

Heated debate on unilateral measures

Bangkok, 5 September (Chee Yoke Ling and Hilary Chiew) – There is a deep division between developing and developed countries over the issue of the use of unilateral measures to deal with climate change.

One of the agenda items under the Ad Hoc Working Group on Long-term Cooperative Action under the UN Framework Convention on Climate Change (AWG-LCA) is the economic and social consequences of the implementation of response measures. Over the past few years, developed countries have refused to include unilateral measures as a response measure in the work of the AWG-LCA on this agenda item.

As part of their united position to terminate the AWG-LCA at the forthcoming 18th meeting of the Conference of Parties (COP) in Doha, Qatar, developed countries are of the view that there is no more work on response measures that needs to be done by the working group. Anything else can be addressed in the 'Forum to Implement the Work Programme on the Impact of the Implementation of Response Measures' that was established in Durban last December at COP 17.

On the other hand, a large number of developing countries emphasize that unilateral measures are clearly an unfinished business of the AWG-LCA. They point to a "conference room paper" (CRP 39) in which several key issues that were controversial were placed by the former Chair of the AWG-LCA (Dan Reifsnyder of the United States). This document contains "texts reflecting work undertaken (at the last pre-COP 17 meeting of the AWG-LCA), in order to carry forward ideas and proposals in areas in which continued discussions are envisaged" in 2012. One section contains 3 options on unilateral measures under the sub-heading "Economic and social consequences of response measures".

The developing countries throughout the week stress that there is a distinction between issues and matters that can be addressed by the subsidiary bodies of the UNFCCC or the new bodies established in the Durban COP 17, and those that need to be addressed through decisions of the COP in accordance with the mandate of the Bali Action Plan, in particular decisions that provide political parameters for the enhanced implementation of the Convention. Unilateral measures are one of the issues that need to be addressed by the AWG-LCA tasked with fulfilling the Bali Action Plan mandate.

In CRP 39, Option 1 deals with developed country Parties' resorting to unilateral measures, including tariff, non-tariff, and other fiscal and non-fiscal border trade measures against goods and services from developing country Parties on grounds related to climate change. Option 2 is about Parties cooperating in accordance with Article 3 paragraph 5 of the UNFCCC. Option 3 states: "No text on trade".

(The UNFCCC Article 3.5 provides the following: "*The Parties should cooperate to promote a supportive and open international economic system that would lead to sustainable economic growth and development in all Parties, particularly developing country Parties, thus enabling them better to address the problems of climate change. Measures taken to combat climate change, including unilateral ones, should not constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade.*")

When the AWG-LCA resumed its work in Bonn in May 2012 this issue was discussed, and continued to be debated in Bangkok in three meetings of the AWG-LCA contact group on 31 August, 1 September and 4 September.

At the 4 September the AWG-LCA Chair, Mr. Aysar Tayeb (also the contact group chair) circulated a paper containing 3 options. He said

that these are options from the submissions that Parties made in reference to the discussions (in Bangkok), and that we still have an option for no text (Option 4).

He said that in Option 3 he tried to capture some of the discussion we had built on Article 3.5 (of the UNFCCC), with some recommendation that may provide further information that is not so much direct guidance but may be useful for the discussion of unilateral measures. He said this option recognizes that the Convention does not put a ban on unilateral measures but recognizes that there are impacts of unilateral measures, and that these measures may not be desirable for a way forward and that there should be a multilateral system.

(Option 1 of the 4 September paper by the Chair reads:

"Decides that the developed country Parties shall not resort to any form of unilateral measures against goods and services from developing country Parties on any grounds related to climate change, including protection and stabilization of climate, emissions leakage and/or cost of environment compliance; recalling the principles and provisions of the Convention, in particular Article 3, paragraphs 1,4 and 5, Article 4, paragraphs 3,5 and 7, and taking into account the principles of equity, common but differentiated responsibilities and respective capabilities and the obligations of the developed country Parties to provide financial resource, transfer technology and provide capacity building support to the developing country Parties.

Request to undertake consideration of what can constitute means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade."

Option 2 reads:

"Decides that Parties should cooperate to promote a supportive and open international economic system that would lead to sustainable economic growth and development in all Parties, particularly developing country Parties, thus enabling them better to address the problem of climate change. Measures taken to combat climate change, including unilateral ones, should not constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade."

Option 3 reads:

"The Parties should cooperate to promote a supportive and open international economic system that would lead to sustainable economic growth and development in all Parties, particularly developing country Parties, thus enabling them better to address the problem of climate change. Measures taken to combat climate change, including unilateral ones, should not constitute a means of arbitrary or unjustifiable

discrimination or a disguised restriction on international trade.

Recognizing that unilateral measures, while permitted by the Convention, have impacts across borders and that Parties have the obligation to minimize negative impacts.

Recognizing that unilateral measures are not the best way forward in designing mitigation policy, and that working through multilateral system is the priority."

Option 4 reads:

"No text."

Canada was the first to respond to the Chair's paper, saying that it does not recall asking the Chair to produce this document. We had a clear mandate from Durban that this is not an issue to discuss. This looks like moving closer to a draft decision and we will never agree to that.

