



norden

Nordic Council of Ministers

Ved Stranden 18
DK-1061 Copenhagen K

www.norden.org

NORDISKE ARBEJDSPAPIRER

N O R D I C W O R K I N G P A P E R S

Strengthening Global Climate Change Negotiations

Improving the Efficiency of The UNFCCC Process

Dr. Antto Vihma and Dr. Kati Kulovesi

NA2012:902
<http://dx.doi.org/10.6027/NA2012-902>

This working paper has been published with financial support from the Nordic Council of Ministers. However, the contents of this working paper do not necessarily reflect the views, policies or recommendations of the Nordic Council of Ministers.

STRENGTHENING GLOBAL CLIMATE CHANGE NEGOTIATIONS: IMPROVING THE EFFICIENCY OF THE UNFCCC PROCESS*

“Process is substance in this process!”

– Unknown negotiator, Durban 2011

1 INTRODUCTION

International climate change negotiations under the United Nations Framework Convention on Climate Change (UNFCCC) are taking place against the backdrop of the continuing growth of global greenhouse gas emissions, the already observable impacts of climate change and the risk of runaway climate change. The urgency for meaningful action has been highlighted by a number of authoritative sources, including the Intergovernmental Panel on Climate Change, the International Energy Agency, and articles published in leading academic journals. While the 195 Parties to the UNFCCC have recently agreed to limit the global average temperature increase to 2°C from pre-industrial levels and review the adequacy of this target in 2015, the negotiating process is yet to produce the commitments needed to achieve the 2°C goal. The world has thus been growing increasingly weary of UN climate talks, which, especially when viewed from a distance, seem to achieve no tangible progress towards an effective solution. Even some of the seasoned “climate insiders” interviewed for this working paper in 2011 privately raised the question “Is this really worth it?”

Such sentiments were particularly close to the surface after the 2009 UN Climate Change Conference in Copenhagen, which focused on procedural wrangling and produced a substantive outcome much weaker than most of those inside and outside the negotiating process had hoped for. However, many would still argue that over the two decades following its adoption in 1992, the UNFCCC has achieved important progress towards tackling the climate change challenge. In the past two years after Copenhagen, for example, it has led to the establishment of several new institutions and processes, including the Green Climate Fund, Adaptation Committee, Technology Executive Committee, Climate Technology Centre and Network and the *Ad Hoc* Working Group on the Durban Platform for Enhanced Action (ADP). Many hope that the ADP will result in a comprehensive post-2020 agreement and also make progress towards closing the pre-2020 “ambition gap”. This means that the “post-Copenhagen crisis” of the UNFCCC process and multilateralism seems to be more or less over and trust has been rebuilt among those participating in the negotiations. Still, the urgent, and multifaceted nature of the climate change problem, the expanding international climate policy agenda and the various new institutions and processes mean that the efficiency of the UNFCCC process remains an important challenge.

* A working paper prepared by Dr. Antto Vihma (Research Fellow, The Finnish Institute of International Affairs, antto.vihma@fia.fi) and Dr. Kati Kulovesi (Adjunct Professor in Climate Law, Department of Law, University of Eastern Finland, kati.kulovesi@uef.fi). The authors contributed equally to the writing of the paper.

Taken together with recent turning points in the process, including agreement to operationalize the new limited membership bodies, terminate the two ‘old’ *Ad Hoc* Working Groups and launch a new one in 2012, time seems ripe for considering the need for broader procedural reforms to strengthen the global climate negotiations process. In fact, the 36th session of the Subsidiary Body for Implementation (SBI) recently invited submissions from Parties on “ways to improve efficiency and effectiveness, planning, as well as the structure of the process to streamline it, including budgetary implications”.¹

It is against such a background that this working paper sets out to analyse the efficiency of the ongoing negotiations under the UNFCCC and discuss some of the key procedural challenges. For the purposes of this project, “effectiveness” will be understood in pragmatic terms, as the utilization of time and resources, while also taking into account the outputs and their relevance for the battle against climate change. An “effective process” is, of course, a politically charged concept as, from a critical perspective, effectiveness can also be seen as an attempt to prioritize somebody’s political agenda. In international negotiations, even the most pragmatic management may become an aspect of social antagonism, instead of being purely “neutral” or “rational” in the way many developed countries typically might assume. As in the wider debate on UN reform, great powers typically complain that the UN governance is “ineffective” and “bureaucratic” when they are not able to push through their political agenda. Reliance on the Rules of Procedure and other procedural devices frequently presents a legitimate attempt by less powerful negotiating groups to influence the substantive outcome and ensure that their voices are heard. However, procedural tools can also be used in bad faith, to “block” the process and to prevent the negotiations from moving forward. Procedural effectiveness requires that “for a system of rules to be fair, it must be firmly rooted in a framework of formal requirements about how rules are made, interpreted and applied.”² The challenge is therefore to strike a balance between (informal, improvised) effectiveness and (slow) proceduralism. Bearing in mind these underlying tensions, this working paper seeks to provide a compact overview of the key challenges in the UNFCCC process. It also suggests points to be discussed with a view to improving the process.

It is useful to remember that the discussion on reforming the UNFCCC is as old as the regime itself. Many ideas currently being floated have a direct bearing on the discussions of the mid- and late 1990s.³ At the dawn of the UN climate regime – much inspired by the perceived successes of the ozone regime under the Vienna Convention for the Protection of the Ozone Layer and its Montreal Protocol – many Parties sought to put into place a number of formal institutions and procedures. These included the procedures for regular review of the adequacy of commitments in light of the latest available science, procedures for adapting legally binding obligations, and the development of institutions and procedures for identifying and responding to non-compliance.⁴ However, lessons

¹ SBI 36, Conclusions on Arrangements for Intergovernmental Meetings, FCCC/SBI/2012/L.24.

² Thomas Franck, *Fairness in International Law and Institutions* (New York: Oxford University Press, 1995), p. 8.

³ To trace this discussion, we have found the works of Werksman and Depledge particularly useful. See Jacob Werksman, *Procedural and Institutional Aspects of the Emerging Climate Change Regime: Do Improvised Procedures Lead to Impoverished Rules*, FIELD, 1999; Joanna Depledge, ‘Looking Back and Looking to Others: Insights on the Organization of the Climate Change Negotiations’, 2010, unpublished manuscript.

⁴ Werksman, *Procedural and Institutional Aspects*.

learned from the Montreal Protocol and several other regimes have also proved that formal procedural arrangements can hinder the dynamic development of a regime.⁵ As elsewhere in the UN world, states have frequently improvised, pushing forward with decision-making when frustrated by formal procedures in the climate regime. This has been the case in order to both overcome the absence of formal rules as well as to by-pass their presence.

This working paper was commissioned by the Nordic Working Group for Global Climate Negotiations (NOAK) to serve as a discussion paper for a workshop “Strengthening the Global Climate Change Negotiations” that took place at the Nordic Council of Ministers in Copenhagen, Denmark, in April 2012. Some updates were subsequently made to the paper to reflect discussions at the workshop on the basis of Chatham House rules. The paper aims to address the state-of-play in the UNFCCC negotiations, identify some of the main problems and develop concrete proposals to enhance the effectiveness of the climate regime. In doing so, the paper focuses on three main clusters of procedural issues: organization of the work; institutions exercising oversight of the negotiation process; and the decision-making of the COP. Inputs from outside the regime are also briefly addressed.

⁵ Thomas Gehring, ‘International Environmental Regimes: Dynamic Sectoral Legal Systems’, 1 *Yearbook of International Environmental Law* (1990), p. 35.

“We live on different continents – but I still spend much more time with these people than with my own family.”

- Unknown negotiator, Barcelona 2009

2 ORGANIZATION OF WORK AND STRATEGIC OVERSIGHT

Organizational issues often play an important role in international negotiations. They include questions such as who will chair a meeting, how to organize work, whether and when to table a text, who will produce such a text, if and when to solicit political input, and so on. However, despite the importance of such questions, there appears to be no single successful formula for organizing international negotiations. As Depledge has noted, “the same organizational approaches have worked well in some conferences but not in others”.⁶ In other words, many of the challenges cannot be solved on a general level, but are functional and grounded in the policy context. The outcome of negotiations therefore seems to depend ultimately much more on leadership and political momentum than on organizational issues.⁷ On the other hand, progress also requires that past decisions and debates are not re-opened at the next meeting as the political momentum fades and public attention shifts elsewhere. With these insights in mind, this section discusses issues related to the organization of work and the strategic oversight of the negotiations.

