

# A CLIMATE OF CONSENSUS

75

THE UNFCCC FACES CHALLENGES  
OF LEGITIMACY AND EFFECTIVENESS

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## THE UNFCCC FACES CHALLENGES OF LEGITIMACY AND EFFECTIVENESS

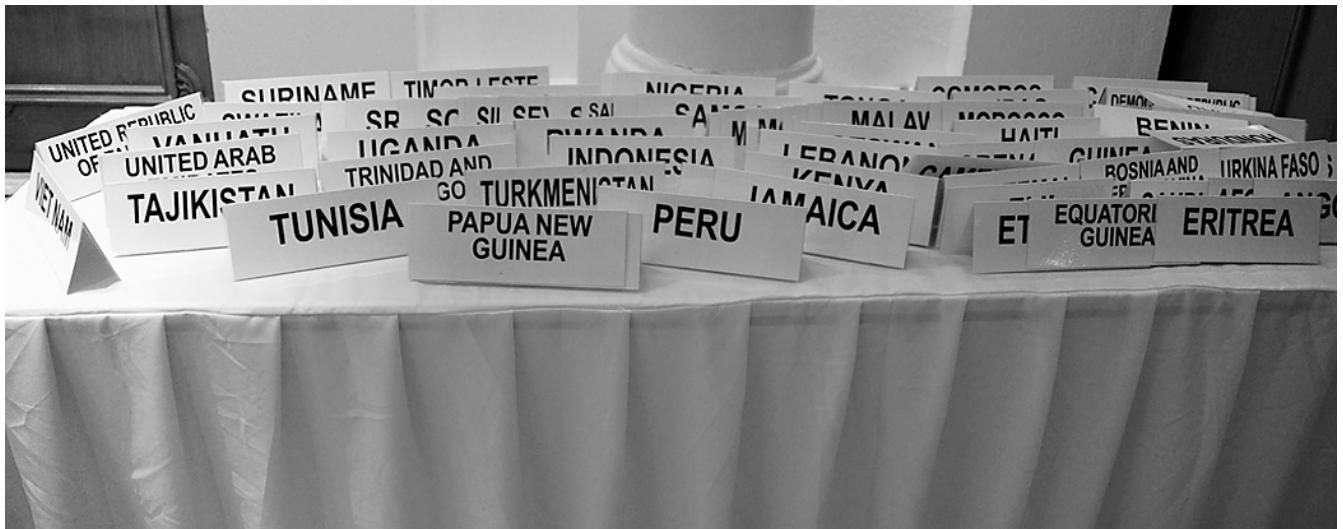


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- The Cancún climate meeting adopted a package of decisions to numerous standing ovations. However, it did so against loud and formal protests from Bolivia, stretching the concept of “consensus” more than ever before within the UN climate regime.
- The Cancún meeting also brought to everyone’s attention the inconvenient truth that decision-making in the UNFCCC exists in a legal vacuum. The Conference of the Parties has never agreed its Rules of Procedure, and has during its 17-year history operated with draft Rules of Procedure without voting rules, under a general agreement that decisions are taken by “consensus”.
- In the light of the dramatic events in the recent Copenhagen and Cancún meetings, as well as the daunting prospects of achieving a ratifiable legal instrument for post-2012, it is clear that the relationship between consent and authority has become too flimsy to provide an unproblematic basis of legitimacy for the UNFCCC’s decision-making.
- The 2000s led to the erosion of UNFCCC’s legitimacy as a decision-making arena, especially in the subjective views of Northern governments as well as considerable parts of the expert community and the public in general. This trend led to an outburst of UN scepticism after the Copenhagen meeting, declaring the UN climate regime to be a “multilateral zombie”.
- While the Cancún meeting has been criticised with arguments based on process and legitimacy, from a broader perspective it seems likely that achieving decisions with some substance is actually the primary need in securing the legitimacy of the UN process.
- Had the Cancún agreement been negotiated outside the UN, it would very likely have been weaker on several fronts. Also, it is important to keep the longer term option for a legally binding treaty open; the only institutional possibility for this lies within the UNFCCC.

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The definition of “consensus” took the spotlight in the final hours of the Cancún climate meeting. Photo: UN Climate Talks / Flickr.com.

The Cancún climate meeting adopted a package of decisions on mitigation, adaptation, finance and technology to numerous standing ovations. However, it did so against loud and formal protests from Bolivia. At the close of the Cancún meeting, Bolivia stood conspicuously isolated, but made very explicit objections to adopting the decisions with unforeseen persistence. The Mexican presidency gavelled through the decisions and clarified 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”*.

