



ecbi report

## 2010 Bonn Seminar

Legal Form of a Future Outcome, and  
the UNFCCC Negotiating Process



La Redoute, Bonn- Bad Godesberg  
6 June 2010

The contents of this paper are the authors' sole responsibility. They do not necessarily represent the views of the European Capacity Building Initiative (ecbi) or any of its Members

All rights reserved. No part of this publication may be reproduced, stored in a retrieval system, or transmitted in any form or by any means, electronic, mechanical, photocopying, recording, or otherwise, without prior permission of the ecbi.

**Acknowledgments:**

This work has been made possible through support to the ecbi from the German Federal Ministry for Economic Cooperation and Development (BMZ) and the Deutsche Gesellschaft für Technische Zusammenarbeit (GTZ)



## Executive Summary



The 2010 ecbi Bonn Seminar continued the tradition of timely and lively discussions between senior developing country and European negotiators on ‘crunch’ issues related to the international climate change negotiations. Participants stepped back from issues related directly to substantive negotiations this year, to review the negotiating process itself. This was considered essential in the aftermath of the 2009 Copenhagen Summit, where serious concerns were raised regarding both breach of existing negotiating procedures, and shortcomings in negotiating process.

Participants also tackled the complicated question of the legal form of a future outcome of the climate negotiations – an issue that is holding up progress in the climate negotiations. With key negotiating Parties insisting on a single global and comprehensive climate treaty that includes legally binding commitments all major economies, any future outcome from the negotiations seems unlikely. The 2010 Bonn Seminar participants considered the possibility of ‘Unilateral Declarations’ providing a way out of this deadlock.

### A. Unilateral Declarations

Wouter Geldhof, Partner at the international law firm Stibbe Brussels, made a presentation on Unilateral Declarations in international law. He said many national law systems recognize Unilateral Declarations, mostly through jurisprudence. International law is mainly formed through treaties, custom (practices by a majority of states which they follow because they believe it is law), general principles of law, good faith, judicial decisions, and teachings of highly qualified experts in international law. ‘Unilateral Declarations’ (UD) have also been used to establish legally binding commitments - for instance in avoiding the breakdown

of the second round of the Strategic Arms Limitation Talks (SALT II) between the US and the then USSR in the 1970s.

The two countries had an interim agreement on the limitation of their nuclear weapons, valid until 3 October 1977. A new agreement was to be completed by that deadline – however, as it drew closer it became apparent that it would not be met. To bridge the gap, the US issued a UD stating that they would not take action inconsistent with the interim agreement. Three days later, the USSR issued a similar UD.

The extent to which UD's are legally binding on a State was made clear in a ruling of the International Court of Justice (ICJ), also in the 1970s, in a case related to France's nuclear tests in the Pacific. France had stated on numerous occasions that they would stop these tests, but failed to do so. New Zealand and Australia asked the ICJ to rule on whether France was bound to its assertions that it would stop, which amounted to a Unilateral Declaration. The ICJ confirmed that a state can be bound by such a UD. For a UD to be legally binding, ruled the ICJ, two conditions must be met: it must be public or generally known, and the act must show the intention of the state to be bound. In another case related to UDs, the ICJ further ruled that a UD need not be directed to one individual, group or country, but can be directed to the international community, and can be legally binding on states.

In 2006, the International Law Commission drafted guiding principles for UDs capable of creating legal obligations. The Commission confirmed the two main conditions laid down by the ICJ, and added that such a UD must be made by an authority vested to do so, including Heads of State, Heads of Government and ministers of foreign affairs. The form of the UD (written or verbal) is not material, as long as it is stated in clear and specific terms. A UD may be addressed to an individual state or the international community. The guiding principles add that such UD cannot be revoked arbitrarily. The UD can include conditions for revocation.

### The UNFCCC Catch 22

Geldhof said the UNFCCC process is in currently in a Catch 22 situation. The EU blocks wants major economies to take on comparable cuts, the US will do so only if BASIC countries take on equal targets, but the BASIC countries want differentiated treatment. UDs might give a kind of outcome from this vicious circle and could fit in the Bali Road map, AWGLCA and KP. Under such a scenario, the Kyoto Protocol would carry on to a second commitment period, but include some COP decisions endorsed through a UD by the US and BASIC countries.

In the question and answer session that followed, Benito Müller, co-author of the report on UDs, further explained that before the 2007 Bali conference the climate negotiations were caught in a 'tripartite' Catch 22 between the US, Annex B countries and large emitters. The Annex B countries refused to agree to a second commitment period for the Kyoto Protocol until at least the US took on comparable reductions. The Byrd-Hagel resolution in the US, meanwhile, meant that the US would not take on reductions until the major developing countries did so.

