

Luke Tomlinson

# Procedural Justice in the United Nations Framework Convention on Climate Change

Negotiating Fairness

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London, UK

ISBN 978-3-319-17183-8                      ISBN 978-3-319-17184-5 (eBook)  
DOI 10.1007/978-3-319-17184-5

Library of Congress Control Number: 2015936695

Springer Cham Heidelberg New York Dordrecht London  
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Printed on acid-free paper

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# Preface

Multilateral efforts at the global level are yet to produce meaningful action on climate change. In light of this inaction, many have questioned whether the UNFCCC is an appropriate forum for coordinating action, and many alternative arrangements have arisen to fill the regulatory void. Part of this criticism suggests that there is a perceived lack of fairness in the UNFCCC. Whilst academic discussion has traditionally focused on the issue of distributive fairness in this context, very little has been said about procedural fairness. To this end, this book considers what is needed for fairness in the decisions of the UNFCCC. It analyses several principles of procedural fairness in order to develop practical policy measures for fair decision-making in the UNFCCC. This includes measures that determine who should have a right to participate in its decisions, how these decisions should take place and what level of equality should exist between these actors. In doing so, it proposes that procedural fairness is a fundamental feature of a multilateral response to address climate change. By showing that procedural fairness is most likely to be achieved through the inclusive process of the UNFCCC, it also shows that global efforts to address climate change should continue in this forum.

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# Acknowledgements

This book is based on a thesis that was submitted for the Degree of Doctor of Philosophy in Politics, the Department of Politics and International Relations, the University of Oxford in 2014. This was part of the project 'Equity and Climate Change', funded by the Economic and Social Research Council.

I owe a great deal of thanks to my supervisor, Simon Caney, for his guidance and supervision in the earlier stages of my research. I am also very grateful for the feedback provided on earlier versions of my thesis by Jeremy Waldron, David Miller, Elizabeth Fraser and Michael Mason.

I am heavily indebted to several people who generously dedicated their time and thought to reading and discussing my research. I owe special thanks in particular to Clare Heyward and Dominic Roser.

All opinions expressed in this book are my own.





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# List of Abbreviations

APP	Asia-Pacific Partnership
AOSIS	Alliance of Small Island States
CDM	Clean Development Mechanism
COP	Conference of the Parties
COP15	UNFCCC Conference of the Parties Copenhagen 2009
COP16	UNFCCC Conference of the Parties Cancun 2010
COP17	UNFCCC Conference of the Parties Durban 2011
COP18	UNFCCC Conference of the Parties Doha 2012
COP19	UNFCCC Conference of the Parties Warsaw 2013
COP20	UNFCCC Conference of the Parties Lima 2014
COP21	UNFCCC Conference of the Parties Paris 2015
G-77	Group of 77 and China
G8	Group of Eight
G20	Group of Twenty
GCCA	Global Climate Change Alliance
IEA	International Energy Agency
IMF	International Monetary Fund
IPCC	Intergovernmental Panel on Climate Change
MEF	Major Economies Forum on Energy and Climate
NGO	Non-governmental Organisation
NSA	Non-state Actor
OECD	Organisation for Economic Cooperation and Development
REDD	Reducing Emissions from Deforestation and Forest Degradation
ROP	Rules of Procedure
UNEP	UN Environment Programme
UNFCCC	UN Framework Convention on Climate Change
WTO	The World Trade Organization

# Chapter 1

## Introduction

### 1.1 Introduction

In December 2015, representatives of governments from around the world will meet in Paris to discuss the terms of a legally binding global agreement for action on climate change. This meeting represents the 21st Session of the Conference of Parties (COP21) to the United Nations Framework Convention on Climate Change (UNFCCC), which is the current global arrangement for collective state action on climate change. The ultimate aim of this arrangement is to prevent human interference with the climate from bringing about dangerous levels of climate change. With this end in mind, the purpose of COP21 is to get states to commit to some sort of legally binding agreement on climate change that will come into force in 2020.

