

Building Consensus in the UNFCCC

*Antonio G. M. La Viña*¹

*Cecilia Therese T. Guiao*²

This paper provides an introduction to the United Nations Framework Convention on Climate Change (UNFCCC) process and suggests how consensus within that process could be achieved. It is written particularly for negotiators who have just joined the process, but will hopefully prove useful to facilitators and seasoned negotiators as well, if only to provide some food for thought or present new perspectives that could be explored.

The perspectives and suggestions discussed in this paper are based on almost twenty years' experience in climate change work and the UNFCCC process. It must also be borne in mind, however, that this experience – as with that of every negotiator or facilitator – is filtered through a lens of personal circumstances and beliefs.

Background

In December 2011, in Durban, South Africa, the Conference of the Parties (COP) to the UNFCCC came out with a decision “noting with grave concern the significant gap between the aggregate effect of Parties’ mitigation pledges in terms of global annual emissions of greenhouse gases by 2020 and aggregate emission pathways consistent with having a likely chance of holding the increase in average global temperature below 2°C or 1.5°C above pre-industrial levels,” and “recognizing” the need to strengthen the “multilateral, rules-based regime under the Convention.”³ This has led to the establishment of the Ad Hoc Working Group on the Durban Platform for Enhanced Action (ADP), which opened discussions on the development of “a protocol, another legal instrument or an agreed outcome with legal force under the Convention applicable

¹ **Dr. Antonio G.M. La Viña** emerged as a national and global environmental leader in the early 1990s, distinguishing himself as a legal and policy expert in forest, watershed, biodiversity and climate change issues. In the Philippines, he is known in government, civil society and academic circles as a champion of environmental advocacy and governance. Internationally, he is a UNFCCC Negotiator best known for his facilitating the LULUCF negotiations in Kyoto and the REDD-Plus negotiations in recent years. Dr. La Viña is currently serving as Dean of the Ateneo School of Government and a professor at three top universities (UP, ADMU, DLSU) in the country.

² **Cecilia Therese T. Guiao** is an environmental lawyer, and is a legal and policy consultant on climate change with the Ateneo School of Government. She is currently the Knowledge Leader of the Climate Negotiations and Policy Support Sub-Cluster of the Ateneo School of Government, and is concurrently Program Manager of the Climate Change Policy Program of the University of the Philippines’ Institute of International Legal Studies.

³ Decision 1/CP.17

to all Parties,” and a “workplan on enhancing mitigation” that would result in the closing of what has been referred to as the ‘ambition gap.’⁴

Deemed “a matter of urgency,” this decision mandates the completion of the work of the Ad Hoc Working Group as soon as possible, but no later than the year 2015, at the 21st session of the UNFCCC COP.⁵ This mandate, however, as any multilateral environmental agreement (MEA) negotiator can tell you, is much easier said than done. The process within which the decisions are arrived at is often an arduous one, and must end in consensus among the parties before it can be adopted.

Consensus

Interestingly, there has been no definition of consensus in any of the provisions found in multilateral environmental agreements. One United Nations legal instrument that defines it is the 1982 Convention on the Law of the Sea, which states that consensus is “the absence of any formal objection.”⁶ The Merriam-Webster online dictionary definition of consensus, on the other hand, is of “general agreement,” or a “judgment arrived at by most of those concerned.”⁷

In MEA processes, the UNFCCC included, consensus alludes to the definition indicated in the UN Convention on the Law of the Sea, referring merely to the absence of objections from any of the parties. No formal voting requirement is required, for as long as no objection is raised by any of the parties concerned. It is only in the event of a formal objection that consensus is blocked. In practice, however, parties usually try to resolve known objections before such matters are brought before plenary. Oftentimes meetings are suspended for a few minutes, in order to allow certain parties to “huddle” and attempt to resolve difficulties on their own.

Decision-making in the UNFCCC can therefore seem quite simplistic, if one merely takes into account the mechanics behind consensus and how it is manifested. However, consensus as a concept, although seemingly ephemeral, is also quite complex. There is, after all, a profound difference between having the agreement of all Parties, and hearing no objections from any of them.