In Bali, one part of this Catch 22 was resolved through the compromise between the US and BASIC in paragraphs 1.b.i and 1.b.ii of the Bali Action Plan. Developing countries agreed to take on Nationally Appropriate Mitigating Actions (NAMAs) as long as requisite financial and capacity building support was provided.

What was not agreed in Bali, however, was the legal form that a future agreement would take, and how it would relate to the Kyoto Track. The US has now been talking about ‘legal symmetry’ between the US and BASIC. That could be achieved if both take on UD’s, with different content. BASIC countries could undertake NAMAs - conditional on support, as agreed in the Bali Action Plan. The US could enter into a legally binding agreement without having to seek Senate approval or ratify.

The UD’s would be an added ingredient to the COP decisions. This would not be a grand unifying treaty everybody is hoping for, but at the same time it would but not just be a free-for-all the US is currently suggesting.

One of the participants asked how this would help the US overcome the problem of domestic legislation, to implement the commitments made under a UD. Müller said a similar situation had arisen in the SALT talks, where President Jimmy Carter was accused of undermining the Senate by opting for a UD. However, lawyers pointed out that he had the support of at least 51 Senators – a majority, and hence he was not undermining the Senate. In order to write a climate-related UD into domestic legislation, the support of 60 votes would be needed. This is a still less than the 67 votes needed to ratify an international treaty.

### Overestimated ‘bindingness’

Geldhof said the term “legally binding” has limited implications in international law, which depends mostly on a voluntary regime. States comply because they want to, not because they are forced. For instance, if Annex B exceeds its target under the Kyoto Protocol, there is no international military force to make them comply. The compliance tool of the Kyoto Protocol is therefore ‘soft’ – member states that fail to meet their targets by 2012 will have their ability to sell emission credits suspended and must make up the difference, with a further penalty of 30% of their assigned amount in the second commitment period. So although the Kyoto Protocol is binding, its ‘bindingness’ should not be overestimated. Compliance is more a matter of losing face than sending in the Marines.

One of the participants said there appear to be different interpretations of what a ‘legally binding outcome’ means. Müller said the legally binding aspect is mainly aimed at domestic constituencies – for instance, to assure investors for the investments they will have to make in order to reach goals in the next 5-0 years. In fact, countries can withdraw from an international treaty if they are in danger of non-compliance. It would be more difficult to withdraw from a UD. A UD is therefore not ‘an easy way out’ – it is as, if not more, binding as a treaty.

One participant expressed a preference for a treaty with strong enforceability, including sanctions. Another participant said including compliance and enforcement in multilateral declarations is the next evolution of international public law. If a UD is binding on a state,

citizens could take governments to court for not complying, thus enforcing it nationally.

## B. UNFCCC Process



Benito Müller, Director of Oxford Climate Policy, made a presentation on the UNFCCC negotiating process based on a survey carried out among negotiators in the aftermath of the 2009 Copenhagen Summit. He said that whereas the existing process works if it is applied properly, there are three major concerns that need to be addressed:

- ▶ The lack of trust in the formation of ‘small groups’ to negotiate text during negotiations. It is undeniably easier to negotiate text in small groups than in Plenary – but the question is how to improve the selection of small groups, and make the process more inclusive, open and transparent.
- ▶ The structure and role of ‘high level segments’, when ministers and heads of states are present at negotiations.
- ▶ The relationship between the Presidency, Bureau and the UNFCCC Secretariat, which is currently uncomfortable.

### Small Negotiating Groups

There appear to be different interpretations of how small groups should be elected. The process seems to work without problems overall, but there have been some problems over who is invited for intersessional consultations (although these consultations are not meant to be negotiations). The key issue appears to be one of transparency – ensuring that those who are not present can find out what happened at the meeting, or participate by proxy. One way of overcoming this is to have a core group of participants for any such meeting, and at the same time to have a few places that are open, for countries or regions that would like to attend. If they are too many countries that would like to attend, regional groups would have to choose representatives from among them. This is what happens in the case of civil society representation, where the Secretariat invites groups to appoint their representatives. This creates inclusiveness. The participants then have a responsibility to report back to the rest of the group.

### High Level Segment

Following the Copenhagen Summit, a key question for the UNFCCC process is how to

make the best use of High Level participation in negotiations, without undermining the work done by negotiators. Several problems arose in this regard at Copenhagen: there was duplication of work, as the same issue was discussed at the political and negotiating levels – sometimes at the same time; issues already dealt with by negotiators were reopened at the political level; and some country negotiators felt their ministers were taken away and manipulated.