Afterwards, Bolivia and its non-governmental supporters dubbed the Cancún meeting a betrayal of the democratic principles and core values of the UN, namely the rule of consensus, which is “sacrosanct”. The 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.<sup>1</sup> What are the broader implications of gaveling over objections in order to make progress in climate politics? Does it damage or revitalize the legitimacy of the UN climate regime?

Major multilateral environmental agreements such as the UN climate regime are expressed in legally

binding treaty form as “conventions” and “protocols” to those conventions. They include provisions for signature, ratification, accession, approval, and withdrawal recognized by international treaty law and customary law as a way of formalizing consent to be bound. The United Nations Framework Convention on Climate Change was signed in Rio (1992) and entered into force in 1994, and it is implemented by its yearly Conference of Parties (COP) as its supreme decision-making body (Article 7, UNFCCC). The Kyoto Protocol was signed in 1997 and entered into force in 2005, containing specific legally binding commitments for developed country parties for its first commitment period 2008–2012. Currently, however, a legally binding protocol seems to be politically impossible, at least for the first years of the post-2012 era in the climate regime. This reality has focused increasing interest and attention on the possibilities and limitations of COP decisions in implementing the framework convention and shaping global climate politics.

The question of whether COP decisions are binding under international law has been widely debated by legal scholars, and the position of the majority is that they lack a legally-binding character. 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”.<sup>2</sup> How-

1 Martin Khor (2010). Complex Implications of the Cancun Climate Conference. *Economic & Political Weekly*, 25 December 2010.

2 Jutta Brunnée (2002). Coping with Consent: Law-Making under Multilateral Environmental Agreements. *Leiden Journal of International Law* 21, note 4.

ever, it is seemingly difficult to generalise about the legally-binding nature of COP decisions, as different treaties empower their respective COPs to different degrees. While not unarguably legally binding, it is increasingly likely that COP decisions taken in the climate regime have rather significant implications for state parties and the non-state actors in these states alike. The authority and scope of COP decisions from Cancún is a subject of considerable political controversy within some UNFCCC parties, and associated with this controversy are different conceptions of country identities, of sovereignty, and of conditions for effective and legitimate governance.

### From Copenhagen to Cancún

After the emotional and unprecedentedly chaotic Copenhagen climate meeting in December 2009 there was a plethora of sceptical writing on the United Nations-based climate regime. Many analysts of international relations—on both sides of the Atlantic as well as in the South—concluded that “political capital” had left the building, and that the UN Framework Convention on Climate Change (UNFCCC) now “smells like failure”.<sup>3</sup> Several EU leaders as well as the EU Commission were visibly frustrated and questioned the UN process, something that the EU as a strong supporter of multilateralism has been keen to avoid in the past. Although the Copenhagen meeting was the scene of a rather complex geopolitical game, several observers saw just what they wanted to see; the end of multilateralism and/or the irrelevance of Europe in world affairs.

The Cancún climate meeting in 2010 was a different story altogether. The meeting had rather low substantive expectations, a far better managed negotiations process, and quickly indicated that many of the sweeping post-Copenhagen judgements had been oversimplifications. A decent amount of political capital was definitely still invested in the talks. Dur-

ing the Cancún meeting, Executive Secretary Christiana Figueres, UN Secretary General Ban Ki-moon, as well as host country President Felipe Calderón all underscored that the meeting was about saving the UN climate regime, with severe implications for multilateralism as a whole. The Mexican presidency used diplomacy at the highest level towards a reluctant Venezuela, and high-profiled Indian minister Jairam Ramesh worked around the clock to achieve North/South compromises on crunch issues. While Air Force One did not land on the Cancún airstrip, and the global media limelight was less bright than in Copenhagen, the climate negotiations appeared to be alive and well.

### No consensus on consensus

Declared many times even before the Copenhagen meeting and its aftermath, the key argument challenging the UNFCCC's legitimacy has been that consensual decision-making among 193 countries is not possible (with such a complicated and politically charged issue), and that a smaller and more flexible group such as the G20 is required for the job. These catchphrases enter expert and public consciousness alike via the mass media. The legitimacy debate is a relevant backdrop to the final events of the Cancún meeting, where the concept of consensus came under the spotlight in a heated exchange between Bolivia and the COP President from Mexico.

