Due to the continuing lack of consensus regarding rule 42 of the Draft rules of procedure of the UNFCCC COP concerning voting majorities (set out below), decision-making in the UNFCCC process is by consensus except for the limited cases where the Convention, the Kyoto Protocol, the Paris Agreement or the Draft rules of procedure establish specific voting majorities.

Rule 42

1. Alternative A

The Parties shall make every effort to reach agreement on all matters of substance by consensus. If all efforts to reach consensus have been exhausted and no agreement has been reached, the decision shall, as a last resort, be taken by a two-thirds 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 or the present rules of procedure.

(b) for a decision to adopt a proposed protocol, which shall be taken by consensus.

1. Alternative B

Decisions on matters of substance shall be taken by consensus, except that decisions on financial matters shall be taken by a two-thirds majority vote.

2. Decisions of the Conference of the Parties on matters of procedure shall be taken by a majority vote of the Parties present and voting, except that adoption of a motion or proposal to close or limit debate or the list of speakers shall require a two-thirds majority vote of the Parties present and voting.

3. If the question arises as to whether a matter is one of a procedural or substantive nature, the President shall rule on the question. An appeal against this ruling shall be put to the vote immediately and the President’s ruling shall stand unless overruled by a majority of the Parties present and voting.

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The concept of decision-making by consensus has however been applied in a very inconsistent manner in the UNFCCC process. In several instances presiding officers have presumed consensus, ignoring raised flags requesting for the floor and gaveling through decisions. In this regard, Rajamani cites the gaveling through of the text of the Convention in 1992 by the Chair of the INC with OPEC Member States and Malaysia requesting for the floor and the gaveling through of the Berlin Mandate in 1995 by the President of the COP with OPEC Member States waving their flags.²

More recently, the Doha Amendment to the Kyoto Protocol 2012 was gaveled through notwithstanding a request for the floor by Belarus, the Russian Federation and Ukraine before its adoption. These are cases of potential disagreement rather than actual formal objections as understood in the UN system and the presiding officer would need to grant the floor to the requesting delegation in order to determine whether any expression of disagreement would amount to a formal objection in the legal sense.

Further examples of issues relating to decision-making by consensus are set out below.

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4. If, on matters other than elections, a vote is equally divided, a second vote shall be taken. If this vote is also equally divided, the proposal shall be regarded as rejected.

5. For the purposes of this rule, the phrase "Parties present and voting" means Parties present at the meeting at which voting takes place and casting phrase "Parties present and voting" means Parties present at the meeting at which voting takes place and casting an affirmative or negative vote. Parties abstaining from voting shall be considered as not voting.

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UNFCCC COP15/CMP5 (COPENHAGEN 2009)

At COP15 in Copenhagen, the Copenhagen Accord was negotiated by approximately 40 Heads of State/Government and other heads of delegations during the High-Level Segment (HLS) in parallel to the formal negotiating process under the Ad Hoc Working Group on Long-term Cooperative Action (AWGLCA) which had been mandated by the Bali Action Plan to undertake the negotiation of “an agreed outcome” for adoption at COP15.

The COP President informed Parties that he had held consultations with a broad group of Heads of State/Government and other heads of delegations attending the Conference during the HLS and that through these consultations the Copenhagen Accord contained in document FCCC/CP/2009/L.7 was developed. The President invited Parties to reflect on the document in their respective regional groups with a view to its adoption by the Conference.

Many Parties expressed concerns with the process by which the Accord was negotiated and presented. Five Parties – Tuvalu, Bolivia, Cuba, Nicaragua and Venezuela – formally objected to the adoption of the Accord on grounds of its substantive content and the manner of its negotiation. They characterized the Accord as a product of a non-transparent, non-inclusive process and lacking in ambition.¹

After extensive consultations and in view of the formal objections, the President proposed that the COP “takes note” of the Accord. Thus, the Accord was not adopted by the COP. In United Nations practice, the term “takes note” is a neutral term that signifies neither approval nor disapproval¹.
UNFCCC COP16/CMP6 (CANCUN 2010)

A different approach to consensus was taken by the President of the COP at COP16/CMP6 at the Cancun Conference in 2010. At the closing plenary of CMP6, Bolivia stated that it was opposed to the draft decisions (the Cancun Agreements) and that it felt that there was no consensus for their adoption. The President of the COP noted the position of Bolivia and assured the delegation that it would be duly reflected in the record of the Conference and gavelled through the decisions to a standing ovation. After adoption the representative of Bolivia reiterated his country’s position regarding lack of consensus. The President ruled that:

Consensus does not mean unanimity or the possibility of one delegation aspiring to impose a right of veto upon the collective will that had been fashioned and achieved.

The President ruled that she could not disregard the vision or the position and the request of 193 Parties and declared the decisions validly adopted.

THE FINAL UNITED NATIONS DIPLOMATIC CONFERENCE ON THE ARMS TRADE TREATY

2013

In accordance with United Nations General Assembly resolution 67/234A of 24 December 2012, the Final United Nations Conference on Arms Trade Treaty (ATT) was convened in New York from 18 - 28 March 2013. Rule 33 of the Rules of procedure of the Conference provided that:

The Conference shall take decisions and consider the text of the treaty by consensus, in accordance with General Assembly resolution 64/48.

When the Chair of the Conference tabled the proposal contained in document A/Conf.217/2013/L.3 to which the draft text of the Arms Trade Treaty was attached for adoption the representatives of Iran, Syria and the Democratic People’s Republic of Korea formally objected to the adoption. The representative of Mexico, supported by a number of delegations, proposed that the concerns of the three delegations be reflected in the report of the Conference since the overwhelming majority of States represented at the Conference were in a position to adopt the text as presented. In Mexico’s view “the text should be adopted without a vote being understood that at the United Nations there is no definition of what consensus means”. The delegation of the Russian Federation protested pointing out that “we should never ignore the views of the minority” and that three countries had clearly stated their objections. In its view the proposal to adopt in spite of the objections was “quite unacceptable”, “a manipulation of consensus” and “the Russian Federation categorically opposes”. The Chair concluded from the intervention of the Russian Federation that there was no consensus to adopt the text and ruled accordingly. In the occurrence, the Arms Trade Treaty was not adopted at the Conference but was referred to the United Nations General Assembly where it was adopted on 2 April 2013 by a vote of 154 in favour, 3 against and 23 abstentions.

It is apparent that where decision-making in a multilateral negotiation process is by consensus, each State and every minority has a veto power over the process. Legally, a single delegation can block consensus.

The President ruled that she could not disregard the vision or the position and the request of 193 Parties and declared the decisions validly adopted.