

Proposal by Mexico and PNG to amend the COP's voting rules

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Introduction

1. On 26 May 2011, the Governments of Mexico and Papua New Guinea (PNG) submitted to the UNFCCC secretariat a proposal to amend Articles 7 and 18 of the United Nations Framework Convention on Climate Change (Convention). This was sent to all the Parties by the secretariat on 30 May 2011. The purpose of the proposal is to allow for an exception to the default voting rule, consensus, and to allow decisions of the Conference of the Parties (COP) to be taken by a three-fourths majority (subject to certain further exceptions).
2. Pursuant to Article 15(1) of the Convention, any Party has the right to propose amendments to the Convention. Proposed amendments can only be adopted at ordinary sessions of the COP and must be communicated by the secretariat to all Parties at least six months before the meeting at which it is proposed for adoption. Having been communicated to the Parties within the relevant timeframe, the proposal will be added to the agenda of COP17.
3. This briefing paper sets out the relevant provisions of Articles 7 and 18, describes the proposed amendments and how they are intended to work and discusses some of the possible implications of the proposal. This briefing paper is for informational purposes only and is not intended to offer a view one way or the other on whether the proposal should be adopted by Parties or whether such an amendment to the voting rules is required at all.

Executive Summary

4. The amendments proposed by Mexico and PNG would, while keeping consensus as the initial threshold for decision-making, have the effect of providing an exception to default consensus voting rule for the COP. They would allow COP decisions (with certain exceptions), after all efforts to reach consensus have been exhausted, to be adopted by a three-fourths majority of Parties present and casting an affirmative or negative vote.¹
5. The key procedural benefit of the proposed amendments is that they would prevent one Party (or a small group of Parties) from blocking the adoption of a COP decision and could help promote efficiency in the UNFCCC process. In particular, it would allow for mandates or protocols to be adopted even if there is no consensus on the matter.

¹ Assuming all Parties to the Convention cast a vote, this majority threshold would require 146 Parties to the Convention to vote in favour of such a decision.

6. However, if the proposed amendments do not enter into force for all Parties,² it will create a system where some Parties will be bound by one set of voting rules (the three-fourths majority rule) while others will be bound by the present rules (the consensus rule). This would create confusion as to which set of rules is to be applied and could undermine the goal of promoting efficiency in the UNFCCC process.

The background to the proposal

7. The rules of procedure for the COP have never been adopted. Since 1996, each COP has decided to apply the draft rules of procedure,³ save for Rule 42 on voting, for the duration of that COP. The practice of the Parties has been to apply the same for all inter-sessional meetings of ad hoc working groups and meetings of the Subsidiary Body for Implementation (SBI) and Subsidiary Body for Scientific and Technological Advice (SBSTA) as well.
8. In the absence of agreed voting rules, the practice of the Parties has been to adopt decisions and conclusions by consensus. For the purposes of this paper, it is assumed that consensus means that no Party objects. It should be noted, however, that there is no clear agreement on what consensus means within the UNFCCC process, save that there is general agreement that it does not mean unanimity.
9. The consensus rule has caused difficulty in the past. At COP2, the Geneva Ministerial Declaration could not be adopted by consensus and so was instead taken note of, by consensus, by the COP. Similarly at COP15, the Copenhagen Accord had to be taken note of as a handful of Parties were not willing to allow it to be adopted by the COP. At COP16, the adoption of the Cancun Agreements was delayed due to the formal objection of one Party. In the end, the COP President declared that there was consensus despite the continued objection of that Party.⁴
10. These issues may not have arisen if decisions could have been adopted by majority vote, whether by three-fourths majority or some other majority. Formal and agreed voting rules are important.

The relevant articles

11. Mexico and PNG's proposal attempts to amend Articles 7(2)(k), 7(3) and 18. Article 7(2) sets out the competences of the COP. Article 7(2)(k) states:

[The COP] shall...agree upon and adopt, by consensus, rules of procedures and financial rules for itself and for any subsidiary bodies. (Emphasis added.)

12. Article 7(3) states:

The Conference of the Parties shall, at its first session, adopt its own rules of procedure as well as those of the subsidiary bodies established by the Convention, which shall include decision-making procedures for matters not already covered by decision-making procedures stipulated in the Convention. Such procedures may include specified majorities required for the adoption of particular decisions.

² Pursuant to Article 15(4), amendments will only enter into force for those Parties that have completed the formal amendment procedures set out in the Convention.

³ FCCC/CP/1996/2.

⁴ The implications of the adoption of the Cancun Agreements despite the objection of one Party are beyond the scope of this paper. For further information on this, see *Christoph Schwarte and David Wei*, 'The limitations of consensus, FIELD, June 2011 (available at: http://www.field.org.uk/files/field_limitationconsensus_web.pdf).