The Cancún climate meeting also brought to everyone's attention the inconvenient truth that decision-making in the COPs of the UNFCCC exists in a legal vacuum. The Conference of the Parties has never agreed its Rules of Procedure, as their adoption was blocked by Saudi Arabia at the last Intergovernmental Negotiating Committee meeting in 1991 before the first Conference of Parties. The Rules of Procedure include rule 42, with several options for voting. The COP has during its 17-year history operated with draft Rules of Procedure (FCCC/CP/1996/2) without the voting rules, under a general agreement that decisions are taken by “consensus”.

To further complicate the picture, there is no crystal clear definition of consensus. The mainstream opinion of international lawyers would have it that consensus is denoted by the Chair's perception that there is no stated objection. This has been the practice in most global negotiation fora and can be

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3 Even many prominent environmentalists were party to the UN scepticism, see for example George Monbiot (2010). *The Short, Happy Life of Climate Change Enlightenment*, The Guardian, 21 October 2010; some more populist critics gladly took the opportunity to denounce international climate regulation as a whole, declaring that “the UNFCCC/Kyoto model of climate policy cannot continue because it crashed in 2009”, see *The Hartwell Paper*, 22 April 2010.



Mr Pablo Solon, Bolivian permanent representative to the United Nations, defended the Bolivian positions in Cancún. Photo: UN Climate Talks / Flickr.com.



referred to as part of international customary law. However, it certainly has been the practice in the UNFCCC (as well as in some other environmental treaties) that decisions have been gavelled through a limited amount of opposition, notably in Kyoto (1997), where Saudi Arabia's objections were heard but not taken into account. According to climate negotiations folklore, the UNFCCC was itself adopted in Rio (1992) despite objections by some OPEC countries.<sup>4</sup> In other cases, when the opposition has been perceived by the Chair as strong enough, the decision texts have only been "noted" as in Geneva (1996) and Copenhagen (2009).

Overall, inadequate attention has been paid to the broader question of the legitimacy of the decision-making process in climate negotiations in either academic or policy literature. Naturally, legitimacy as a justificatory relation has traditionally been most relevant between the citizens and their nation state. The dominant source of international legitimacy has been seen as emanating indirectly from the state level, expressed by the explicit agreement of a nation's own legitimate authorities. The authority of treaties such as the UNFCCC can be seen as self-imposed, resting firmly on the consent of the very states to which it applies. Theories of legitimacy in the social sciences revolve around the possibilities and problems of domination, the imposition of one's will on another – the legitimacy of consensual obligations such as contracts has not been regarded as interesting. However, in the light of the dramatic

events in the Copenhagen and Cancún meetings, as well as the daunting prospects of achieving a ratifiable protocol for post-2012, it is evident that the relationship between consent and authority has become too flimsy to provide an unproblematic basis of legitimacy for the climate negotiations.

### Effectiveness and legitimacy intertwined

When the legitimacy of international decision-making is *not* indirectly derived from the consensual agreement of legitimate nations, and some level of authority is exercised in its decision-making on member states and non-state actors, an alternative basis for legitimacy is needed. This can be approached by grouping the components that provide the legitimacy for international decision-making into source-based (the source of the authority is considered legitimate, such as expertise or science), procedural (the authority emerges from fair procedures), and substantive (leads to successful outcomes).<sup>5</sup>

The legitimacy of the UNFCCC has so far been mainly built on the first two pillars. Generally, the *source-based* legitimacy in global climate governance is derived from climate science. While the scientific evidence for climate change has been periodically questioned in some (mainly political, not scientific) forums in different domestic contexts, this has hardly affected the functioning of the UN process

<sup>4</sup> Kati Kulovesi (2010). *Different views on consensus: legality of the Cancun Agreements?* Point Carbon, 23 December 2010.

<sup>5</sup> Daniel Bodansky (1999). The Legitimacy of International Governance: A Coming Challenge for International Environment Law? *The American Journal of International Law* 93, 596–624.

Ms Patricia Espinosa, Secretary of Foreign Affairs of Mexico, championed the Cancún compromise and became one of the most popular COP presidents in UNFCCC's history. Photo: Marco Castro / United Nations.



directly. However, climate science only provides imperatives for the tendency that there is a need to reduce greenhouse gas emissions, but not by how much, as science does not define “dangerous”. It also stays silent on the political questions of how and by whom. The *procedural* source of legitimacy in global negotiations is about “fair play”. The usual questions are naturally how many governments are allowed at the table and how equal the terms will be. The procedural source includes formal legitimacy, meaning that the agreement is based on a formally valid multilateral process within the system and tradition of international law. The procedural source differs quite starkly from the definitions of a legitimate process of norm development in domestic politics, where legitimacy is predominantly linked to some notion of democracy. There is also a lively debate on democracy in global governance—on current democracy deficits and how they could be reduced, the meaning of democracy at the international level, and what type of democracy is possible or desirable. This complex discussion, however, remains largely in academic circles.