Chair Aysar said he disagreed that there is mandate that this issue is not to be discussed.

The **US** said this was a process question it shared and it was not surprised at the strong voice from Canada. It understood that from Durban that on the issues on adaptation and response measures, and capacity building, the directive was that we try to see if there was convergence on these issues. And if there were convergence we could try to go forward.

The US said (from the stock-take session on 3 September) there are certainly different views on issues; here in response measures there certainly are. The issue is about what paragraph 91 means.

(Paragraph 91 of the Durban decision 2/CP.17 on the outcome of the work of the AWG-LCA reads: "Recognizes decision 8/CP.17 that establishes the Forum to Implement the Work Programme on the Impact of the Implementation of Response Measures, and consolidates all progressive discussions related to response measures under the Convention.")

It thought the contact group had a good discussion but it thinks and believes that last night (at the stock take) the Chair identified there was a division of views and there is no convergence. Without convergence we feel very strongly that we should not work with what looks like text moving forward.

(Observers at the Bangkok meeting note that the US is particularly determined to close the AWG-LCA in Doha as it is adamantly against the commitment made by the Administration of the senior George Bush in 2007 in the Bali Action Plan that the US would reduce greenhouse gases

emissions comparable to the cuts taken by Kyoto Protocol developing country Parties.)

Saudi Arabia said the Chair's paper does not capture fully all the elements that it had submitted to the Chair, adding that it would like to discuss and add in elements based on what we discussed in Bonn.

Chair Aysar responded that while recognizing there are other elements, this is attempt to facilitate a very focused exchange on unilateral measures and see if somehow the different views can be bridged, or whether something else needs to be said about unilateral measures.

Argentina on behalf of the G77 and China said that we still have not solved the issue of economic and social consequences of response measures and this needs to be dealt with in Doha. It said the Group was still consulting on further on this issue.

India also thanked the Chair for his effort so that this issue can move forward. This is a Party-driven process and there is no decision that everything that has to do with unilateral measures will get moved to the Forum. It reiterated that this is a misinterpretation of the (Durban) decision – there was setting up of the Forum but this issue remains an unresolved issue. It agreed with Saudi Arabia and Argentina that all the elements they submitted were not reflected.

India said there is a need to enhance the implementation of Article 3.5 of the UNFCCC, and to ensure that measures to combat climate change, including unilateral ones, not constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade.

The issue, it added, is that the Convention does not define what is a “means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade”. Therefore, to enhance the implementation of Article 3.5, there is a need to have political parameters of what this could mean in the context of the principles and provisions of the Convention, and these parameters should be discussed within the AWG-LCA towards an outcome in Doha.

India stressed it is not against measures which Parties are taking domestically to respond to climate change, but our concern is about the unilateral measures that could have negative economic and social consequences on developing

countries and that could be a means of arbitrary or unjustifiable discrimination.

It further said the parameters that could help define what is an arbitrary and unjustifiable discrimination or a disguised restriction on international trade are the following:

- the measure transfers the burden of the developed country Parties' obligations of climate change mitigation to developing country Parties, in a manner inconsistent with the principles of equity and common but differentiated responsibilities;
- the measure undermines the development of the developing countries, affecting their economic and social development and poverty eradication, being that they are the first and overriding priorities of the developing country Parties, in accordance with article 4.7 of the Convention;
- the measure obliges developing country Parties to take mitigation actions to comply with that response measure, with their own financing, that is, without the adequate international support, in a manner inconsistent with articles 4.3, 4.5 and 4.7 of the Convention;
- The measure weakens the multilateral system and undermine the spirit of multilateral cooperation, leading to retaliatory measures;
- The measure applies in an extraterritorial manner, having impacts across the borders and compromising the sovereign rights of Members;
- The measure does not take into account the special economic and social conditions of developing countries.

India said that therefore, any AWG-LCA decision in Doha must include a clear provision against unilateral measures that would affect developing countries' economic and social development, and that would be disguised restrictions on trade, inconsistent with the principles of the Convention. In this respect, India recalled the submission made by a group of like-minded countries including itself.

Saudi Arabia associated with India's statement.

New Zealand said that in its mind it is clear. We agreed in Bonn to open this contact group to explore areas of convergence. There is no further

convergence on unilateral measures here, and there is no need and certainly no agreement to work on a text decision. It will not be an efficient or effective way of using our negotiating time.

The European Union said we had a very interesting exchange last time we talked about this. Let us find a way to have some discussion on the concerns that Parties have, this is exactly the discussion that we can have at the Forum to further work in this area. It is interested in what India has to say even though it does not think that is the way the issue should go.

It said that if there are disputes there are other fora and international agreements to resolve these issues. Referring to the stock take on 3 September, it said there is no convergence on response measures and more particularly on unilateral measures. It considered that we have sufficiently dealt with this issue in another home and fora.

Regarding the informal note it said that it is unfortunate that in the capturing the discussion the Chair has text that looks like a decision. It said again that the issue is whether there is a need for decision on this issue, and its conclusion is that we don't need to take further decision at the COP.