Journey to Consensus: Lessons Learned

The climate change regime is a formal one, with legally binding commitments, procedures and processes that are both similar and unique in comparison to other MEA’s. It has taken a life of its own after the UNFCCC was adopted, and its annual COP has perhaps the highest attendance among those of other multilateral agreements. In

⁴ *Id.* pars. 2, 7

⁵ *Id.*, par. 4

⁶ Art. 161(8)(e), Convention on Law of the Sea

⁷ See: <http://www.merriam-webster.com/dictionary/consensus>

2009, for instance, registration for the 15th COP held in Copenhagen reached approximately forty-five thousand (45,000) people, the highest for any COP ever held.

What must not be forgotten in the maze of treaty provisions and procedures, however, is that the entire regime is built upon human beings trying to represent the interests of their own constituencies. The bottom line is that as one negotiates for what would best serve his or her country, the negotiation process builds on relationships between the different country delegations, and the relationship of these delegations with their constituencies. It is therefore vastly important that as a negotiator working towards what you believe would be the best outcome, one bears in mind that the journey to consensus is one based on human interaction.

Being forthright would build trust and inspire respect, whether one is a facilitator or a negotiator. Facilitators, in particular, should remember that as such, they are, for a time, putting aside their biases and assuming a role similar to that of a mediator or arbitrator, with negotiators taking on the role of advocates. While many joke that dissatisfaction with the decision on all sides means that a compromise has been reached, it should be the goal of the facilitator to reach a compromise that will make all sides return home feeling as though something has been accomplished, that could be used to build on something better. The UNFCCC negotiations should not be treated like a game of one-upmanship. Despite the differences in circumstances and representations, one overarching goal remains – one that will benefit all the Parties involved.

Know your country.

Before anything, one must remember that as a negotiator, he or she represents the interests of his or her own country and its citizens. Needless to say, it is important to know the circumstances within your country, and what this would mean when the time to negotiate comes along. One must be aware of his or her “red lines;” the lines that must not be crossed when trying to find a solution to conflicting positions.

At the same time, however, a negotiator must also know in what areas his or her country can give way to what could be the greater needs of another country. Acknowledging and making room for needs that are equal to or greater than one’s own creates good will and opens up space for healthy discussion that could lead to a satisfactory compromise for all.

Know the substance.

Along with knowing one’s national circumstances, it is essential that negotiators know the substance of the issues involved, and very well. This allows the negotiator to be imaginative and innovative, and to know where solutions can be worked out through the use of perhaps a little less linear problem solving.

Some delegations have the capacity to assign particular negotiators to certain issues, which allows them to explore their respective subject matter further and avail of their

more specific areas of expertise. Those that don't could perhaps hold consultation or feedback sessions before and after negotiation sessions, in order for them to have a firmer grasp on the subject matter. Depending on country policy, the negotiators could come solely from their Foreign Service department, or from a number of different department and/or sectors.

It is vastly important for negotiators to prepare for and be up to date on the current state of negotiations. It would do them well to go through decisions and discussions during previous COPs, and make sure their knowledge of the subject matter and their country situation remains current and practical. It would also be to their advantage if they could note and try to understand the positions most opposed to theirs, and the reason for such.

New negotiators may find the volume of data and information rather overwhelming, and with good cause. There is an amazing amount of information on climate change available, for instance, especially online. It becomes essential to be able to determine what data and information are accurate and useful. Oftentimes, new negotiators find that despite all of their preparations beforehand, the actual negotiations takes on a life of its own. The kind of knowledge and mastery over not just the subject matter, but of the process itself, is substance that can best be learned through experience in the UNFCCC itself. Talking to senior negotiators about their experiences and insights is one way to fast track this kind of learning.

Go for the maximum.

It is important to remember that apart from the interests of your constituency, what you are negotiating for is a matter of global significance. While it may be that your country is particularly more vulnerable to climate change, all will be affected in the long run, and the best possible climate policy should be one that would address everyone's needs, especially the most vulnerable. It may be necessary to remind negotiators of this and appeal to everyone's common humanity, especially when the time for compromise comes.

Facilitators in the process may find it useful to make negotiators aware of the least common denominator, in order to illustrate how inadequate such a result would be. This could open the floor to more ambition from everyone involved.