2.1 Frequency of meetings

The intensity of the negotiations and the frequency of the meetings has varied according to the political momentum around climate change. In the early 1990s, the Intergovernmental Negotiating Committee for a Framework Convention on Climate Change (INC) spent about four weeks a year in negotiations to craft the Convention itself. This excludes, however, informal meetings, workshops and coordination, which naturally absorb time and resources, too. The intensive pace of negotiations continued after the Convention’s entry into force in 1994. COP 1 established the *Ad Hoc* Working Group on the Berlin Mandate (AGBM) and negotiations began for the Kyoto Protocol. The AGBM held a total of eight sessions between August 1995 and October 1997, followed by final negotiations leading to the adoption of the Protocol at the third session of the Conference of the Parties (COP) in December 1997. From then on, it became customary to organise the negotiations around the intersessional Subsidiary Bodies (SBs) meeting in June and the annual COP in November/December with very few exceptions.⁸

The number of meetings began to mushroom again in 2007 before the Bali COP-13 in 2007. In 2008 two extra weeks of negotiations were organised for the *Ad Hoc* Working Group on Annex I Parties’ Further Commitments under the Kyoto Protocol (AWG-KP) and the newly created *Ad Hoc*

⁶ Depledge, ‘Looking Back and Looking to Others’, p.16.

⁷ Depledge, ‘Looking Back and Looking to Otherw’, pp. 16-17.

⁸ In 1997 and 2000 an extra week of SB sessions was organized, for details see: <http://unfccc.int/meetings/items/6240.php>.

Working Group on Long-term Cooperative Action under the Convention (AWG-LCA). The pre-Copenhagen negotiations in 2009 marked the pinnacle, totalling ten (10) weeks of formal negotiations. The past two years have seen the total amount of negotiating time return to six weeks.

From the perspective of individual negotiators, it may seem lucrative to always try to obtain some more time to negotiate. A climate negotiator frequently works inhumane hours and feels the pressure coming from the increasingly urgent, complex and time-consuming agenda items and the growing number of negotiating bodies. However, many delegates and observers interviewed for this working paper - especially those from developed countries - shared the view that increasing the number of intersessional meetings has not necessarily improved the outcomes. As one insider interviewed for this paper noted: “We as negotiators can always fill whatever time will be given to us - but whether we do it efficiently is a different question”. The recent pre-Copenhagen experience paints a bleak picture: after nearly fourteen weeks of intense negotiations under the AWG-LCA since 2008, the official negotiating text was still nearly 200 pages long and included over 2 500 brackets indicating areas of disagreement.⁹ This goes to show that the expert process was not able to produce mature text for political negotiations in Copenhagen regardless of the considerable amount of extra time allocated to it in 2008-2009. One could, however, also argue that this massive endeavour made an indirect contribution towards achieving the Copenhagen Accord and, consequently, the Cancún Agreements.

Procedural wrangling and prolonged agenda fights at intersessional meetings in 2009-2012 have also been a growing source of frustration.¹⁰ In 2011 and 2012 it took the AWG-LCA and ADP respectively an entire negotiating session to reach agreement on their agendas. While these agenda disputes undoubtedly had substantive dimensions relating to the interpretation of the outcomes from Cancun and Durban, they have contributed to the sentiment that intersessional meetings do not necessarily constitute the most efficient use of negotiating time. Some in fact argue that intersessional meetings may give the “laggards” in the process opportunities to open up and renegotiate COP decisions.¹¹ Depledge has indicated, for instance, that Saudi Arabia has specialized in provoking conflicts and obstructing intersessional meetings, while staying out of the high-level political conflicts and global media spotlight.¹² The volume of meetings may well also have contributed to the political inflation of the annual Subsidiary Body meetings in Bonn. The interest shown by stakeholders and the media has been constantly on the wane since the crowded schedule of 2009.

Overall, several insiders interviewed for this paper felt that the UNFCCC should return to the previous practice of organizing just two negotiating sessions each year and consider other ways of managing the increasing workload.

⁹ *The Earth Negotiations Bulletin*, Vol.12, No.459, 22 Dec. 2009.

¹⁰ Antto Vihma, ‘Arrested Development’, FIIA Comment 8, 2011.

¹¹ This was suggested with respect to the Cancún decisions, for example, by Grubb in 2011. See Michael Grubb, ‘Durban: The Darkest Hour?’, *Climate Policy* 11 (6), 2011, pp. 1269-1271.

¹² Joanna Depledge, ‘Striving for No: Saudi Arabia in the Climate Change Regime’, *Global Environmental Politics* 8 (4), 2008, pp. 9-35.

The fact remains, however, that the substantive scope and complexity of the UNFCCC negotiations have increased significantly over the years. As the former UNFCCC Executive Secretary Yvo de Boer explained in the run-up to Copenhagen in 2009, the climate deal attempted in Copenhagen was “probably the most complicated international agreement that history has ever seen”. This provides an obvious challenge for proposals to cut down the number of meetings: How to handle the workload with just two meetings a year? For example, the new processes regarding reporting and transparency could dedicate between two to three hours to each Party, thus meaning hundreds of hours of work under the Subsidiary Bodies. From a developing country perspective, small delegations are already struggling with the busy agendas and are eager to call for more time for negotiating.

Some new proposals are emerging for managing the growing workload. Some, for example, have raised the idea of a more *continuous* arrangement for the UNFCCC negotiations. Such proposals have not been very detailed to date, but the World Trade Organization (WTO) has sometimes been referred to as a possible example in this regard. Under the WTO, work and negotiations take place continuously in Geneva under the General Council and various other permanent bodies. The Doha Round negotiations are organized under the Trade Negotiations Committee and its subsidiary negotiating bodies. The Ministerial Conference, the WTO’s top decision-making body, usually convenes every two years. In the UNFCCC context, some hope that a more continuous arrangement would change the dynamic of the negotiations by lowering expectations for a breakthrough at COP meetings and, perhaps, give more emphasis to implementing and reviewing policies. On the other hand, there are many question marks. A key difference between the UNFCCC and the WTO is that most WTO members have large embassies in Geneva whereas Bonn is lacking similar permanent diplomatic representation. Several discussants at the NOAK workshop expressed in fact reservations to a permanent setting under the UNFCCC: “It is only through the come and go with capital cities how the process moves forward”, noted one expert. Also the danger of professional diplomats taking over the process was flagged.

On the other hand, many workshop participants expressed support for enhanced continuity and for organizing most negotiating sessions in Bonn. The advantages of Bonn include the fact that such meetings are cheaper and easier to organize, and also because holding meetings in Bonn would help avoiding domestic criticism against excessive “climate change tourism” to exotic locations. In addition, the idea of increasing the number of workshops and other informal work - with adequate support for developing country participation - was also raised. In this regard, some experts noted the negotiations from the “Marrakech era” as an encouraging example whereby details concerning the implementation of Articles 5, 7 and 8 of the Kyoto Protocol were successfully matured in workshops. In the negotiations, however, non-Annex I countries have tended to prefer formal negotiations while Annex I countries are expressing preference for workshops and other informal settings. The potential of the various new bodies to remove workload from the negotiating bodies was also flagged at the workshop. On the other hand, the operationalization of the Green Climate Fund Board, for example, has been delayed due to persisting disagreement over its membership. In this sense, it appears that the new bodies are not immune to procedural hurdles either. Questions concerning transparency are also likely to be important in order for the new bodies to be able to feed their results into the broader UNFCCC process.

2.2 Managing agendas and workload

“These guys just love to talk!”

- Exhausted observer listening to AWG-LCA closing plenary

One of the current challenges in the UNFCCC negotiating process is the large number of agenda items and negotiating groups, resulting in a heavy workload during each negotiating session. Starting from the Poznan Conference in 2008, a total of six negotiating bodies have convened in parallel at the annual UN Climate Change Conference, each with their opening and closing plenaries and other formalities. At the 2012 UN Climate Change Conference in Doha a total of seven bodies will convene with a considerably large number of agenda items. While the two AWGs are scheduled to terminate in Doha, management of the workload and negotiating time have become critical issues for the UNFCCC negotiations. In an attempt to make the process less time-consuming, some streamlining practices have been applied. For instance, the two AWGs have recently tended to suspend and resume their sessions rather than opening and closing them, thereby skipping some formalities, including the adoption of the agenda. Opening and closing statements have also often been limited to group statements and time limits have been imposed on speakers. These practices appear to be widely seen as useful ways of improving time management at the negotiations and their continuation was also generally supported by the workshop participants.

