamin and Depledge, p.444; or Environmental News Bulletin at <http://www.iisd.ca/vol12/enb1265e.html>.
- 18 See above under Consensus.



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