Given that climate change is now largely undisputed and a central priority of the global political agenda, COP21 has become the most significant and highly anticipated conference on climate change to date, drawing public attention and inspiring political discussion around the world. As questions over the science of climate change have faded, the urgency of the action needed has become startlingly clear. The result is that COP21 in Paris is now seen as a ‘make or break’ opportunity for world leaders to act. Provided a new agreement arises in Paris, there will be continued discussions over the final details of this agreement in the coming years. This is just the start of the process towards a comprehensive agreement.

But looking back at previous COP meetings throughout the history of the UNFCCC leaves little room for optimism over the chances of a meaningful agreement arising in Paris. Since its creation over two decades ago, the UNFCCC has brought about little in the way of meaningful action on climate change. Instead, there is an alarming disjuncture between what’s collectively required to avoid dangerous climate change and what action has actually been taken so far by individual states, leading to much political, academic and public debate, not only

about how to instigate action within the UNFCCC, but also whether it is a suitable forum for addressing climate change at all.

Some authors attribute the lack of action in the UNFCCC to a perceived lack of fairness among its participants, which in turn has created a political stalemate as parties argue over intractable positions. In response to this challenge, many philosophers and political theorists have considered what's fair in relation to climate change. Traditional discussions of fairness in the UNFCCC focus on distributive aspects, which relate to the fair distribution of costs and benefits. Climate change is a both a global and an intergenerational problem for which there is much at stake. Many of those who will experience the very worst effects of climate change will have had little responsibility for bringing it about. There will be many winners and losers in the years to come. As a result, there has always been a strong divide in the COP negotiations between poorer nations, who demand more action from those that have historically caused climate change, and the rich, who expect greater action from rapidly developing economies.

Little, however, has been said about procedural fairness in relation to the UNFCCC, which concerns the way that decisions are made. If distributive fairness relates to the costs and benefits that arise from the actions of the UNFCCC, procedural fairness concerns how decisions about these actions are made. In fact, very little has been said about the procedural rules of the UNFCCC at all. Many of its procedural rules have not yet been formally adopted, operating instead on an ad hoc basis. In particular, the UNFCCC has not yet adopted any rules over voting, with the result that decisions are made by consensus, which allows a single party to obstruct action even if there is agreement among the rest of the group. This has led to both stalemate and outcomes that consistently reflect the 'lowest common denominator' where ambition and leadership is desperately needed. Further, procedural fairness is not just important in its own right, but also because it can provide a way of reaching agreement amongst those who disagree over distributive issues. Given the stalemate that exists in the UNFCCC and the urgent need for action on climate change, a review and analysis of the UNFCCC's procedural rules is long overdue.

To this end, this book identifies which rules should govern the decisions of the UNFCCC. In specific, it develops a set of rules so that the decisions of the UNFCCC are made *in a fair way*. As such, this book isn't about *what* should be decided in the UNFCCC, but rather *how* its decisions should be made. I argue that if a decision is made in accordance with these rules, then an agreement will gain long-term support and endorsement. In doing this, I also show that, on account of its universal membership, the UNFCCC is the only appropriate forum for international action on climate change. This book therefore makes a twofold contribution to the debate preceding the UNFCCC COP21 meeting in Paris 2015 and its aftermath in the years to come; first, by determining several practical policy measures for instigating action on climate change and second, by arguing that states should continue to support international action on climate change within the UNFCCC. It does this by linking analytical political philosophy with applied public policy.



Given the growing academic and political debate taking place on the future of the UNFCCC, and the need for policy guidance at a practical level, the book provides an important contribution to an otherwise neglected issue area that will be of interest to both academics and practitioners working in the field, including state delegations, NGOs, and international organisations. What's more, many of the arguments in this book will apply to other multilateral agreements to address climate change. Its recommendations will not only guide the UNFCCC in the immediate years to come, but also action on climate change in many other forums.

The book ultimately develops several practical policy measures for the design of the UNFCCC. It does so in four steps. First, it considers the various principles of distributive fairness that have been advocated in the UNFCCC and shows that, not only is there disagreement over what is fair in this context, but also that there is *reasonable* disagreement over how the costs and benefits of climate change should be fairly distributed. This is important because it means that deliberation and discussion is unlikely to bring about an agreed outcome. Second, having shown this, the book then argues that procedural fairness is an important way of reaching a mutually acceptable outcome when there is reasonable disagreement over how to distribute costs and benefits. As a result, the current use of consensus-based decision-making is partly responsible for the political inertia in the UNFCCC and there is a consequent need to revise its procedural rules.