Under each body, negotiations are based on the agenda and organization of work, which are typically adopted at the opening of each session. Looking at the agendas of the various negotiating bodies, it appears that there are some clear overlaps. Technology issues, for instance, are being considered by both the SBI and Subsidiary Body for Scientific and Technological Advice (SBSTA). In addition, the AWG-LCA has considered long-term technology issues. Response measures have been discussed under all four subsidiary bodies; mitigation by developed countries has been discussed under the AWG-KP and AWG-LCA. Eliminating overlaps and reducing the number of negotiating groups would, on the face of it, appear to be one possible way to enhance the efficiency of the process. However, the political and legal viability of this approach requires careful consideration. The agenda plays a strategic role in determining which issues will and will not be considered. Agenda debates can therefore easily become highly politicized. For instance, the proliferation of agenda items related to response measures and technology reflects strategic moves and priorities by some Parties. In the case of technology transfer, for instance, the Group of 77 and China wanted to have the item on the agenda of both the SBI and SBSTA, while Annex I countries wanted to confine technology issues to only one body. The key reason why mitigation by developed countries is being discussed by both the AWG-KP and AWG-LCA relates to deep divisions among Parties concerning the post-2012 legal architecture. The consideration of response measures, in turn, has been advocated by Saudi Arabia and other OPEC countries. To avoid overlapping discussions in practice, technology transfer as well as the agenda items on Protocol Articles 2.3 and 3.14 are normally considered by their respective joint SBI and SBSTA contact groups.

From the legal point of view, agenda modifications also present some challenges. The preparation of the provisional agenda for each body is regulated under the Rules of Procedure. Accordingly, the

Secretariat prepares the provisional agenda in agreement with the COP President based on detailed categories in the Rules of Procedure. The provisional agenda and supporting documents must be distributed to Parties six weeks prior to an ordinary session. In principle, Parties can propose adding or deleting agenda items. Consensus is, however, required in order to add, delete, defer or amend agenda items. A proposal to modify the agenda carries the risk of escalation and can lead to time-consuming debates: the history of the UNFCCC process includes several examples of agenda fights. Some of these have been resolved by holding an agenda item “in abeyance”. Such items are neither discussed nor taken off the agenda, and are typically carried over to the next session.¹³ For example, the COP agenda item on the second review of the adequacy of Articles 4.2(a) and (b) has been held in abeyance since COP 4. Similarly, the SBI agenda item on the review of information contained in non-Annex I national communications has been held in abeyance for a long time. Recent examples of delays in the negotiations due to agenda controversies include the AWG-LCA 14 in Bangkok in April 2011, where the post-Cancún agenda was only agreed on the final day of the five-day meeting. In June 2011, the opening plenaries of SBI and SBSTA 34 remained suspended for the first three days pending agenda discussions. In May 2012, the ADP only adopted its agenda on the final day of the two-week meeting.

All this goes to show that while streamlining the agendas could provide one possible avenue for making the UNFCCC process more efficient, it entails several challenges. Attempting to modify the agendas easily opens the door for lengthy procedural debates. Not all of such debates find a successful substantive compromise, as evidenced by the number of agenda items held in abeyance. However, from time to time opportunities may arise that enable Parties to reconsider the organization of work at the negotiations. Furthermore, the possibility of using the new bodies, including the Adaptation Committee, Technology Executive Committee and Forum on response measures, to eliminate agenda overlaps on issues such as adaptation, technology and response measures could be explored. Questions concerning transparency and representation would, however, need to be considered carefully for the work under the new bodies to enjoy legitimacy and be able to benefit the broader negotiating process.

2.3 The use of subsidiary bodies vs. limited membership bodies

As discussed above, the effectiveness of the increase in the number of intersessional meetings has been dubious. A related source of concern is that the Subsidiary Bodies have been slow in their decision-making. An illustrative example is the second review of the capacity-building framework, which took four years until it was completed in Durban, although the matter was not particularly sensitive politically, at least not to the extent of several other climate regime agenda items.

Many negotiators interviewed for this working paper suggested that limited membership bodies with a specific mandate from the COP could deliver speedier results than the SBs. A recent example to this effect is the Transitional Committee for the Design of the Green Climate Fund (TC) in 2011. The Committee was established by COP 16 to design the Green Climate Fund by COP 17 with

¹³ Farhana Yamin & Joanna Depledge, *The International Climate Change Regime: A Guide to Rules, Institutions and Procedures* (Cambridge: Cambridge University Press, 2004), p. 438.

relatively specific terms of reference. It included a total of 40 members, with 15 members from developed countries and 25 members from developing countries. The Committee held four meetings in 2011. Although the Committee's text ultimately became a political bargaining chip and the last meeting of the group was unable to reach agreement to adopt its recommendations and the draft governing instrument for the Green Climate Fund, the TC was nevertheless successful in doing the necessary preparatory work for COP 17 to come to an agreement on the design of the Green Climate Fund. This year the Adaptation Committee and the Technology Executive Committee are also scheduled to begin their work, and it will be interesting to see whether they will be able to enhance the efficiency of work on adaptation and technology. Some concerns have already been raised over the lack of connection between these limited membership bodies and entities involved in implementation, such as the Adaptation Fund and the Technology Centre and Network, in which case there might still be opportunities for organisational streamlining.

One of the benefits of using limited membership bodies is that it can be assumed that the COP will not be keen to start "tearing apart" a text prepared for it by a limited membership body. Some may see the use of these bodies as a threat to democratic procedures, as important substantive issues get transferred from the more inclusive negotiating settings, while others will perceive this as adding much-needed effectiveness to the negotiations. The COP naturally still has the power to accept or reject the texts prepared for it.

It has also been suggested that the review of the adequacy of the long-term global goal, first mentioned in the unadopted Copenhagen Accord and subsequently decided upon in the Cancún Agreements,¹⁴ should be prepared by a limited membership body and neither of the SBs. In fact, the AOSIS, which champions the review initiative, seems to be afraid of the possibility that the review would end up in the SBs.¹⁵ However, the SBs still have a notable role to play, both in theory and in practice. There are also political reasons for not understating the SBs' work, as the crucial transparency elements embodied in the International Consultation and Analysis (ICA) and International Analysis and Review (IAR) processes have been delegated to the SBI.¹⁶ Several experts have noted that they are "deeply worried" on how SBI can handle these transparency processes "without sitting in Bonn all year round".

2.4 Institutions

2.4.1 The COP Presidency

The COP Presidency can play an important role in the negotiations. One of its key functions is the strategic organization of the negotiations, usually in cooperation with the Secretariat. Tactical decisions taken by the COP Presidency typically relate to the conduct of business and decision-making, use of different negotiating forums, choice of negotiating texts, time management,

¹⁴ Decision 2/CP.15, *The Copenhagen Accord* (UN Doc. FCCC/CP/2009/11/Add.1, 30 March 2010), paragraph 12; Decision 1/CP.16, *Outcome of the work of the Ad Hoc Working Group on Long-term Cooperative Action* (UN Doc. FCCC/CP/2010/7/Add.1, 15 March 2010), paragraphs 138-140.

¹⁵ Authors' informal discussions with delegates, Durban 2011.

¹⁶ See Decision 1/CP.16, paragraph 63; Decision 2/CP.17, *Outcome of the work of the Ad Hoc Working Group on Long-term Cooperative Action under the Convention* (FCCC/CP/2011/9/Add.1, 15 March 2011).

transparency and involvement of ministers.¹⁷ In the history of the UNFCCC process, some COP Presidencies have played a very active role, while others have been more subdued.¹⁸ Some have begun informal consultations well in advance of the COP, such as the Danish Presidency of COP 15, while others have continued their consultations intersessionally after the COP, sometimes at the request of the Parties.

The Rules of Procedure regulate the basic functions of the COP Presidency. According to Rule 22.1, the COP Presidency is normally subject to rotation among the five UN regional groups.¹⁹ While the President is formally elected at the opening session of the COP, in practice his or her identity is normally known long before the COP. The President remains formally in place until the following session of the COP, although the incoming presidency usually takes charge of the preparations for the next COP.

The COP Presidency can attempt to secure a successful outcome through informal preparations and consultations prior to the conference itself. A recent prime example is the Greenland Dialogue by the Danish Presidency of COP 15, an initiative that aimed to build trust and convergence around key issues. Focusing on a core group of 20-30 ministers, the Dialogue operated through six roundtable discussions under Chatham House Rules, allowing ministers to meet informally, get to know each other and discuss options in an open dialogue.²⁰ While continuing the practice of informal preparations, the Mexican Presidency of COP 16 made modifications to the format based on experiences from Copenhagen, which put questions concerning transparency and participation in informal groups under the spotlight.