Experience dictates that both negotiators and facilitators must find the right balance between pushing for more and knowing when to compromise. This involves being sensitive to where the process is, the direction it is going in, and an appreciation of when the timing is right to push or give in. Patience is a must, especially when particularly sensitive issues, or matters that require much detail, are being negotiated. Instead of allowing a difficult issue to cause a standstill in negotiations, incremental but systematic steps forward may be taken.

In order to avoid future gridlocks, it is also advisable to isolate issues that can be separated and deal with them early. It is also useful to remember that legal technicalities, especially to a facilitator, are meant to simplify and expedite the resolution of subjects under negotiation. They should not be allowed to needlessly hinder agreement.

Negotiations, especially in the climate regime, are never easy. It is very rare for negotiators to immediately come to agreement, especially on fundamental concepts under the Convention, such as the principle of common but differentiated responsibilities and historical responsibility. Whether facilitator or negotiator, therefore, one should not give up easily; proposals and counterproposals must – and will – be made. As stated earlier, however, it is important to know when to push or compromise.

Contrary to conventional wisdom, a successful climate change negotiations is not one where everyone leaves supposedly unhappy. In fact, I believe the opposite is true and that the ultimate measure a good climate change agreement is that everyone comes out of it believing that we have made progress and that what we have achieved will make a difference for our planet and peoples.

Build trust.

Just as a negotiator ought to know the subject matter and the interests of his or her constituency well, the interests of other parties must also be borne in mind. Understanding the circumstances from which other parties negotiate will not only help in coming to a satisfactory agreement for all, but also help build trust when others take considerations of other parties into account.

As in any other venue or setting, everyone must be treated with respect. There should be a presumption of good faith, which will allow parties to make efforts towards compromise more willingly.

Facilitators, in particular, should make an effort to build trust among negotiating parties. They should not force or pressure any of them to do or agree to things they do not want, even when others do so. Resurrected fights must be avoided, and the parties involved must be encouraged to find ways to resolve them

Trust-building is absolutely essential, and will pave the way for a satisfactory outcome for all. As negotiations draw to a close and tensions run high, the trust that has been fostered will help parties to disregard rumors and actively work towards the best possible outcome.

As a facilitator, building trust between oneself and the negotiators, and the negotiators amongst themselves, includes creating a space where they can be comfortable. One must not embarrass anyone involved in the proceedings, and engage them as parties and individuals. Equal engagement with all stakeholders is a must, but enough distance must be maintained so as to not allow lobbying.

Ensure transparency.

Equally important in trust-building is transparency. A facilitator must not play games, must be fair, and must be straightforward about what his or her next steps are.

The different means through which agreement can be reached should be explored. If a facilitator is able to make negotiators talk to each other and not past each other, then he

or she is headed in the right direction. In my experience, the best way to do this is to encourage bilateral talks as well as small group discussions between the delegates. Those talks or discussions should however be focused on specific, concrete topics and should be done transparently so other do not feel left out.

Complementary activities.

Although the negotiations seem to take on a life of its own, it should be borne in mind that the UNFCCC process did not come about in a vacuum and neither is it happening without a broader context. There is much history behind the climate issue, one that dates back to the industrial revolution and perhaps even beyond it. Relationships between States outside the regime continue to exist and progress – sometimes alongside that of the climate regime, sometimes apart from it. Allies in the regime may be on opposing sides in other global discussions, while opponents – so to speak – during the negotiations may have strong ties beyond the climate change regime.

Activities and ties involving parties outside the negotiations process creates ties and relationships between these States, which could open lines of communication and pave the way for more open discussions between those involved. Of course, it may also be that due to strong ties between certain States, one party will give way to the other despite fundamental differences in their country needs and/or positions during negotiations in order to preserve or enhance this relationship. This could then go either way – it could more quickly lead to a successful decision that would be advantageous for all, or it could result in an ineffective decision that would have repercussions on States beyond the earlier two.

Conclusion

While 2015 might seem like quite some time away, those involved in the climate regime know that the UNFCCC decision-making process is long and arduous. The ADP discussions are moving forward, albeit slowly, and many who experienced the disappointment of the 15th COP held in Copenhagen in 2009 – where there was much expectation as to the adoption of a decision on commitments after the effectivity of the Kyoto Protocol – are apprehensive as to the possibility of a similar event occurring in 2015. This journey to consensus promises to be filled with challenges, particularly given rather recent developments in the global economy. Building trust between parties, in particular, seems to be something that must be done, and quickly.

