

A new Chair's text as Cancun meetings begin

Cancún, 29 November (Meena Raman) – The annual set of UNFCCC meetings begins in Cancun today, with hopes that this year there will be a better negotiating atmosphere, especially at the end, than last year's Copenhagen conference.

Problems relating to process and procedures were mainly responsible for the bad ending in Copenhagen, so the participants in Cancun hope there will not be similar problems here. Process and substance are not separate issues, of course. A different process can give advantage to or even determine a particular choice of substance.

The UNFCCC meetings in Cancun include the 16th session of the Conference of Parties (COP16), the 6th session of the Conference of Parties serving as the meeting of the Parties to the Kyoto Protocol (CMP6), and meetings of subsidiary bodies -- the Ad-hoc Working Group on Long-term Cooperative Action (AWGLCA), the Ad-hoc Working Group on Further Commitments for Annex 1 Parties under the Kyoto Protocol (AWGKP), the Subsidiary Body for Implementation (SBI) and the Subsidiary Body for Scientific and Technological Advice (SBSTA).

It is learnt that the Mexican hosts have invited some Heads of States for the high-level segment of the Cancun talks on 9 December. The list of invitees, and the response to the invitations are not publicly known. In addition, several political leaders, especially from the neighboring countries, have made their own decision to come to Cancun.

There is corridor talk on whether “new texts” will emerge “from above”, if there is a perceived need to break an impasse in the negotiations, so as to produce a success in Cancun. However, the Mexican hosts have pledged there will be a transparent process and there will be no surprises. Many delegates believe that the best chance for success is to allow the negotiators to do their work. In the AWGLCA, this would be on the basis of the Party-driven text of August 13, complemented by the

revisions of text arising from the Tianjin meeting of the AWGLCA.

A surprise complication has emerged in the form of a new text produced by the Chair of the AWGLCA, Ms. Margaret Mukahanana-Sangarwe of Zimbabwe, on November 24 called “Note by the Chair on possible elements of the outcome”. This is surprising as there was no mandate given to the Chair to produce a new text. Earlier this year, the Chair had also produced a “facilitating text”, and it evoked significant controversy, and eventually a process was agreed on to produce a member-driven text (the 13 August text).

The new Chair's text is in the form of a draft decision to be adopted by the COP and is issued as a CRP document or a Conference Room Paper. According to some senior delegates, a document is only issued as a CRP paper when it is drafted by Parties, and this is not the case as regards the Chair's note.

At the end of the last AWGLCA meeting in Tianjin in October, it was the understanding that the basis of continued negotiations would be the August 13 text, supplemented by the revisions to it as a result of the work in Tianjin. Parties had not given any mandate to the Chair to produce a fresh text.

In her scenario note for the meeting on 12 November, Mukahanana had indicated the possibility for the Chair to present “elements of the outcome in a more elaborate form” to help Parties “in resolving outstanding difficult issues and to offer ways forward”. This seemed like the Chair was preparing the ground to seek a mandate in Cancun to draft a new text. But in a surprise move, the Chair issued a text through placing it on the internet on 24 November without waiting for the Parties to give her the mandate.

The note by the Chair states that “this document contains the results of an effort by the Chair, under

her own responsibility, to elaborate possible elements of the outcome to help the negotiations move forward and to contribute to the resolution of outstanding issues.” The note expresses the hope that it will “facilitate convergence on an outcome to be presented to the Conference of the Parties.”

It is debatable if the note will assist in achieving its aim. Firstly, there are already texts that the Parties have compiled, and negotiations based on the options in these texts are more likely to lead to a durable outcome, rather than another attempt by a Chairperson's new draft.

Secondly, a careful reading of the paper shows that it is imbalanced, as it rejects or weakens the position of developing countries in many important areas, without even placing their positions or proposals as options or within square brackets.

Areas in Chair's paper which excluded or diluted developing countries' positions

The Chair's paper is presented in 33 pages with text on the various elements (except that relating to the mitigation of developed and developing countries under paragraphs 1(b)(i) and (ii) of the Bali Action Plan).

Some of the ideas and language in the draft is derived from the Party-driven text of August 13 and further work done in Tianjin. It does try to capture some of the areas of convergence, such as in several parts of the technology mechanism and its functions.

However in some other key areas, the Chair's draft has weakened or disregarded the proposals of developing countries, for example in shared-vision, adaptation, finance, capacity-building, climate and trade measures and intellectual property rights as related to technology transfer, and the use of market-mechanisms in mitigation. This is elaborated on below.

Shared vision: Under the shared-vision on the long term-global goal, keeping temperature rise to below 2 degree C is the only option proposed, with the option of the 1.5 or degree being removed.

The developing countries have proposed that the determination of the long-term global must be preceded by a “paradigm for equitable access to global atmospheric space” and allocation of the remaining carbon budget according to criteria to be determined, which are in the 13 August text.

However the Chair's draft only refers to only “the taking account of historical responsibilities and

equitable access to global atmospheric space”, thus weakening considerably the proposals by developing countries.