Third, the book develops several principles that should govern the decision-making processes of the UNFCCC, including principles governing who should participate, the terms on which decisions should be made, what voting method should be used, and how actors should bargain. It does this by analysing principles of procedural fairness and considering how they can be applied in the context of climate change. Finally, it argues that the UNFCCC is the only appropriate forum for addressing climate change at the global level. It does this by arguing that procedural justice is a fundamental part of any effective climate change agreement. Drawing on the earlier arguments, the book suggests that procedural justice requires that a fair climate agreement have universal representation. Given that the UNFCCC is the only forum that provides universal membership, it is the only appropriate forum for effectively addressing climate change. As such, the book serves as both an academic study of procedural justice and climate change as well as a guide for policy-making for international cooperation on climate change.

## 1.2 Climate Change and the UNFCCC

The fact that the earth's climate is undergoing fundamental changes due to human activity is now undisputed (UNFCCC 1992; IPCC 2007, 2012; Stern 2007; Garnaut 2009). The Assessment Reports of the Intergovernmental Panel on Climate Change (IPCC) are the most comprehensive studies to date on climate change and the

impacts that it has on human interests.<sup>1</sup> The most recent of these, the IPCC Fifth Assessment Report published in 2013, represents the most comprehensive study of the climate ever undertaken (IPCC 2013). This report states that climate change is occurring, that this is very likely due to human activity, and that unabated action will result in further climate change (IPCC 2014 Synthesis Report). The potential implications of climate change include severe and irreversible changes to the climate system, which are expected to have extreme consequences for fundamental human interests on a global scale.<sup>2</sup> This includes sea level rise and an increase in the incidence of extreme weather events such droughts. It is widely thought that this will threaten basic human rights to food, water, health and shelter and could represent an existential risk to some countries (Caney 2009; OHCHR 2009; OHCHR and UNEP 2012).<sup>3</sup>

The IPCC also states that climate change mitigation is a global commons problem, for which collective action to reduce emissions of greenhouse gases will provide greater aggregate gains than continued unrestricted emissions (Toth et al. 2001, p. 653; IPCC WG3 TS.4.4). As such, the potential benefits of avoiding severe climate change are expected to outweigh the anticipated costs of achieving this objective (IPCC 2007; Stern 2007; Garnaut 2009).<sup>4</sup> This has been reiterated by the Global Commission on the Economy and Climate, a group of experts, commissioned to analyse the economic implications of addressing climate change (the Global Commission on the Economy and Climate 2014).

Given that climate change is a global problem and that no single actor is responsible for a significant proportion of total emissions, achieving climate mitigation is often seen as requiring an international, if not fully global response (IPCC 2001, 2007). The United Nations Framework Convention for Climate Change (UNFCCC) is the existing international agreement for international cooperation on climate change and the Conference of the Parties to the UNFCCC (COP) is the official negotiating forum for collective decision-making in the Convention (UNFCCC 1992).<sup>5</sup> This is an international agreement among nation states to cooperate on climate change. The ultimate objective of the Convention, which and has been signed and ratified by 196 states, is to ‘stabilise greenhouse gas concentrations in the atmosphere at a level that prevents dangerous interference with the climate system’ (UNFCCC 1992, Article 2).

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<sup>1</sup>The remainder of this book draws from the Assessment Reports of the IPCC, in particular: Banuri et al. 1995; Bashmakov et al. 2001; Toth et al. 2001; Gupta et al. 2007; Halsnæs et al. 2007; Stavins et al. 2014.

<sup>2</sup>For further discussion, see: IPCC 2007; Caney 2009; OECD 2012.

<sup>3</sup>Small island nations are particularly vulnerable to sea level rise. See: Yamano et al. 2007.