During the months leading up to the Cancún Conference, the Mexican COP Presidency held a series of informal consultations with both Parties and stakeholders. These included the pre-COP and series of activities in New York in conjunction with the UN General Assembly, as well as the informal preparatory meetings covering topics such as mitigation and monitoring, reporting and verification (MRV) as well as finance.²¹ The meetings were open to all interested governments, which probably helped to build trust in the Presidency. The process apparently also helped the Mexican Presidency to gather information and understand the Parties' views. These factors, along with the Parties' shared desire to "save" the UNFCCC process and multilateralism, contributed to the success of the Cancún Conference, while the transparent leadership style of the Mexican COP Presidency appeared to be widely appreciated by most Parties. Through its leadership strategy, the Mexican COP Presidency was able to generate a sufficient amount of support, goodwill and trust to enable COP President Espinosa to openly overrule Bolivia's objections to the adoption of the Cancún

¹⁷ Joanna Depledge, *Organization of Global Negotiations: Constructing the Climate Regime* (London: Earthscan, 2005), p. 41.

¹⁸ Similarly Depledge, 'Looking Back and Looking to Others', p. 16.

¹⁹ Draft Rules of Procedure of the Conference of the Parties and its Subsidiary Bodies, UNFCCC: FCCC/CP/1996/2.

²⁰ Per Meilstrup, 'The Runaway Summit: The Background Story of the Danish Presidency of COP 15, the UN Climate Change Conference', *Danish Foreign Policy Yearbook* (2010), p. 120.

²¹ *The Earth Negotiations Bulletin*, Vol.12, No. 480, 2010; *The Earth Negotiations Bulletin*, Vol. 12, No. 488, 2010.

Agreements without any protests from other Parties. Similar practices were used by the South African COP Presidency in 2011, including “indabas”.²²

The annually rotating nature of the COP Presidency is a firmly established and widely appreciated practice. It does mean, however, that the strategic leadership style changes with each COP Presidency, including the style and intensity of informal preparations. In fact, it has been pointed out that few generalizations can be made, except that COP Presidencies by Annex I Parties face a more difficult job and are more easily accused of bias.²³ In this sense, the overall context of North-South politics influences and limits the role that can effectively be taken by the Presidency. This reality, as noted by several delegates, makes large, progressive developing countries most suitable in driving the process forward as COP presidents. Developed country presidents, on the other hand, should tread softly when it comes to pushing for outcomes. While COP Presidencies are based on voluntary offers from UNFCCC Parties and they will retain discretion concerning their process and degree of active engagement, one question to consider is whether there are ways to encourage the continuation of best practices given the rotating nature of the COP Presidency.

2.4.2 The COP Bureau

The COP Presidency is assisted in its work by the COP Bureau. Focusing on process management, the Bureau performs several important functions. Between sessions, it works closely with the Secretariat, *inter alia*, to discuss upcoming meetings, agenda items and meeting structure.²⁴ The Bureau members can assist the COP Presidency in various ways, such as providing advice and undertaking consultations on behalf of the President. While the Bureau can play a role in testing Parties’ reactions to certain proposals, it is not in itself adequately representative of divergent political groupings in the climate change negotiations.²⁵ According to the Rules of Procedure, the Bureau has a total of eleven members, including the COP President, chairs of the Subsidiary Bodies, seven COP Vice-Presidents and the Rapporteur. Each of the five UN regional groups must have two members in the Bureau while the eleventh place is reserved for small island developing states. An informal understanding has evolved whereby oil-exporting countries are also always represented in the Bureau.²⁶ Bureau members stay in office until they are replaced at the next ordinary session and cannot serve more than two consecutive terms. In the history of the UN climate change negotiations, an “extended Bureau” has sometimes been used to move the process forward both inter-sessionally and at the negotiations: For example, the Chair of the Rio Prepcop used a group of ‘Chairmen of regional and interest groups’ and the Chair of the INC convened an

²² In an explanation by the South African COP Presidency, “indaba” was characterized in the following terms: “Convening Indabas is an essential element of South African participatory democracy. Indaba is a word in Zulu that refers to a gathering of people, infused with wisdom and Ubuntu, with a purpose of discussing a matter of great importance to the community, particularly problems that affect everyone, and to solve intractable or difficult collective challenges. Indabas aim at establishing a common mind or a common story that all participants can take with them. In successful Indabas, participants come with open minds motivated by the spirit of the common good, listening to each other to find compromises that will benefit the community as a whole”. COP 17 / CMP 7 Indaba, available at: <http://unfccc.int/files/meetings/durban_nov_2011/application/pdf/cop17_cmp7_indaba_explanatory_note.pdf>.

²³ Depledge, ‘Looking Back and Looking to Others’, p. 12.

²⁴ *Multilateral Environmental Agreements: Negotiator’s Handbook*, UNEP-University of Joensuu Course Series (2007), at 3.51.

²⁵ Depledge, ‘Looking Back and Looking to Others’, p. 15.

²⁶ Depledge, *Organization of Global Negotiations*, p. 55.

Extended Bureau; and Chair Estrada used an Extended Bureau in 1997 during negotiations for the Kyoto Protocol.²⁷

2.4.3 Chairs

The question of chairmanship is another important aspect of the UNFCCC process and other international negotiations. In general, the Chairs' role depends on the degree that Parties are willing to trust them with control over the negotiations. In some other processes, Chairs tend to have more leeway to prepare text and direct the negotiations than in the climate negotiations. Under the UNFCCC, developed countries typically call for "strengthened trust on the Chair" and emphasize Chairs' rights to present papers and produce text, while developing countries tend to be more reserved. Some workshop participants raised the question as to how the role of Chairs in the UNFCCC process could be enhanced to a similar level than in other negotiations.

Recently, the question of chairmanship became particularly relevant in the context of the new ADP. Since their creation, the AWG-KP and AWG-LCA have been chaired by a Chair and Vice-Chair, with these posts rotating annually between Annex I and non-Annex I countries. Many countries supported a similar arrangement for the new ADP. However, reflecting tensions among non-Annex I countries concerning the new ADP, two non-Annex I nominations were put forward for the Chair of the new body. After intense informal consultations before and during the two-week negotiating session in Bonn in May 2012, the outcome was ultimately a complex arrangement whereby instead of a Chair and Vice-Chair, the ADP has two Co-Chairs, one from an Annex I and one from a non-Annex I country. Some of the NOAK workshop participants noted that the general challenge of a co-chairing arrangement is that it could complicate the advance planning of each session as there is no single Chair competent to take his/her vision forward. For this reason, the personal relationship and dynamic between the two co-chairs becomes particularly important.

2.5 Organization of negotiations

"It's a party-driven process – and a process-driven party."

- T-shirt slogan, Durban 2011

In addition to formal plenary sessions and contact group meetings, a number of informal meetings typically take place at international negotiations. In fact, key elements of a deal are mostly struck in various settings behind closed doors. Informal negotiations take a variety of forms. Some are geared towards drafting and resolving technical issues, while others attempt to break political deadlocks. The use of informal and exclusive negotiating settings can certainly help move things forward – but they can also create tension and complications.

Perhaps the most established form of informal consultations is when a contact group moves to an informal setting to start in-depth negotiations. The term "drafting group" is sometimes used for

²⁷ Depledge, 'Looking Back and Looking to Others', p. 5.

informal groups that are engaged in intensive drafting.²⁸ Informal groups also frequently break into sub-groups to focus on particular issues. In an attempt to resolve controversial substantive issues, Parties can meet in private with or without a presiding officer. To resolve particularly complex issues, a “Friends of the Chair” group is often established. Such groups typically include only a limited number of delegates. There are no rules as to how such groups should be formed,²⁹ meaning that questions concerning representation can be critical and challenging. Established examples under the Convention on Biological Diversity are the “Vienna Setting”, originally used during negotiations for the Cartagena Protocol on Biosafety, and the “Vienna+ Setting”, used during the recent negotiations on access and benefit-sharing.³⁰ Climate negotiators have, however, been reluctant to use these relatively established settings as models under the UNFCCC.³¹ Small-group negotiations are typically complemented by bilateral and other unofficial meetings between Parties. In addition, the COP President and other presiding officers often conduct bilateral consultations.

Under the UNFCCC, the Copenhagen Conference is the predominant example of controversies related to process management and the use of small groups. On the second to last day of the Conference, Parties agreed to establish contact groups under the COP and COP/MOP respectively to consider outstanding issues forwarded to them by the AWG-KP and AWG-LCA.³² The two contact groups began working in the afternoon, dividing into smaller drafting groups. At the COP contact group’s evening stocktaking meeting, the question of setting up a Friends of the Chair group became controversial and, while reluctantly agreeing, some members of the G-77/China emphasized that negotiating groups should be able to appoint their own representatives and only discuss a limited number of issues. Meanwhile, a large number of world leaders were already in Copenhagen and undertook their own improvised negotiations late on Thursday and throughout Friday in an attempt to secure an outcome.³³ There was a disconnect between these and the formal negotiations. The final compromise on the Copenhagen Accord was apparently reached in an improvised meeting between US President Obama and the BASIC leaders, and President Obama announced the Accord to the media before it had been considered by all Parties. This process led to a long and acrimonious plenary where a small number of Parties strongly criticized the undemocratic nature of the process, refusing to do more than “take note” of the Copenhagen Accord. While outstanding given the high-level politics involved, this is certainly not the only example in the history of the UNFCCC process when exclusive and sometimes improvised settings have been used – sometimes also successfully.

