

Draft Rule 42

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Introduction

1. In this briefing paper, we set out general information in relation to the following issues which may be useful to delegates when considering the procedure for approving decisions:
 - (a) The draft rules of procedure (Draft Rules)¹ and the voting rule (Draft Rule 42);
 - (b) The meaning of consensus;
 - (c) Voting procedure in respect of amendments and new annexes;
 - (d) Previous practice in relation to consensus decisions; and
 - (e) Any differences in rules of procedure for the COP and the CMP.

The Draft Rules

2. Article 7.2(k) and 7.3 of the UNFCCC required the COP, at its first session to agree upon and adopt, by consensus, rules of procedure for itself and its subsidiary bodies (Draft Rules). The Draft Rules for the COP were prepared, but have never been adopted due to disagreement over Draft Rule 42, which sets out specific voting majorities needed for decision making.
3. Instead, these Draft Rules are consistently “applied” at each COP with the exception of Draft Rule 42. In the absence of an agreement on the level of majority required for decision making, **consensus is required** (except where a different threshold is set in the UNFCCC). The remaining rules (excluding Draft Rule 42) have been applied consistently since COP2 and there is now no disagreement on their use.
4. We note that during the opening COP plenary on Monday 29 November 2010, the COP President said that the Draft Rules would be applied with the exception of Draft Rule 42, on which informal consultations would continue.

Consensus

5. The meaning of consensus is not defined in the UNFCCC or the Draft Rules. However, as with other intergovernmental processes, in the UNFCCC context, consensus is seen as distinct from unanimity. Consensus is accepted to mean there are no objections to a decision, whereas unanimity requires that all parties votes in favour of the decision.

¹ FCCC/CP/1996/2.

Voting procedure in respect of amendments and new annexes

6. Articles 15 and 16 of the Convention and Articles 20 and 21 of the Kyoto Protocol specify procedures for the adoption of decisions and amendments, new annexes and amendments to annexes.
7. Under these articles, the Parties are required to make every effort to reach agreement by consensus, but where consensus cannot be reached, amendments may be adopted by a 3/4 majority vote of the parties present and voting.

Previous practice in relation to consensus decisions

8. In the past, Parties have chosen not to formally object to a decision (in order to preserve the consensus), and have instead made statements registering their concerns in order to protect their position. This was done by a number of countries in relation to the adoption of the Berlin Mandate.²
9. If consensus cannot be achieved, further negotiation is often needed. As a last resort, the presiding officer (e.g. Chair, President etc.) can make a ruling (as to whether consensus has been achieved), which, if challenged, leads to a vote. The vote is called pursuant to the powers conferred on the presiding officer by the Draft Rules to make rulings and have complete control over the meeting they are presiding over.³ The ruling of the presiding officer will stand unless overruled by a majority of Parties present and voting.
10. The issue of a lack of consensus arose at negotiating session before COP3 (Kyoto). The Chairman ruled that there was consensus in favour of one negotiating option despite the fact there were three Parties that objected to that decision. These delegations challenged the Chairman's ruling. In response, the Chairman made clear his intention to put his ruling to a vote. In light of this, the objectors withdrew their challenge and no vote was called: the Chairman's ruling that there was a consensus stood.

Rules of Procedure under the Kyoto Protocol

11. Pursuant to Article 13(5) of the Kyoto Protocol, the Draft Rules apply equally to the CMP, save for Draft Rule 42. As such, consensus is required for decisions taken by the CMP.
12. For completeness, we note that the following Kyoto bodies have their own rules of procedure which deal with voting procedures in a different way to the Draft Rules:
 - (A) the Executive Board of the CDM;
 - (B) the Compliance Committee; and
 - (C) the Joint Implementation Supervisory Committee.

² See Report of COP1 (FCCC/CP/1995/7), part I, paragraphs 58-60.

³ See Yamin and Depledge, *The International Climate Change Regime* (2004, 1st ed.), page 444; and Draft Rules 23, 34, 42.2 and 42.3.