The third source of international legitimacy is *substantive*: the actual impact of the norms. Several theorists have emphasized the substantive or “output dimension” of legitimacy in global governance because of the lack of democratic means and accountability between those who govern and those who are governed. The argument is that input-oriented arguments could never carry the full burden of legitimizing the exercise of governing power, but they are always complemented by output-oriented arguments. Ultimately, the output legitimacy of the norms depends on social judgments about “accept-

able performance”, which may or may not coincide with objective factors.

This elaboration on different components of international legitimacy confirms how mutually interdependent effectiveness and legitimacy are. In the traditional view, legitimacy is crucial in achieving state compliance and thus effectiveness—legitimacy is where the law acquires its “force” in non-hierarchical systems such as global negotiations. But equally important, effectiveness is a component of legitimacy; as the lack of acceptable performance (substantive decisions) undermines the legitimacy of the norm in the long term. This argument has been widely noted in sociology, but seemingly has not been internalized by the analysts of international regimes.

### The UNFCCC's great challenge

The major challenge for the legitimacy of the UN-based climate regime has been the lack of substantive decisions, in other words its lack of effectiveness. The 2000s led to the erosion of its legitimacy as a decision-making arena, especially in the subjective views of Northern governments, but also among some of the most vulnerable in the South, as well as considerable parts of the expert community and the public in general. This trend led to an outburst of UN scepticism in the aftermath of the Copenhagen meeting, with declarations that the UN climate regime is a “multilateral zombie”.

Second, for some considerable time there has been a need to clarify and formalize the decision-making

rules of the COP, the primary shaper of the post-2010 climate governance, via a systematic search for possible solutions to the voting question (rule 42). In the light of these challenges, the Cancún meeting and its final plenary were potentially useful developments. Cancún showed the wider public that the UNFCCC is not completely paralyzed, and in spite of “consensus” in the decision-making, one (small) country does not have veto rights. It may, hopefully, also have provided some stimulus for governments to work on the decision-making procedures of the COP with renewed urgency. So far, Papua New Guinea has been out on a limb in raising the issue of voting, receiving stonewall responses from the likes of China and India.

While the Cancún results have been criticised with arguments based on process and legitimacy, from a broader perspective it seems likely that achieving decisions with some substance is actually the primary need in securing the legitimacy of the UN process. Bolivia’s diplomatic pride might be wounded, but that will soon become just another unfortunate footnote to the history of climate diplomacy. A breach of process rules can hardly be described as positive from the legal point of view, but the risk of procedural issues undermining the UNFCCC’s legitimacy seems relatively small compared to the threat of its erosion via lack of results.

Climate change is nowadays part of a broader international policy agenda and the UNFCCC is no longer the only platform for global climate governance—and the COP plenary will have to be careful not to be seen as incapable of taking decisions. Furthermore, the UN process is likely to have to seal deals made elsewhere, to some extent. Even Secretary General Ban Ki-moon has hinted in this direction, emphasizing the “necessity of cooperation between the UN and G20” in issue areas like development and climate change.<sup>6</sup> However, equally important is the fact that the UN climate regime continues to play a central

role in global climate politics. The UNFCCC process gives both a voice and a certain leverage to the most vulnerable countries, in rather stark contrast to the G8/G20 groups or the Major Economies Forum, where most of these countries are not even invited to participate passively. Also, the role of civil society is marginal in these *ad hoc* group meetings. Had the Cancún agreement been negotiated outside the UN, it would very likely have been weaker on several fronts, and less emphasis would have been placed on adaptation. Furthermore, it is crucial to keep the longer term option for a legally binding treaty open; the only institutional possibility for this lies within the UNFCCC.

The emission reduction figures that key countries have pledged for 2020 remain clearly inadequate to achieve a safe level of greenhouse gas concentrations in the atmosphere. This inconvenient truth can only be addressed in the long term, with concentrated and painstakingly slow diplomatic efforts, ultimately building a broad-based, more transparent and better financed climate regime within the UN.

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<sup>6</sup> UN chief stresses necessity of cooperation between UN, G20, Xinhua, 11 October 2010.