Recently, during the negotiations that succeeded in the adoption of the 2010 Nagoya Protocol on Access and Benefit Sharing at COP 10 of the Convention on Biological Diversity, the Japanese

²⁸ Yamin & Depledge, *The International Climate Change Regime*, p. 453.

²⁹ Yamin & Depledge, *The International Climate Change Regime*, p. 455.

³⁰ Described in detail in Depledge, ‘Looking Back and Looking to Others’, pp. 3-4.

³¹ Depledge, ‘Looking Back and Looking to Others’, p. 7.

³² The overview is a shorter version of a detailed description in Marko Berglund & Kati Kulovesi, ‘Climate Change Negotiations Simulation’, *International Environmental Law-making and Diplomacy Review*, 2010, pp. 265-266.

³³ For details, see Meistrup, ‘The Runaway Summit’, p. 131.

COP Presidency played an active role, along with secret meetings between key players.³⁴ Japan convened, *inter alia*, a closed meeting in conjunction with the ministerial segment of the COP, which included some, but not all, of the key negotiating groups.³⁵ While the process upset some negotiators, the Nagoya Protocol's text was finalized based on the Japanese COP Presidency's compromise proposal.³⁶ The outcome also benefited from financial pledges put forward by the Japanese government.³⁷

In the aftermath of Copenhagen, questions concerning representation in small groups have played an important role in the UNFCCC process. As described above and below, the Mexican Presidency of COP 16 placed a particular emphasis on transparency, leading to a largely successful outcome at the Cancún Conference. A related question is the COP Presidency's role vis-à-vis other presiding officers such as AWG Chairs.³⁸ There are examples of various successful approaches. At the recent ABS negotiations in Nagoya the COP Presidency ultimately assumed a central role, keeping the two co-chairs of the Working Group, who had chaired the ABS negotiations for four years, out of the final hours' parallel discussions.³⁹ These negotiations led to a successful outcome. In other instances, however, COP Presidencies have given more leeway to working group chairs.

The question of small group negotiations is particularly relevant during the high-level segment of the COP and CMP, where ministers typically participate. The key function of ministers is to provide political guidance that is often necessary to push forward controversial issues. Their presence lends prestige and political momentum to the decision-making process.⁴⁰ The assumption is also that ministers can "rise above the squabbling among officials and sanction bold decisions."⁴¹ The most ambitious attempt to take advantage of high-level political input in the UNFCCC process was the 2009 Copenhagen Conference. The joint high-level segment of COP 15 and COP/MOP 5 involved nearly 120 heads of government, making it one of the world's most significant gatherings of world leaders outside of New York. There are, however, mixed views on the usefulness of this approach. As heads of state and government began to arrive in Copenhagen, their official negotiating text was not ready for high-level political input. As explained above, the exceptionally high political pressure to achieve an outcome then led to improvised efforts to negotiate and broker the Copenhagen Accord.

The planning process for each COP involves the question of how to organize the high-level segment and when the ministers should arrive to provide optimal input for the negotiations. The trend in

³⁴ Gurdial Singh Nijar, *The Nagoya Protocol on Access and Benefit Sharing of Genetic Resources: An Analysis*, CEBLAW, 2011, see: <<http://biogov.cpdr.ucl.ac.be/multistakeholder/presentations/Gurdial-Nijar-NagoyaProtocolAnalysis-CEBLAW-Brief.pdf>>.

³⁵ Elisa Morgera & Elsa Tsoumani, 'Yesterday, Today and Tomorrow: Looking Afresh at the Convention on Biological Diversity', forthcoming in *Yearbook of International Environmental Law* (2011). See: <<http://ssrn.com/abstract=1914378>>.

³⁶ Morgera & Tsoumani, 'Yesterday, Today and Tomorrow'.

³⁷ Morgera & Tsoumani, 'Yesterday, Today and Tomorrow'.

³⁸ For analysis, see Depledge, *Organization of Global Negotiations*, p. 47.

³⁹ Singh Nijar, *The Nagoya Protocol*.

⁴⁰ Werksman, *Procedural and Institutional Aspects*.

⁴¹ Joanna Depledge, 'The Outcome from Copenhagen: At the Limits of Global Diplomacy', *Environmental Policy and Law* 40(1), 2010, p. 18.

recent years has been that ministers have begun to arrive earlier than the beginning of the high-level segment. In Copenhagen and Cancún, for example, most ministers arrived as soon as the first weekend. The Copenhagen experience highlights the need to ensure that the process is ripe for high-level political input – ministers and heads of state cannot be expected to negotiate technical details and a text full of brackets as was the case in Copenhagen.

The high-level segment raises the question of how the negotiations should be organized when the ministers arrive. At recent COPs, ministers have been involved in chairing informal negotiating groups. For instance, in Cancún, ministers from developed and developing countries were paired and appointed to consult on issues where political decisions had to be taken.⁴² The basic idea was that the ministers would not be drafting compromise language but would concentrate on identifying where the political balance was to be found. As some ministers had not yet arrived, consultations chaired by pairs of ministers remained open to any representatives that each party chose to appoint. The Mexican COP Presidency also took pains to emphasize that there was going to be no parallel or separate ministerial process and that the role of the ministerial efforts was to support work under the two AWGs on issues that had not advanced in a formal setting. Ministerial efforts were complemented by consultations by the COP Presidency on various key issues. The format proved largely successful, although also the Cancún meeting has been accused of setting aside “open and participatory methods normal in the UN”, and it has been claimed that senior negotiators’ work was “overtaken” by ministerial-level guidance.⁴³ At the subsequent COP 17 in Durban the ministerial role was more moderate than in Cancún. Many delegates acknowledge the importance of political input in moving the process forward : “Diplomats are trouble, ministers save us”, commented one insider at the workshop.

2.6 Observer organization and transparency of the process

Transparency, possibilities for public participation and access to information play an important role in global environmental governance. One of the essential arguments is that public participation leads to better environmental decision-making.⁴⁴ While democracy remains a contested notion in the international context, public participation in environmental decision-making can also be defended by the democratic argument that people have the right to be consulted over issues that affect their lives.⁴⁵

Even with the possibility of attending negotiating sessions, it may be difficult for NGOs and other observers to follow everything important that is going on. At a negotiating session, each of the bodies establishes a number of informal negotiating groups to work through their busy agendas. At COPs, this means a large number of informal meetings. While the number of official contact groups

⁴² On organization of ministerial work in Cancún, see COP President Patricia Espinosa’s statement at an informal meeting of the President on Sunday, 5 December 2010, available at: <http://unfccc.int/files/statements/application/pdf/espinosa_statement_5dec_for_delivery.pdf>.

⁴³ Martin Khor, ‘Complex Implications of the Cancún Climate Conference’, *Economic & Political Weekly* 25, 2010.

⁴⁴ Jeremy Wates & Seita Romppanen, ‘The Aarhus Convention: A Legally Binding Framework for Promoting Procedural Environmental Rights’ *International Environmental Law-making and Diplomacy Review* (2009).

⁴⁵ For discussion, see Kati Kulovesi, *The WTO Dispute Settlement System: Challenges of Environment and Legitimacy*, (The Netherlands: Kluwer Law International), 2011.

meetings has been limited to two parallel meetings, in reality, a much larger number of negotiating groups convene at any given moment. Even if some informal sessions are opened for observers, following the daily developments is a difficult task and highlights the role of, stocktaking sessions, briefings from Chairs, prompt circulation of key documents and other documents via UNFCCC website as well as daily updates, for example, by the Earth Negotiations Bulletin in promoting transparency. It is also worth noting that it is not only observers who may find it difficult to keep track of developments in the complex negotiations. Also smaller delegations and developing countries experience various challenges.