<sup>4</sup>There is not complete consensus on this matter. Some argue that it would be better to pursue other policy options aside from mitigation. See, for example: Schelling 1997; Lomborg 2001; Nordhaus 2009.

<sup>5</sup>For discussion: Bodansky 1993, 2001; Yamin and Depledge 2004; Depledge 2005.

The legal instrument of the UNFCCC is the Kyoto Protocol (1997), which puts legally binding commitments on states to reduce their greenhouse gases (UNFCCC 1997). The Marrakech Accords (2001), the Bali Action Plan (2007), and the Durban Platform (2011) are subsequent agreements that have been adopted to continue action through the UNFCCC. Whilst the recent COP15 negotiations in Copenhagen highlighted the limits of the UNFCCC process, the outcome of COP16 in Cancun and COP17 in Durban renewed optimism in its ability to deliver collective action on climate change.<sup>6</sup> In particular, COP17 established a second commitment period under the Kyoto Protocol, as well as the Ad-hoc Working Group on the Durban Platform: an agreement to negotiate an agreed outcome with legal force by 2015, which will become operational in 2020. The recent COP18 in Doha (UNFCCC 2012) committed to build on the framework put in place at Durban and this process was reaffirmed at COP19 and COP20 in Warsaw 2013 and Lima in 2014 respectively (UNFCCC 2013; UNFCCC 2014).

Although there is some dispute over what dangerous climate change exactly entails, avoiding dangerous anthropogenic interference with the atmosphere is now broadly seen as limiting global temperature increases to within 2 °C of those before the industrial revolution. The IPCC states that in order to keep a 50 % chance of meeting this target, it is necessary to limit atmospheric concentrations of greenhouse gases to between 480 ppm and 530 ppm, which in turn requires drastic reductions in the overall levels of global greenhouse gas emissions. But little action is taking place to mitigate the activities that cause climate change and the international community has struggled to come up with a collective response to this problem. On current trends, temperature increases could exceed 4 °C by the end of this century, which would lead to extreme and irreversible impacts (Global Commission on the Economy and Climate 2014). Some think that the lack of action achieved by the UNFCCC requires a major reassessment is needed of the current focus to implement action through the UNFCCC. It would be more worthwhile pursuing international action in other international forums and to focus attention elsewhere.

There are many other multilateral arrangements that coordinate cooperative action on climate change where it might be much easier to stimulate action.<sup>7</sup> These are agreements amongst limited numbers of states to address climate change, including traditional international institutions that are now incorporating climate change into their mandates, such as: the Group of Eight Industrialised Countries (G8), the Group of Twenty (G20) and the UN Security Council. Given that the G8

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<sup>6</sup>For criticism of COP15, see: Dubash 2009, p. 8; IISD 2010; Winkler and Beaumont 2010, p. 640. For discussion of COP16, see: King et al. 2011. For commentary on the Durban Platform, see: Fu-Bertaux and Ochs 2012. For the outcomes of COP17, see: UNFCCC 2011.

<sup>7</sup>For more on climate change initiatives outside of the UNFCCC, see: Jagers and Stripple 2003; Pattberg and Stripple 2008; Biermann 2010; Bulkeley and Newell 2010.

and G20, as well as agreement set up to specifically address climate change such as the Major Economies Forum on Climate Change and Energy (MEF).<sup>8</sup>

There are also many arrangements between state and non-state actors at the international and national level.<sup>9</sup> Examples include the Netherlands Voluntary Agreement on Energy Efficiency and the Australia Greenhouse Challenge Plus Program (Gupta et al. 2007, p. 761). National laws and policies are also critical areas of climate policy (Levi and Michonski 2010). For this reason, some authors argue that power over collective action for climate change is increasingly located beyond the intergovernmental system (Kingsbury et al. 2005; Pattberg and Stripple 2008; Biermann et al. 2009; Biermann 2010; Corbera and Schroeder 2011). Others argue that climate change politics is decentralised, or ‘fragmented’, reflecting the multiplicity of actors and power relations that exist beyond the traditional interstate system (Biermann et al. 2010). As such, the failure of centralised approaches to action on climate change, and the increasing prevalence of alternative forms of cooperation, has led some to suggest that action might be better pursued in forums outside of the UNFCCC (Prins and Rayner 2007a, 2007b; Grasso and Timmons Roberts 2013).