At the same time, political involvement is very essential for the success of the negotiations, and ‘quarantining’ the political negotiations from the technical negotiations is not a good idea. Politicians can be more flexible than negotiators in finding solutions. They should not, however, be tasked with drafting text. This should also be left to the negotiators, and not be undertaken by the political segment. While EU ministers are used to drafting text, others are not and are therefore at a disadvantage.

Müller suggested rules laying down a structured, sequential and iterative process for the two segments to interact. For instance, political involvement could begin at a meeting with a formal, institutionalised briefing from the negotiators, either from country delegations or regional/ political groups. Ministerial level negotiating groups could then be formed to deal with ‘crunch’ issues – with careful attention to ensuring inclusiveness and transparency. A debriefing and a technical session could follow, where negotiators draft text. Further negotiating sessions may be needed, depending on whether the text is acceptable negotiating session.

#### The relationship between the Presidency, Bureau and Secretariat

Müller said the relationship between the Presidency, Bureau and Secretariat was even more important – and equally difficult to resolve. The role of host country/Presidency in the negotiations is totally out of balance, and viewed as a chance for local politicians to score points. The Presidency chairs the conference. This appears to be a recent change – at the Kyoto Conference in 1997 for instance, it was not a Japanese minister but Ambassador Raúl Estrada-Oyuela who chaired the negotiations throughout. The Presidency has also taken on the role of convening smaller meetings – and taking on de facto Presidency not only during the COP, but during the preceding year. The Bureau, meanwhile, has become more and more marginalised. A more permanent home for the negotiations may help overcome this problem.

Another area that is causing mistrust appears to be the role of the UNFCCC Secretariat in speaking for the process to the outside world (for instance, to the media and to civil society). The Executive Secretary is meant to be impartial, but is put in a difficult situation when called on to speak on substantive issues.

Bo Kjellén, Senior Research Fellow at the Swedish Environment Institute also made a presentation on the process based on a paper circulated to the participants, *Friends of the Chair, or the Chair's (true) friends?: The Art of Negotiation in the Rio process and climate negotiations* (<http://www.eurocapacity.org/downloads/ecbiFOCPolicyBrieffinal.pdf>) the importance of transparency, representation and of reporting back. He said that as the negotiations got more complicated, it is necessary to have smaller groups in order to take some of the pressure off negotiators. This includes rules, such as not having more than two meetings at the same time.

He emphasised the importance of having outside convenors, and meeting under the Chatham House rules, which would help others better understand the real background of positions. A country's position is decided on the basis of national circumstances – including for instance the political and economic situation. Negotiators need to be aware not only of the positions but also the background of these positions.

Kjellén supported Müller's idea of sequencing the interaction between the political/ High Level negotiations and the technical negotiations and drafting. He said over 110 Heads of State were present at the United Nations Conference on Environment and Development (UNCED) in 1992, but they did not negotiate text. They made statements, and negotiations carried on long after the limos had left. Ministers can be used as a last resort, to resolve crunch issues as they have a broader mandate. However, ministerial agreement would have to be developed at the technical level, as Ministers are often not familiar with details.

Kjellén said the role of the Chair is much more than just chairing meetings – it is to organise the process in cooperation with the Secretariat and represent the process in many different ways. He said it was an advantage to have one Chair who did not belong to any group, but was committed to getting a result in consultation with all groups. A co-chair was only necessary if trust was lacking in the Chair. Until the Kyoto conference, there was only one Chair, balanced by the Bureau and a Rapporteur. Getting agreement in the Bureau was always a bit of a problem, but the Chair was in a unique position of having a certain confidence invested, allowing him/her to take the lead in certain negotiations.

Another participant at the meeting agreed that the concept of a 'co-chair', recently introduced to ostensibly balance North-South representation, was in fact institutionalising the divide and emphasising rather than diminishing suspicion. Moreover, she felt some of the best G77 negotiators were 'neutralised' by being appointed co-chairs. The proliferation of negotiating groups and the resulting need for co-chairs has meant that co-chairs are often clueless about the issues they are dealing with in the group. The process of appointing co-chairs has also become very arbitrary. There used to be consultations, but not any more. It does affect the process.

During a discussion on the role of the Bureau, Kjellén said the Bureau was meant to be a small group with regional balance, acting as a sounding board for the Chair. At UNCED, the Bureau turned out to be of no value whatsoever, as everyone wanted to be on the Bureau and there were 53 members who never met.