There has been a growing debate on the practices of stakeholder participation and the transparency of UNFCCC negotiations. Many parties have championed transparency and participatory initiatives in multilateral environmental decision-making. The authors' informal discussions have revealed that several delegates are in favour of opening informal meetings increasingly to observers in the hope that the increased attention will make obstructing Parties more uncomfortable. However, some have also expressed reservations. Their argument is that increased transparency would drive the "real discussions" deeper into cabinets and smaller groups, endangering small-country influence. Indeed, open contact groups may well lead to even more bilateral and informal coordination, which in any case takes place in the background. This would further burden negotiators' timetables in busy meetings. The situation of fragmentation and specialization of the climate agenda is topped with new transparency demands – this alone makes some delegates suspicious of the new initiatives. Whether small country influence would suffer due to increased transparency is perhaps a more debatable concern.

In some areas of global climate politics, transparency is also an objective itself. This is especially the case in the IAR and ICA processes that are aimed at promoting the comparability and transparency of climate actions undertaken by major economies.⁴⁶

In some ways, arguing against participation and transparency reforms would also seem like an awkward strategic move. The commitment to engage stakeholders is enshrined in the UNFCCC.⁴⁷ The Secretariat recognizes that stakeholder participation "helps to bring transparency to the workings of a complex intergovernmental process [...] improves *popular understanding* of the issues, and promotes *accountability* to the societies served [...]"⁴⁸ International law in general, and the Rio Declaration in particular, supports public participation and access to information in matters relating to the environment and climate change.⁴⁹ Furthermore, the recent empirical evidence suggests that the relative lack of transparency and large number of meetings by no means guarantees effectiveness (see chapters 3.2 and 3.3). Second, transparency via stakeholder participation has not delayed committee work – the UNFCCC has recently allowed accredited

⁴⁶ See for example, Decision 1/CP.16, paragraphs 41, 44, 63, 64, 96, 98.

⁴⁷ See for example UNFCCC: Article 6(a) (ii) and (iii); Article 7.6; Decision 1/CP.16, paragraph 7.

⁴⁸ *Promoting effective participation in the Convention process*, UNFCCC: FCCC/SBI/2004/5, see: <<http://www.un-ngls.org/orf/UNFCC.pdf>>.

⁴⁹ See for example UN Conference on Environment and Development, Rio Declaration on Environment and Development, principle 10; *Guidelines for Participation of Major Groups and Stakeholders in Policy Design*, Nairobi: UNEP, 2004.

stakeholders to participate in meetings and inform decisions in the Transitional Committee on the Green Climate Fund.

If we arrive at the understanding that a change towards increased transparency in the UNFCCC is needed, the main question evolves into: how does this kind of change take place? According to the Mexican Presidency of Cop 16, there is no need for any major changes to the Rules of Pprocedures. There are several examples of flexible and inclusive practices within the UN, and the climate process could, in time, change its collective mentality and get used to this kind of flexibility. However, Mexican Ambassador Luis Alfonso de Alba also highlighted the need for some kind of *institutional follow-up* on the initiatives that Mexico undertook in the name of the COP 16 Presidency , and referred particularly to the level of interaction with all nine stakeholder constituencies plus parliamentarians.⁵⁰

⁵⁰ Ambassador Luis Alfonso De Alba, intervention in the SBI In-session workshop to further develop ways to enhance the engagement of observer organizations, 8 June 2011, Bonn.

"Finally, Chair, if I permit myself a personal note, we have had three years of negotiations and one agreed paragraph."

- Ambassador Adrian Macey, Cancún 2010⁵¹

3 DECISION-MAKING

3.1 COP decisions

Hundreds of COP decisions have been adopted following the entry into force of the UNFCCC. The vast majority cover relatively technical issues, such as the budget, arrangements for intergovernmental meetings, reporting, the financial mechanism and capacity-building. However, there have also been politically significant ones. The Marrakesh Accords and the Cancún Agreements are prime examples of COP and COP/MOP decisions with far-reaching political consequences.

What, then, are the differences between COP decisions and legally-binding instruments, such as new protocols, and what are their respective pros and cons? This question has been subject to a lively debate in the context of the post-2012 negotiations with the majority of the Parties preferring to base the future legal architecture on a new protocol, while others would favor a COP decision. In fact, the legal form of the post-2012 climate regime has been one of the key hurdles in the negotiations since COP 13 in Bali, where the controversial question of the legal form of the AWG-LCA's outcome was deliberately deferred in order to secure agreement on launching the Convention track of negotiations.

At least in the short-term, the role of COP decisions is increasing in importance, as the prospects for the Kyoto Protocol's second commitment period to include other than European countries (apart from Australia and New Zealand) has become more and more daunting. The legal form of the post-2020 climate regime was one of the main political struggles at the Durban COP 17. The conference resulted in Parties launching the ADP to negotiate "a Protocol, another legal instrument or agreed outcome with legal force under the Convention applicable to all".⁵² The negotiations are scheduled to conclude in 2015 and implement the new instrument from 2020 onwards. The compromise language "agreed outcome with legal force", resulting from US and Brazilian negotiators huddling together to solve a political stand-off between the EU and India, does not reflexively signal a ratifiable instrument. However, it makes a ratifiable treaty the most likely and widely expected form of outcome for post-2020.⁵³

⁵¹ Amb. Macey was reporting back to the AWG-KP final plenary on the proceedings of the contact group on the Kyoto Protocol's flexibility mechanisms Cancún, 10 December 2010.

⁵² Decision 1/17.CP, *Establishment of an Ad Hoc Working Group on the Durban Platform for Enhanced Action* (FCCC/CP/2011/9/Add.1, 15 March 2012).

⁵³ Lavanya Rajamani, 'Deconstructing Durban', Indian Express, 15 December 2011.

The difficulty of reaching agreement on a new climate treaty has channelled interest and attention towards examining the possibilities offered by, and the limitations of, COP decisions in implementing the UNFCCC and shaping global climate politics. The question of whether COP decisions are binding under international law has been widely debated by legal scholars. The majority view is that they lack a legally-binding character.⁵⁴ Jutta Brunnée elaborates that “[COP] decisions do contain terms that make conduct mandatory, and make access to certain benefits contingent upon compliance with some of these mandatory terms. Yet, they do not appear to be binding in a formal sense”.⁵⁵ However, it is seemingly difficult to generalise about the legally-binding nature of COP decisions, as different treaties empower their respective COPs to different degrees. The COP in the climate regime is empowered by “make, within its mandate, the decisions necessary to promote the effective implementation of the Convention” and to “exercise such other functions as are required for the achievement of the objective of the Convention”.⁵⁶ The text of the Kyoto Protocol instructs the COP/MOP, for example, to adopt “rules and guidelines” concerning various aspects of implementing the Kyoto Protocol.⁵⁷ Indeed, as explained above, the operationalization of the Kyoto Protocol relies considerably on COP/MOP decisions in the form of the Marrakesh Accords. In this sense, it is credible to argue that COP and COP/MOP decisions will be the principal instrument of global climate governance until 2020 – and also beyond it.

The main argument for COP decisions is that they do not, *per se*, require ratification. However, in some countries at least, the contents of an international instrument – rather than its name or formal status – determine the legal procedures through which it must be transposed into national legislation. In Finland, for example, the contents of the Marrakech Accords were deemed to be so substantial that they were transposed into the national legal system through a special Decree.⁵⁸ This has not been done with respect to other COP or COP/MOP decisions but relates to the far-reaching substance of the Marrakesh Accords. This means that for some countries at least, the more substance is put into the decision text, the more likely they are to trigger national implementation procedures in accordance with national constitutional requirements. In other countries, however, the form and name of the agreement might make a remarkable difference. The most crucial implication of the ratification requirement is the advice and consent procedure and the two-thirds majority by which the US Senate has to consent to international agreements signed by the US executive branch. This has effectively prevented most environmental treaties from being implemented in US domestic legislation. A recent report sheds light on the status of ten pending environmental treaties – half

⁵⁴ For a recent discussion on the properties of COP decisions, see for example AnttoVihma, ‘A Climate of Consensus: The UNFCCC faces challenges of effectiveness and legitimacy’, *Finnish Institute of International Affairs Briefing Paper* 75, 2011, p. 8.

⁵⁴ *Reclaiming Global Environmental Leadership: Why the United States Should Ratify Ten Pending Environmental Treaties*, Center for Progressive Reform White Paper #1201, 2012, see: <http://www.progressivereform.org/articles/International_Environmental_Treaties_1201.pdf>.

⁵⁵ Jutta Brunnée, ‘COPing with Consent: Law-Making under Multilateral Environmental Agreements’, *Leiden Journal of International Law* 21, 2002, note 4.

⁵⁶ UNFCCC, Article 7.2.

⁵⁷ Kyoto Protocol, Article 17.