These different international arrangements aren’t mutually exclusive, and many work alongside one another. However, focusing international efforts to address climate change in one arena does limit the resources that can be put into achieving outcomes in other areas, so there are tensions between these different forums for cooperation. For one thing, the UNFCCC can be perceived as the overall institution that should deliver action on climate change, so waiting for a top down agreement to arise may prohibit action in other areas as states anticipate action to come about. The costs of the annual COPs aren’t insignificant either. Given what’s at stake, the lack of action active by the UNFCCC thus far, and the emerging diversification of alternative arrangements for international cooperation, it’s worth considering whether the UNFCCC is still the most appropriate forum for addressing climate change.

### 1.3 Guiding Principles for International Cooperation on Climate Change

In light of the different institutional arrangements and institutions that exist in relation to climate change, a number of authors have evaluated the UNFCCC and proposed options for its reform.<sup>10</sup> Many of these evaluations and proposals are based

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<sup>8</sup>The MEF facilitates dialogue among 17 countries (MEF 2013).

<sup>9</sup>For a description of public-private agreements, see: Gupta et al. 2007, p. 761. For discussion, see: Bulkeley and Newell 2010; Bäckstrand 2008.

<sup>10</sup>This section draws on the discussions from: Höhne et al. 2002, p. 34; Aldy et al. 2003; Bodansky and Chou 2004; Aldy and Stavins 2007, 2010.

on implicit assumptions about the normative desirability of different arrangements and the role that they should play. The IPCC Fourth Assessment Report defines several principles and criteria that can be used to either evaluate existing cooperative arrangements or guide their design (IPCC 2014). Typically, the overall desirability of an institution relates to its performance, or ‘effectiveness’ in reaching an overall objective (for example, achieving climate stabilisation). But many refer to other normative criteria when making proposals about climate institutions, including justice, legitimacy, and economic efficiency.

The literature on climate change typically divides normative criteria into two categories: substantive criteria, which relate to the outcomes of an institution, and procedural criteria, which relate to the processes that generate these outcomes. These criteria are interlinked, in the sense that they can either complement and conflict with one another in different situations. For example, an institution that achieves economic efficiency may not yield the best environmental outcome (Philibert and Pershing 2001). On other occasions they are mutually supportive; an institution that is neither equitable, nor politically feasible, is unlikely to achieve its goals (Rajamani 2000).

Substantive criteria can also relate to the procedural design of an institution, just as procedural criteria can be matters of substantive concern. For instance, it might be desirable to design an institution that achieves a substantive end, such as economic efficiency. This involves ensuring that the outcomes of the agreement are those that minimise the economic cost of the agreement. But it also involves designing the procedural aspects of the institution so that these minimise the economic cost of the agreement as well. This might involve designing procedures that minimise transaction costs, or that do not place high information costs on participating actors. In this instance, a substantive normative criterion has implications for the procedural design of the institution. Consequently, whilst a distinction can be made between procedural and substantive criteria of institutional design, this does not limit the aspects of institutional design that each type of criterion applies to.

Further, some of the criteria proposed here have *both* procedural *and* substantive elements. For instance, the criterion of legitimacy, which is defined and discussed in the following section, has elements that govern both of these criteria. Separating these elements is common in the literature on institutional design. For example, Fritz Scharpf has labeled these ‘input legitimacy’ and ‘output legitimacy’, which respectively relate to procedural and substantive elements (Scharpf 1999). Both Thomas Franck, and Buchanan and Keohane also make a distinction between these two features of legitimacy (Franck 1995; Buchanan and Keohane 2006). The reason for separating such criteria into their substantive and procedural components, even when some of these criteria concern both of these dimensions, is to show that, in certain cases, they matter to both process *and* outcome. This is something that is sometimes overlooked in the literature. I separate these two features to demonstrate that one can focus on the procedural aspect of legitimacy irrespective of the substantive ends that it brings about.

Substantive criteria relate to the outcomes that are brought about by the institution. These criteria are important regardless of the process through which they