Appendix A:

Overview of the process: The Convention

Having entered into force in March 1994, the UNFCCC has been ratified by one hundred eighty-nine (189) of the one hundred and ninety-four (194) United Nations member states as of December 2006. The main objective of the UNFCCC is the stabilization of climate “at a level that would prevent dangerous anthropogenic interference with the climate system,” within a time frame “sufficient to allow ecosystems to adapt naturally to climate change.”⁸

Under the treaty, industrialized or developed countries – known as Annex I countries – agreed to reduce their GHG emissions to 1990 levels by the year 2000. No such mitigation reduction obligations were placed upon developing countries (non-Annex I countries) on the bases of *common but differentiated responsibilities, historical responsibility* and *respective capabilities*.

The Kyoto Protocol, meanwhile, was adopted as an addition to the UNFCCC in 1997. It entered into force in February 2005, and in only two years it had already been ratified by one hundred sixty-eight (168) states and the European Economic Community. Under the Kyoto Protocol, Annex I parties agreed to reduce their GHG emission levels to an average of 5.2% below 1990 levels within a specific timeframe, namely the years 2008 to 2012. For the same reason as that of the UNFCCC, no mitigation reduction obligations were placed upon non-Annex I parties.

Needless to say, implementation of the Convention and the Protocol has fallen far short of what was not only expected, but what was mandated. This led to the decision on the Ad Hoc Durban Platform for Enhanced Action mentioned above, and the Doha Climate Gateway, which contains the provisions on the second commitment period of the Kyoto Protocol.

⁸ United Nations Framework Convention On Climate Change (UNFCCC) (July 2011), online: <<http://unfccc.int/2860.php>>.

Appendix B:

Overview of the process: Bodies under the Convention

As with other MEA's, the UNFCCC established a *Conference of the Parties* to act as the "supreme body" of the Convention.⁹ The COP is composed of delegations from states that are party to the Convention, and meets every year to review its implementation and discuss ways to move forward and improve its application. It is supported by the *Secretariat*, which oversees all logistical arrangements of the COP, and sees to the daily operations necessary for the implementation of the Convention and all its functions.

The *Subsidiary Body for Scientific and Technological Advice* (SBSTA), meanwhile, was established under the Convention to "provide the Conference of the Parties and, as appropriate, its other subsidiary bodies with timely information and advice on *scientific and technological matters*."¹⁰ (Emphasis added.) It generally meets twice a year, and is tasked to report regularly to the COP in order to aid the latter in its decision-making.

The *Subsidiary Body for Implementation* (SBI), on the other hand, was created with the mandate to "assist the Conference of the Parties in the *assessment and review of the effective implementation* of the Convention,"¹¹ (emphasis added) with a similar mandate to regularly report to the COP on its work.

Under the Kyoto Protocol, parties to the UNFCCC that are signatories to the Protocol convene during the yearly COP meetings as well. These sessions are referred to as the *Meeting of the Parties* (MOP), and only parties to the Protocol are allowed to take part in its decision-making processes. Parties to the UNFCCC that are not signatories to the Protocol may take part in the meetings, but only as observers.

Other formal bodies are sometimes established through COP decisions, such as *ad hoc working groups*, which are given specific mandates. While the SBSTA and SBI are permanent subsidiary bodies, ad hoc groups are usually temporary in nature, ceasing to exist as soon as their mandates are fulfilled. Subsidiary groups, whether permanent or otherwise, are not prohibited from establishing further subgroups in order to aid in the accomplishment of their mandates. Such subgroups may also be created through a COP decision, for the same reasons. As subsidiary bodies – and, in effect, further subgroups – receive their mandates from the COP and report back to it regularly, it is therefore apparent that the COP has the power of control and supervision over these bodies.

While it is only during the *formal plenary sessions* that decisions are adopted and reports or submissions by subsidiary bodies are assessed, most negotiations take place in informal groups, which may vary in terminology and attendance.

⁹ Art. 7, UNFCCC

¹⁰ Art. 9, UNFCCC

¹¹ Art. 10, UNFCCC

The President of the COP or chairperson/s of subsidiary bodies may convene smaller negotiating bodies and appoint respective facilitators with the purpose of paving a smoother way to consensus. These smaller, less formal negotiating settings allow parties to speak more frankly with each other and ideally provide a venue for the resolution of differences. Apart from working groups, which were discussed earlier, there are also contact groups, informal groups, friends of the Chair, and drafting groups.