⁵⁸ Decree of the President of the Republic amending the Decree on the Entry into force of the Act on Entry into force of the Kyoto Protocol to the UN Framework Convention on Climate Change and the Protocol’s Legislative Provisions (376/2006). The Decree provides that specified decisions adopted by the COP/MOP in Montreal on 9 Dec. 2005 that the President of the Republic has approved on 19 May 2006 are in force and applicable from 9 Dec. 2005.

signed by Democratic presidents and half signed by Republican presidents – which have been pending for 13 years on average, awaiting ratification.⁵⁹

3.2 Voting

The recent Copenhagen, Cancún and Durban COPs have served as a reminder that decision-making under the COP and the COP/MOP takes place in a legal vacuum. This is because the COP has never been able to agree on its Rules of Procedure, as mandated by Article 7.2 of the UNFCCC. The sticking point is Rule 42, which contains several options on majority voting. The lack of agreement on the Rules of Procedure means that the COP has held its seventeen sessions operating on the basis of the draft Rules of Procedure (FCCC/CP/1996/2) without the voting rules, under a general understanding that in the absence of voting rules, decision must be taken by “consensus”.⁶⁰ The (unused) exceptions are situations where voting rules are provided in the text of the UNFCCC and the Kyoto Protocol. According to Article 15 of the UNFCCC, amendments to the Convention could be adopted, as a last resort, by a three-fourths majority vote of the Parties present and voting. Amendments to the Protocol and its annexes could also be adopted by a three-fourths majority vote under Articles 20 and 21 of the Kyoto Protocol.

The framework established by a regime’s Rules of Procedure is of vital importance as it helps to shape the Parties’ expectations and power relationship.⁶¹ When negotiations began for the Kyoto Protocol and stronger emission-reduction commitments, the stakes were raised, and many saw that the absence of voting rules threatened to unduly influence the crafting of the Protocol, and even to block its adoption altogether. The most serious push to reach consensus on the Rules of Procedure took place in informal consultations by the COP Presidency in 1997, but led to no breakthrough.⁶² Also two other, quite different attempts to by-pass the requirement that decisions be adopted by consensus were also made during these heated debates of the late 1990s.⁶³

A factor that further complicates decision-making under the UNFCCC is that there is no clear definition of consensus. Detailed discussions of the meaning of consensus under international law have taken place, for instance, in the context of COP 6 of the Convention on Biological Diversity in 2002 as Australia objected to the adoption of a decision on invasive alien species, but the decision was still adopted.⁶⁴ The mainstream opinion of international lawyers would have it that consensus is denoted by the Chair’s perception that there is no stated objection. International negotiations seem to develop their own contextual interpretation of consensus, either through rules or practice. It certainly has been the practice in the UNFCCC – as well as under other environmental treaties – that decisions have been gavelled despite a degree of opposition, notably in Kyoto (1997), where

⁵⁹ *Reclaiming Global Environmental Leadership: Why the United States Should Ratify Ten Pending Environmental Treaties*, Center for Progressive Reform White Paper #1201, 2012, see: <http://www.progressivereform.org/articles/International_Environmental_Treaties_1201.pdf>.

⁶⁰ The Climate Change regime shares this challenge with its “sister” Convention on Biological Diversity which, for similar reasons, has yet to adopt its voting rules.

⁶¹ Werksman, *Procedural and Institutional Aspects*.

⁶² See, Organizational Matters, Adoption of the Rules of Procedure, Note by Mr Chen Chimuntengwende (Zimbabwe), see UNFCCC: FCCC/CP/1997/5, 19 November 1997.

⁶³ For a detailed account see Werksman, *Procedural and Institutional Aspects*.

⁶⁴ See CBD COP 6 Decision VI/23, *Alien species that threaten ecosystems, habitats or species*.

Saudi Arabia's objections were heard but not taken into account, and in Rio (1992), where the Convention was adopted despite objections by OPEC countries. The most recent example is from COP 16 where President Espinosa ignored Bolivia's explicit objection to the Cancún Agreements, stating that *"The consensus rule does not mean unanimity, far less does it mean the possibility of one delegation exercising a right of veto after years of hard work and huge sacrifices by many others... I cannot disregard the position and wish of 193 other parties, hence the decision has been duly adopted"*. In other cases, when the opposition has been perceived by the Chair as strong enough to prevent the adoption of a formal decision, the texts have only been "noted" as in Geneva (1996) and Copenhagen (2009).

This lack of clarity has arguably contributed to the current difficulties with regard to COP decision-making. As stakes are raised in the negotiations, it seems that the final plenaries have become increasingly theatrical and unpredictable as decision packages are gavelled – or not gavelled – through objections. Fuzziness reigns over the Parties that are able to utilize veto or brinkmanship strategies, and at what stage. In response, Mexico and Papua New Guinea have recently tabled a proposal to amend the Convention itself regarding voting.⁶⁵ At COP 17 in Durban, at least Costa Rica, Guyana, Surinam, the EU, Sierra Leone, Colombia, Indonesia, New Zealand and Australia showed a degree of support for the proposal. However, Saudi-Arabia, Qatar, Bolivia and Venezuela voiced deep concerns. The Mexico-Papua New Guinea proposal suggests modifying Article 7 of the Convention (on the COP's role and functions) and adding two paragraphs to Article 18, entitled "the Right to Vote". In essence, the proposal would enable the COP to adopt decisions by a three-fourths' majority vote that would take place "as a last resort" after "every effort" to reach consensus has been exhausted.⁶⁶ In this sense, the language would be similar to that used in the provisions concerning Convention and Protocol amendments. According to the proposal, however, decisions related to financing under certain paragraphs of Articles 4, 7 and 11 would be excluded from the scope of the amendment and taken by consensus.

As discussed above, amending the UNFCCC (and adopting the voting proposal) would be possible with a three-fourths' majority. However, the amendment would also require ratification to enter into force. This can, as such, lead to considerable hurdles. Generally, the ratification process tends to be time-consuming. As a recent pessimistic example, the Belarus amendment to Annex B of the Kyoto Protocol has never entered into force because of the ratification requirement. Furthermore, the amendment only becomes binding on those Parties having ratified it. It is worth noting that key countries, such as China nor India have expressed support for the Mexico-Papua New Guinea proposal, and many insiders doubt whether they along with other key members of the Group of 77 and China as well as the US would accept the proposed system of voting. If these Parties would not ratify the amendment, one could hardly say that the decision-making has been clarified, and it would in practice have to continue as consensus-based.

⁶⁵ Revised Papua New Guinea and Mexico proposal for an amendment to the Convention, UNFCCC: FCCC/CP/2011/4/Rev.1.

⁶⁶ Revised Papua New Guinea and Mexico proposal for an amendment to the Convention, UNFCCC: FCCC/CP/2011/4/Rev.1.

However, it would not seem coherent to argue against a ratification process just because it seems difficult and time- consuming – especially in case a party is simultaneously a proponent for a legally binding, ratifiable instrument for all major emitters. This could in all probability lead to an even more challenging period of ratification. Some experts also feel that voting on officers – which is already possible under the draft Rules of Procedure - may be needed in the future, as some Parties seem to be increasingly using the nominations process to slow the negotiations. At the same time, the most recent negotiating session in Bonn showed that Parties were reluctant to establish a voting precedent and use these rules to resolve the deadlock over the ADP Bureau – the situation was ultimately resolved without a vote.

To conclude, voting is unlikely to solve all outstanding issues, especially those related to practices of consensus-building. The UN environmental regimes, and indeed most international institutions, typically operate by consensus; they turn to voting very reluctantly, only when all efforts at consensus are exhausted. This is also the way in which voting may enhance effectiveness. Parties are typically willing to go the extra mile just to avoid the open confrontation that can come with voting.

“Let us be honest here – the process is hostile towards ministerial input.”

- Former Chair of the AWG-KP

4 OUTSIDE INPUTS

Following Copenhagen, the narrative took hold that there is a need to “save” multilateralism and safeguard the role of the UNFCCC as the legitimate, universal forum for global climate policy. Thus, at the 2010 Cancún Conference, UNFCCC Executive Secretary Christiana Figueres, UN Secretary-General Ban Ki-moon and Mexican President Felipe Calderón all underscored that the Cancún conference was about saving the UN climate regime, and would have important implications for multilateralism as a whole. Also in Durban, as COP President Maite Nkoana-Mashabane urged the final plenary to adopt the decision texts, she highlighted that the multilateral process remains fragile, and “cannot take another shot”.⁶⁷

The key challenge to the UNFCCC’s legitimacy is its perceived lack of effectiveness in producing meaningful progress on climate change mitigation. This is often justified by the argument that its global and consensus-based decision-making structure is not conducive for reaching agreement on an effective climate treaty: *“Moving the climate change agenda forward multilaterally among 195 parties to the UNFCCC is proving to be a serious challenge [...] The turn today toward a multipolar world indicates that approaches based on consensus are unlikely to produce results”*.⁶⁸ It has been proposed by scholars and mass media alike that more flexible international venues, such as the Group of 20 (G-20) or the Major Economies Forum on Energy and Climate (MEF) could better suited for the making progress on the critical issues.