China supported Saudi Arabia in that the Chair's paper does not include every element submitted by China and other like-minded developing countries, and that it fully agrees with India. It said that Article 3.5 (UNFCCC) needs to be further elaborated and should be done under the AWG-LCA. It said for some countries that do not wish for text on this topic they can choose option 4 and we can continue discussing on this.

South Africa on behalf of the Africa Group said that the Group also made a submission that deals with unilateral measures, and also supported India and China that lucidly set out the challenge that lies ahead. It said there is mandate for clarification of Article 3.5, that the Forum is for technical work and not setting principles, which it believes should take place at the AWG-LCA.

St Vincent and Grenadine speaking for the Alliance of Small Island States said it heard from several quarters that it is unresolved and it would like to hear more from partners why we cannot discuss this under the Forum.

Australia agreed with the US, New Zealand and Canada that there is no consensus on response measures and do not agree to draft text, adding that Parties agreed that the Forum can consolidate

all discussion. It is not sure where India is coming from, and said that the Forum covers all issues related to both positive and negative impacts (of response measures).

It said that Article 3.5 makes it clear that while partners can take unilateral measures it should not be arbitrary or unjustifiable discrimination or a disguised restriction on international trade. This provides for protection to Parties for discriminatory behaviour; and there should be no attempt to redefine the carefully crafted Article 3.5. Parties will resist any attempt to redefine them.

Australia said that the World Trade Organisation has also got a mandate on trade-related disputes; the UNFCCC does not have infrastructure to arbitrate on such disputes while the WTO has a track record and also ensure that rules on international trade are upheld and Members are not discriminated in an arbitrary manner.

Switzerland agreed with Canada, the US and Australia, saying that the contact group has a specific mandate to see how far can discuss and agree, and as far as response measures are concerned especially unilateral measures, the discussion shows no agreement and if so, no decision text should be produced. It added that fortunately we have an avenue to continue discussion on this (the Forum).

Singapore highlighted that it had made submission on unilateral measures, and stressed that it does not condone unilateral measures including those that are of extraterritorial nature. It said that CRP 39 reflects that various options are on the table, so it does not see the need to have another decision text to be put forward to the Doha meeting.

Chair Aysar said that one of the options in his paper came from Singapore's submission and asked if it wanted to remove this option?

Singapore responded that it does not see the need for any specific outcome from this contact group for the Doha meeting; the proposal in CR 39 is still on the table. It said that at this juncture we don't have to make a pronouncement if our option is in or out of the mix.

Japan reiterated that we already established the Forum in Bonn and all discussion related to response measures can be made in the Forum. On the issue of coverage of unilateral measures, its understanding is that although specific examples are not listed, Parties can raise any kind of issue in

the Forum instead of continuing further work in the AWG-LCA. We should get the process going in the Forum and there is definitely no need for decision text in Doha.

Mexico said there is no need for text; this is not about options, it's about the mandate and its understanding is that there is no mandate to produce an outcome.

Argentina speaking for itself, associated with China, India, Saudi Arabia and South Africa, and thanked the Chair for capturing the state of discussion. It said that even for those who do not agree to have text, this option is there. It said that its submission (jointly with a group of other developing countries) is not fully captured and understands that the Chair's intention is to resolve issues. It supported India on what can constitute arbitrary and disguised restriction.

In this respect, it said, this is about principles and provisions of Convention; and even if some Parties are saying that this is related to other fora, we feel this is the forum for climate change and we have provisions in the Convention that we need to further enhance in its implementation.

It said it is not against domestic measures and sovereign rights; we are trying to establish what would be disguised restriction that would have impact; we are not discussing trade here; it's about climate change so has to be discussed here. Argentina also said that the Forum is for implementation and not to establish parameters; it does not overlap with the Forum nor other fora; we have specific mandate to comply and we really encourage Parties to continue discussing this issue.

The EU questioned how we could address unilateral measures within the Forum. The work

programme set out does deal with positive and negative consequences of response measures that we had identified; sharing information and understanding, exchange of experience; many of them allow us to address this issue and we consider unilateral measures as part of the wider response measures debate. This can be picked up, we don't think our exchange is useless but it is better to do it in a place that can focus our work.

India said it fully acknowledges the work of the WTO and we are not interfering with their decision but here we are discussing more than trade. If WTO is doing some work on trade it doesn't mean all parameters have been fixed for socio and economic consequences. It would like to take the work further and lay the parameters for future work.

Chair Aysar sought further clarification from Singapore that at this juncture there should be no text on unilateral measures.

Singapore concurred with India that this is not the forum to discuss trade issue; also agreed that unilateral measures is not just trade so we are now on the right path. It said that it made a number of submissions but CRP 39 option 2 is different from what is reflected in the paper (by the Chair). It said its submission cannot be turned into a CRP type of proposal for Doha.

Saudi Arabia echoed India on clarifying the issue and the role of WTO; the use of unilateral measures is crucial and it reiterated that this is the right place to agree on some kind of decision on this. We need to explore a solution so as to enhance actions for mitigation; so we have to avoid, minimise the adverse impact of unilateral measures; while doing so we also recognise (this is the Durban decision) the positive impacts.