Contact groups are formed in order speed up the resolution of certain issues that are proving difficult to resolve. These meetings are open to all parties, but are often attended by parties that have particular interests in the issue under consideration. Another means through which difficult issues are resolved is the convening of an *informal group*, wherein parties meet in private. Discussions in these groups are presided over by a chairperson, and are often kept confidential.

Although they tend to foster more direct speaking, these private meetings sometimes backfire in that discussions that take place have no transparency with regard to civil society and similar stakeholders. *Friends of the Chair* meetings, in particular, have limited attendance – only a small number of representatives from delegations are allowed to take part, usually representing regional groupings, negotiating blocks or parties that are particularly sensitive to the issue at hand.

Drafting groups, finally, are those that are tasked to develop text on certain issues. They meet privately, and texts that are developed, once agreeable to the group, are submitted to the COP for adoption.

As previously mentioned, decisions are taken or adopted only by the COP during formal negotiations in plenary, during the last day of the annual COP. The process within which the decision is arrived at, however, is often an arduous one that must end in consensus among the parties.

Appendix C:

Overview of the process: Negotiating Blocs

Parties to MEA's often negotiate both as independent states, and as members of negotiating blocs. Negotiating as a member of a group adds extra weight to country positions, ensuring that points of convergence are given proper emphasis. States with shared interests often find that this gives them more leverage in negotiations. This likewise allows parties with smaller delegations to make their views known without having to spread themselves too thin.

The *Group of 77 & China* (G77&China), for instance, is a group of developing countries composed of one hundred and thirty-one (131) State-members from the various regions of the world. Subgroups within this particularly large bloc also exist, with States having joined together to form the *African Group*, *AOSIS* (Association of Small Island States), the *Arab Group*, the *LDC's* (Least Developed Countries), the *Coalition of Rainforest Nations*, *ALBA* (Bolivarian Alliance for Latin American and the Caribbean) and more recently, the *LMDC* (Like-Minded Group of Developing Countries) and *ILAC* (Latin American and Caribbean Initiative for Sustainable Development). The G77&China often comes out with a group position on matters wherein consensus among the members is present, and members deliver their own national views on issues where there is none.

The *European Union* (EU) has a negotiating bloc of its own, and is composed of the twenty-seven (27) States that are members of the Union. They negotiate as a block more often than not, coming together to form a position on all matters that are to be discussed or resolved.

A number of non-EU developed countries established what they call the *Umbrella Group*. There is no formal list of members for this group, but Australia, Canada, Japan, New Zealand, Norway, the Russian Federation, Ukraine and the United States of America (USA) are acknowledged to be part of this bloc.¹²

Mexico, Monaco, Liechtenstein, Monaco, the Republic of Korea and Switzerland, meanwhile, came together to form the *Environmental Integrity Group* (EIG), through which they likewise negotiate as a bloc.¹³

Other groups that work together in the climate change regime are the *Organization of Petroleum Exporting Countries* (OPEC), *Central Asia, Caucasus, Albania and Moldova* (CACAM) and the *Agence Intergouvernementale de la francophonie*.

¹² See: http://unfccc.int/parties_and_observers/parties/negotiating_groups/items/2714.php

¹³ *Id.*



This document is an output from a project funded by the UK Department for International Development (DFID) and the Netherlands Directorate-General for International Cooperation (DGIS) for the benefit of developing countries. However, the views expressed and information contained in it are not necessarily those of or endorsed by DFID, DGIS or the entities managing the delivery of the Climate and Development Knowledge Network*, which can accept no responsibility or liability for such views, completeness or accuracy of the information or for any reliance placed on them.

© 2013, All rights reserved

* The Climate and Development Knowledge Network ("CDKN") is a project funded by the UK Department for International Development and the Netherlands Directorate-General for International Cooperation (DGIS) and is led and administered by PricewaterhouseCoopers LLP. Management of the delivery of CDKN is undertaken by PricewaterhouseCoopers LLP, and an alliance of organisations including Fundación Futuro Latinoamericano, INTRAC, LEAD International, the Overseas Development Institute, and SouthSouthNorth.