The idea of addressing climate change issues outside the UNFCCC is not new; the question is rather whether the growing number of venues outside the UN are presented as alternative or complementary to the UNFCCC negotiations. The launch of the Asia-Pacific Partnership for Clean Development and Climate (APP) in July 2005 created remarkable political turmoil and media coverage, given that some saw it as an attempt to sideline the UNFCCC.⁶⁹ In recent years, several high-level political forums have begun to address climate change issues. These include existing venues, such as the Group of Eight (G-8) and the G-20. They also include dialogues and other initiatives designed to address climate and energy issues, such as the Gleneagles Dialogue, the Greenland Dialogue, the Major Economies Meeting by the Bush Administration and the subsequent MEF by the Obama Administration, as well as the Cartagena Dialogue for Progressive Action. Also a number of other informal climate change initiatives have taken place, such as the Cochabamba Conference in Bolivia and the Petersburg Dialogue in Germany.⁷⁰ Furthermore, regional meetings,

⁶⁷ Durban Final Plenary, Saturday, 19 pm.

⁶⁸ Rafael Leal-Arcas, ‘Top-Down versus Bottom-Up Approaches for Climate Change Negotiations: An Analysis’, *IUP Journal of Governance and Public Policy* 6 (4), 2011.

⁶⁹ Some examples of the headlines includes ‘Bush Administration Unveils Alternative Climate Pact’ (Reuters, July 28 2005) and ‘US Moves to Sideline Kyoto’ (The Financial Times, July 28 2005).

⁷⁰ Camilla Bausch & Michael Mehling, ‘Addressing the Challenge of Global Climate Mitigation: An Assessment of Existing Venues and Institutions’, *Friedrich Ebert Stiftung Study*, 2011.

such as the Asia Pacific Economic Cooperation (APEC) have increasingly begun to produce statements and declarations on global climate politics.

The combination of formal negotiations under the UNFCCC and the use of informal processes has produced some concrete results. Most importantly, agreement on the two-degree target in the Copenhagen Accord and the Cancun Agreements clearly benefited from progress outside the UNFCCC negotiations. The breakthrough was made in l'Aquila meeting in 2009 under the MEF, which is made up of the EU and 16 major economies. The MEF's aim has, at least officially, been to "accelerate progress within the Convention" and "help to achieve consensus" within the UN climate regime.⁷¹ According to second hand sources, the two-degree target, which the EU adopted already in 1996 as a benchmark for its own climate policy and has campaigned for its international adoption since the 1990s, was spotted in a Brazilian submission to the UNFCCC,⁷² which served as a starting point for the breakthrough in the Heads of State level discussions in the MEF meeting. At the same time, it is useful to remember that most of the particularly vulnerable developing countries – who are not members of the MEF or G-20 do not view the 2°C target as ambitious enough but are, instead, advocated for the more ambitious 1.5C° target.

A seasoned delegate pointed out that it takes time for the outside influences to "trickle down" to the UNFCCC. This could well be a 3-4 years process. Recent examples include the UN Secretary-general's High-level Advisory Group on Climate Change Financing, as its ideas are slowly making their way in the formal texts under the Convention, as well as the Copenhagen Accord, which has influenced Cancún and Durban decisions in a notable manner.

Many of the non-UN processes appear to have some common characteristics: they are not legally binding; have no established institutional structures or capacity for technical analysis.⁷³ Many of them have a tendency to avoid timetables and concrete targets, their participation is limited, they consider climate change in the context of other concerns, many tend to emphasize technological development, and do not explicitly differentiate between developed and developing countries.⁷⁴ The UNFCCC process, in turn, enjoys universal participation, has established institutional structures and negotiating procedures, as well as capacity to undertake technical work that serves to facilitate the negotiations. Bausch & Mehling, for example, have argued that no existing venue outside the UNFCCC process can have long-term success in tackling climate change mitigation.⁷⁵ The UNFCCC itself suffers from weaknesses concerning political will and shared vision. The solution, then, could perhaps be "harnessing complementarities resulting from varying degrees of political weight, formality, institutional capacity, and specificity of mandate".⁷⁶

⁷¹ Antto Vihma, 'Friendly Neighbor or Trojan Horse? Assessing the Interaction of Soft Law Initiatives and the UN Climate Regime', *International Environmental Agreements* 9 (3), 2009, pp. 239–262.

⁷² Submission from Brazil on a Shared Vision for Long-Term Cooperative Action, The paragraph 1 (a) of the Bali Action Plan, see: <<http://unfccc.int/resource/docs/2009/awglca6/eng/misc04p01.pdf>>.

⁷³ Bausch & Mehling, 'Addressing the Challenge of Global Climate Mitigation'.

⁷⁴ Vihma, 'Friendly Neighbor or Trojan Horse?'.

⁷⁵ Bausch & Mehling, 'Addressing the Challenge of Global Climate Mitigation'.

⁷⁶ Bausch & Mehling, 'Addressing the Challenge of Global Climate Mitigation'.

Overall, the argument can be made that the plea for “saving the UNFCCC” or “saving multilateralism” was credible after the traumatic events of Copenhagen. Currently, however, after two relatively successful meetings the role of the UNFCCC seems stable until 2015, the intended deadline of the Durban Platform negotiations.

“Multilateralists of the world, despair!”

- The Economist, 19 November 2008

5 CONCLUDING REMARKS

This working paper was originally intended to serve as a basis for freewheeling and open-ended discussion at a workshop to be organized by NOAK in April 2012. It has subsequently been updated to reflect discussions at the workshop. Given its background, the paper does not intend to give mature suggestions on the way forward, but rather, it seeks to identify issues and themes concerning the efficiency of the UNFCCC negotiations for further discussion.

There are, however, a couple of general points we wish to highlight for the discussion. First, the need to take a closer look at the efficiency of the UNFCCC negotiations appears as real and in light of, *inter alia*, recent progress and the SBI's current request for submission on efficiency, the time seems ripe for a broader consideration of the issues covered by the paper. To be sure, many important steps have been taken in the UNFCCC negotiations since the long-term discussions officially began in Montreal in 2005. Mitigation by developing countries is now firmly on the agenda, as are the critical questions of enhanced transparency and climate finance. Parties have found a shared vision on the need to limit the global average temperature increase to below 2°C and agreed review the ambitiousness of this goal by 2015. Adaptation has been given the same priority as mitigation, and new institutions have been established to promote technology issues. While many of the incremental advances are important, hard-fought and compelling to those “inside” the process, they fail to create a narrative for the wider public that the UN climate talks are getting to grips with the big questions. While talks on the most critical issues – mitigation, transparency and funding sources – have been moving forward dangerously slowly, several participants at the NOAK workshop emphasized the need to better communicate results and successes of UNFCCC to the public, as “there has been more progress than we have been able to sell, including the global 2°C target and the new constituted bodies”.

While the recent advances in Cancún and Durban have “rescued” the UNFCCC process and multilateral climate change cooperation for now, in the next few years the process will face a critical test: It must deliver tangible results and ensure that the Convention's ultimate objective remains achievable. While the post-Copenhagen crisis now seems to be over, there is a new, pressing need to deal with the increased complexity and new institutional architecture of AWG-ADP and limited membership bodies.

Possible long-term objective is two sessional meetings, punctuated with the limited membership bodies, and transparent informal workshops and extra meetings taking place in Bonn in between. The general feeling among negotiators and experts seems to be that procedural reforms are possible as incremental changes, but no “big bang” solution is available. Time also seems ripe for discussing these reforms given the scheduled termination of the AWG-KP and AWG-LCA in Doha, and the recent launch of the ADP. Many developed country Parties also seem willing to make changes due

to frustration and excessive costs of meetings. However, rushing procedural reforms is always risky, and future meetings such as COP18 in Doha have already crammed workload. Also it may be necessary to wait until the work of limited membership bodies has really begun: “one year later we can say that there is duplication, and then decide to do something about it”.

To conclude, for some considerable time there has been a need to clarify, formalize and reform the organization of work and decision-making rules of the UNFCCC. This task starts with a systematic search for possible solutions and political will to begin a long battle to push them through. In the light of these challenges, the Copenhagen, Cancún and Durban meetings and their final plenaries were potentially useful exercises. They may, hopefully, have provided some stimulus for governments to work on the procedural issues in the climate regime with renewed urgency.