13. Article 18 states:

1. *Each Party to the Convention shall have the right to vote, except as provided in paragraph 2 below.*
2. *Regional economic integration organizations, in matters within their competence, shall exercise their right to vote with a number of votes equal to the number of their member States that are Parties to the Convention. Such an organization shall not exercise its right to vote if any of its member States exercises its right, and vice versa.*

The proposed amendments

14. In respect of Article 7(2)(k), the proposed amendment would remove the words “rules of procedures and”, leaving the amended Article 7(2)(k) to read:

[The COP] shall...agree upon and adopt, by consensus, financial rules for itself and for any subsidiary bodies.

15. The proposal goes on to remove the words “at its first session”, such that Article 7(3) would read as follows:

The Conference of the Parties shall adopt its own rules of procedure as well as those of the subsidiary bodies established by the Convention, which shall include decision-making procedures for matters not already covered by decision-making procedures stipulated in the Convention. Such procedures may include specified majorities required for the adoption of particular decisions.

16. In relation to Article 18, the proposal would add the following two sub-articles:

3. *Without prejudice to the provisions of paragraph 3 of Article 15, the Parties shall make every effort to reach agreement on all matters by consensus. If such efforts to reach consensus have been exhausted and no agreement has been reached, a decision shall, as a last resort, be adopted by a three-fourths majority vote of the Parties present and voting, except:
 - a. *as otherwise provided by the Convention, the financial rules referred to in Article 7, paragraph 2(k) of the Convention;*
 - b. *for decisions under paragraph 3 of Article 4 and paragraphs 1, 3 or 4 of Article 11 of the Convention, which shall be taken by consensus.**
4. *For the purposes of this Article, ‘Parties present and voting’ means Parties present and casting an affirmative or negative vote.*

The effect of the amendments

17. The effect of the proposed amendments is that COP decisions will continue to be adopted by consensus, except for where all efforts to reach consensus have failed. In such circumstances (and subject to certain further exceptions, set out below), the amendments would allow for an exception to the consensus rule whereby decisions could be adopted if a three-fourths majority of Parties present and voting cast an affirmative vote in favour of the decision. The

rules of procedure could thus be adopted in such a manner despite the absence of consensus.

18. Further, the proposed amendments would remove the necessity for the draft rules of procedure to contain voting rules for the COP as these would be covered by the amended Article 18. Since this rule is the only one which has prevented the adoption of the draft rules of procedure, it is possible that they would then be adopted by consensus.
19. However, as alluded to above, this exception which would allow for three-fourths majority voting, would not apply in the context of decisions relating to finance. In particular:
 - a. Decisions relating to the financial rules in the amended Article 7(2)(k) would continue to require the threshold set out in that Article, namely, consensus;
 - b. Decisions under Article 4(3) (i.e. the obligation for developed country Parties and other Annex II developed country Parties to provide new and additional financial resources to meet the agreed full costs incurred by developing country Parties in complying with their obligations under Article 12(1) (National Communications) and the obligation for the same Parties to provide resources needed by developing country Parties to meet the agreed full incremental costs of implementing measures covered by Article 4(1)) would have to be adopted by consensus; and
 - c. Decisions under Article 11(1), (3) and (4), relating to the policies, programme priorities and eligibility criteria of the financial mechanism, its modalities in relation to project funding and the review of the mechanism, would have to be adopted by consensus.
20. The amended Article 18(3) also makes clear that the provisions of Article 15(3) in relation to amendments to the Convention continue to apply. In other words, amendments to the Convention will continue to be able to be adopted by a three-fourths majority (if all efforts to reach consensus are exhausted) even if such amendments relate to Articles 7(2)(k), 4(3) of 11(1), (3) or (4).

The potential implications

21. There are a number of legal and procedural pros and cons to this proposal. The main ones are set out below.

The pros

22. The main benefit of the amendments is to provide for a more efficient decision-making process whereby decisions cannot be blocked by a small minority of Parties (or even one Party) in the face of overwhelming support for the adoption of that decision.⁵
23. For better or for worse, it would have allowed the Cancun Agreements to have been adopted without the extended procedural wrangling that accompanied their eventual adoption. In other circumstances, the proposed rule could allow for more ambitious COP decisions to be adopted even if there was no consensus. This is important in the context of fulfilling the ultimate objective of the Convention.

⁵ That this is a potential consequence of the new voting rules may make Parties wary about agreeing to their adoption.