Another participant said the Bureau is meant to take care only of procedures. The regional representatives have the responsibility to bring to the Bureau the concerns of the regional members and of reporting back. The Bureau deals with questions such as bad hotels, high prices, members robbed or harassed. They do not get into substantive matters, but members have to be very clear about the rules of procedure. The Bureau also helps the Secretariat to keep the process going smoothly. In some negotiations, such as the Convention on Biological Diversity, the Bureau has a bigger role (such as appointing the Executive Secretary) that has been institutionalised through COP decisions.

She added that in the past, the President of the Conference could not make substantive contribution to the process, such as presenting a paper. Only Parties could present papers and positions - in a 'Party-driven' process all substantive matters must emanate from Parties. The rules of procedure clearly state that President cannot exercise the rights of a Party.

On the High Level Segment, one participant said that Ministers should not be handpicked for negotiations – all ministers should be involved. One of the causes of the failure of Copenhagen was the exclusion of the ministers from some countries in the discussions. Another participant said developing countries suffer many disadvantages in a high level meeting. First not all can attend, either because they are overworked or lack the budget. It is often not clear in advance who the environment or foreign minister will be during a negotiation session. Ministers are not briefed regularly at intersessional fora like the OECD.

In Copenhagen, issues were taken away for discussion at the High Level Segment arbitrarily – not because they were crunch issues. Negotiators felt they were progressing well on trade and finance issues, for instance, but these were taken up at the High Level Segment. Another participant felt that after Copenhagen, the role of the negotiators needed to be re-emphasised. He also felt that the incoming Presidency should take charge at the end of a COP. On a positive note, he said Copenhagen was an eye-opener for many developing country politicians, as they saw that some countries have Ministers for climate change, and accorded it high importance.

Another participant emphasised the need for more ministerial-level meetings at the regional level intersessionally, to keep Ministers informed and engaged.

At the end of the session, Kjellén said it is important to recognise that Ministers carry the mandate of the people, and the best tools possible should be made available to them in order to carry out this mandate. He suggested the ecbi should take the discussion on process further. Müller said a draft report on the issue would be circulated for comment among participants by the end of August, and discussions would be continued from there.

## List of Participants

Mr. Balisi Gopolang	Botswana Meteorology Office
Rapelang M. Mojaphoko	Botswana Ministry of Environment, Wildlife and Tourism
Mr. David Lessolle	Botswana Meteorology Office
Mr. Mamadou Honadia	Permanent Secretariat for Environment and sustainable Development, Burkina Faso
Ms Fatou Ndeye Gaye	Department of Water Resources, Gambia
Mr. Pa Osman Jarju	Department of Water Resources, Gambia
Mr. Mamadou Nije	Department of Water Resources, Gambia
Mr. Alexander Sarac	Ecosecurities, Georgia-UK
Ms. Nana Kunkel	Deutsche Gesellschaft für Technische Zusammenarbeit
Ms. Emily Massawa	UNEP, Nairobi
Mr. Bruno Sekoli	LDC Chair, Lesotho
Mr. Birrama Diarra	Mali Met Office
Mr. Mama Konate	SBSTA Chair, Mali
Ms. Carolina Fuentes Castellanos	Secretaría de Medio Ambiente y Recursos Naturales, Mexico
Ms. Socorro Flores	Global Affairs for Mexico's Foreign Relations Department
Mr. Asad Khanun	Minister, Permanent Mission of Pakistan to the UN
Mr. Farrukh Khan	Pakistan
Mr. Massamba Ndour	Ministre de l'Environnement, de la Protection de la Nature, Senegal
Mr. El Hadji Mbaye M. Diagne	National Committee of Climate Change Syndicat Professionnel des Industries et Mines du Senegal
Mark Storey	Swedish Energy Agency

Mr. Kaveh Guilanpour	Department of Energy and Climate Change, UK
Ms. Harriet Thompson	Department of Energy and Climate Change, UK
Ms. Bernarditas Mueller	Lead Negotiator, Spokesperson G77 & China, Philippines
Mr. Saleem Huq	ecbi, International Institute for Environment and Development
Mr. Benito Muller	ecbi, Oxford Climate Policy
Mr. Bo Kjellen	ecbi, Stockholm Environment Institute
Ms. Achala Chandani	ecbi, International Institute for Environment and Development
Ms. Izabela Juszko	ecbi, Oxford Climate Policy
Ms. Rod Janssen	ecbi, Independent Evaluator

Contact:

57 Woodstock Road, Oxford, OX2 7FA, UK

Phone +44 (0) 1865 889 128, Fax: +44 (0) 1865 310 527

e-mail: [adm.n.ocp@gmail.com](mailto:adm.n.ocp@gmail.com)