24. In particular, the proposed exception to the default consensus voting rule would allow for a mandate to negotiate a legally binding instrument to be adopted without consensus, thus preventing a small group of Parties who want to prevent such progress from blocking the mandate decision. Similarly, the amended voting rules would allow for protocols to the Convention to be adopted without consensus, meaning that a small group of Parties would not be able to stop those Parties that want to move ahead from proceeding with the adoption (and subsequent ratification) of the new protocol.
25. In addition, the fact that majority voting procedures exist as a last resort does not necessarily mean they will be used. The fact that they are there as a last resort option often aids with reaching consensus. The threat that majority voting may be resorted to in respect of a proposed decision with which one Party disagrees (and thus made to apply to that Party without its consent) can often act as a catalyst to that Party making compromises or genuinely trying to find an alternative option (as often happens within the EU).
26. Significantly, the proposed amendments preserve the consensus voting rule for various finance related decisions (see above) which will give comfort to various Parties who might otherwise be uncomfortable with them.
27. Clarity on voting rules and the adoption of the rules of procedure could also contribute to the legitimacy of the regime. Fair and transparent procedures are crucial to build confidence and could assist with ensuring high levels of compliance.
28. Finally, given that the three-fourths majority voting option would be an exception to the consensus rule rather than the default rule itself, the proposed amendments would still protect the benefits of consensus decision-making, such as ensuring that minority groups have the opportunity to raise their positions and be listened to.

The cons

29. The key disadvantage of the proposed amendments is that if they do not enter into force for all Parties, they will create a system where some Parties will be bound by one set of voting rules (consensus, with exceptions) while others will be bound by the present rules (the absolute consensus rule). This would create confusion as to which set of rules is to be applied and could undermine the goal of promoting efficiency in the UNFCCC process.
30. As noted above, pursuant to Article 15(3), amendments to the Convention can be adopted by a three-fourths majority; consensus is not required. As a result, it is conceivable that the proposed amendments are adopted (and subsequently ratified) by most, but not all, Parties. The amendments will enter into force for those Parties only on the ninetieth day after the date of receipt by the Depositary of an instrument of acceptance by at least three-fourths of the Parties to the Convention.
31. This would, in effect, mean that the COP would have to operate under two different sets of voting: the new three-fourths rule in respect of those Parties accepting the amendment; and the consensus rule for all other Parties.
32. What this would mean for the adoption of decisions is not clear. On the one hand, it could be argued that COP decisions relating only to those Parties accepting the amendments could be adopted by a three-fourths majority and thus meaning they could be applied to Parties (who have accepted the amendment) which have voted against the decision, while decisions relating to all Parties would have to be adopted by consensus. This is clearly not ideal and

could cause significant confusion as Parties attempt to determine which COP decisions apply to which Parties. On the other hand, it could be argued that since the COP acts as the supreme body for the Convention (which comprises of all Parties), it can only adopt decisions with each Party's consent, i.e. by consensus.

33. In the first scenario, the only way parallel voting regimes could be avoided is if all Parties adopt and ratify the proposed amendments (and thus apply the three-fourths voting rule). In the second scenario, despite the co-existence of two different voting rules, decisions applicable to all Parties would still have to be taken by consensus, thus making the adoption and ratification of the proposed amendments an unnecessary sideshow.
34. If the only way to make majority voting effective is if all Parties adopt and ratify the proposed amendments, then this raises the following question: why not adopt rules of procedure (containing the voting rules) in the COP rather than going through the formal amendment process which is lengthy and leaves doubt over whether every Party will ratify the amendments (even if the amendments are adopted by consensus)? Taking such a course of action would also make it easier to amend the voting rules in future, if necessary, without the issue of parallel voting systems coming up all over again.
35. Assuming the proposed amendments are adopted and ratified by all Parties, there is still the potential for the new voting rules to cause practical issues. Any decisions relating to Articles 7(2)(k) (as amended), 4(3) or 11(1), (3) or (4) (save for decisions adopting amendments to those provisions) would have to be separated from all other decisions as these would have to be adopted by consensus rather than just a three-fourths majority. Although this is not a significant problem, it still has the potential to cause delays to the process.
36. The amendments, as proposed, also have the potential to cause a conflict in relation to voting rules, even if the amendments enter into force for all Parties. The proposed Article 18(3) suggests that all decisions (except those related to the amended Article 7(2)(k) and Articles 4(3) and 11(1), (3) and (4)) could (as a last resort) be adopted by a three-fourths majority.
37. However, the amended Article 7(3) allows for the rules of procedure (which could be adopted by a three-fourths majority) to include specified majorities required for the adoption of particular decisions. For example, the rules of procedure could specify that decisions related to adaptation can be taken by a majority of 51 percent of Parties.
38. This voting rule would then be in conflict with the voting rule in Article 18(3), requiring a three-fourths majority, and would cause further confusion as to which rule should apply.
39. Finally, it should be noted that the proposed amendments only apply to voting rules for the COP. In the absence of similar voting rules for the CMP being proposed and entering into force for all Parties to the Kyoto Protocol, the adoption of CMP decisions will continue to require a consensus vote, creating different voting rules for the COP and the CMP.