Adaptation: The August 13 text contained a proposal by developing countries “to establish an international mechanism to address loss and damage associated with climate change”. The other option was the proposal by developed countries on “the need to strengthen international cooperation and expertise to address loss and damage ...” which in the Tianjin climate talks, was modified to reflect “the need to strengthen international cooperation and expertise to understand and reduce loss and damage associated with the adverse effects of climate change...”.

The Chair's text rejected the developing countries' text on an international mechanism to address loss and damage and instead chose the developed countries' weaker proposal for “the need to strengthen international cooperation and expertise to understand and reduce loss and damage...”.

The Chair's draft “requests the AWGLCA to consider arrangements to address loss and damage and to make recommendations on this matter” to the COP next year, thus depriving Cancun from making a decision on this matter.

Finance: On the quantum of finance required by developing countries, the Chair's note refers to launching a process “to mobilize sources of long-term finance to arrive at a level of USD 100 billion per annum by 2020.” This is far below the G77 and China proposal, reflected in the 13 August text, that there be assessed contributions of at least 1.5% of the GDP of developed countries, while Bolivia had proposed at least 6% of the GDP of developed countries. These proposals have been excluded from the Chair's paper.

Capacity building: The e developing countries' proposal to establish a technical panel on capacity building was reflected in the August 13 text. But the Chair's paper does not refer to this. Instead it requests the AWGLCA “to further consider possible arrangements for enhancing the delivery of capacity-building support ...with a view to developing recommendations for consideration by the COP” at its session next year.

Market mechanisms: Within the mitigation issue, there is a sub-issue on the use of various approaches including markets. Two options were included in the text from Tianjin. One was for a market- based

approach, which was mainly advanced by developed countries; the other was for postponing a decision on this until matters under the AWGKP are resolved. This second option was proposed by developing countries, which did not want the establishment of market mechanisms inside the AWGLCA (at least at this stage) as this would facilitate the transfer of the market mechanisms, which now exist only in the Kyoto Protocol to the AWGLCA, thus facilitating the demise of the KP.

The Chair's text has rejected the important second option and instead only provides for a decision to establish new market-based mechanisms in the Convention. The Chair also includes a decision for non-market based mechanisms to be established. But here draft does not include the 13 August option of not considering non-market based mechanisms. Thus an option that is more favourable to developed countries has been chosen.

Climate and trade measures: Under the issue of the economic and social consequences of response measures, there were proposals in the August 13 negotiating text by a large number of developing countries for strong language forbidding the use of unilateral trade measures such as border tax measures taken against imports on the grounds on climate change. However the Chair's text has disregarded these proposals and instead chosen text on this issue that merely reiterates language of the existing Article 3.5 of the Convention.

Intellectual Property Rights: On the issue of technology transfer, there were various proposals by developing countries to address the issue of intellectual property rights. These proposals were included as options in the 13 August text. They include proposals that IP agreements shall not be interpreted in a manner that prevents climate action measures; that specific measures be taken to remove barriers to technology transfer arising from IP; that Parties can exclude IP on climate-related technologies and that developing countries can fully use TRIPS flexibilities.

Some developed countries, especially United States and Japan, had proposed having no reference at all to IPRs in the text, and this option is also in the 13 August text.

The Chair's text disregards the proposals by developing countries and merely proposes the continuation of "... dialogue among Parties in 2011 on ways to enhance technology innovation and

access to technologies for mitigation and adaptation."

Resolving the mitigation impasse or compounding the problem?

A glaring omission in the Chair's paper is the absence of any text on the key issues of mitigation actions of developed countries (para 1b(i) of the Bali Action Plan) and of developing countries (para 1b(ii) of the BAP).

One reason for this is that in Tianjin there had not been progress in texts on these two issues. In her note the Chair states that "the elements of such a package would need to be advanced to a comparable level of detail. The elements elaborated in this document will not alone provide the desired balance. Such a balance can be achieved by elaborating the remaining elements in the course of the thirteenth session. The Chair is prepared to offer possible ways of taking forward the sections on mitigation and measurement, reporting and verification during the session."

Given the highly contentious issues in mitigation, it is important to know the approach to be taken by the Chair. The Note does not spell out this approach, but an indication of this is in the speech on "elements for a balanced outcome" given by the Chair in the pre-COP meeting in Mexico on 4-5 November, to which selected countries were invited.

The Chair said that there is "need to address BIG questions, otherwise nothing will move forward. However, agreement in these areas will not be reached without movement on the difficult issues, which are at the core of a package in Cancún, namely mitigation, including measurement, reporting and verification or MRV and finance, including governance and long-term financing.

"It is my assessment that in order for Cancún to deliver an outcome, we need to address the apparent deadlock over mitigation commitments by developed country Parties under the Convention and the Kyoto Protocol. There are two central challenges in the area of mitigation. First the relationship between AWG-KP and AWG-LCA when it comes to mitigation by developed country Parties and second, the balance between mitigation commitments by developed country Parties and mitigation actions by developing country Parties.

"I understand the difficulties surrounding commitments under the Kyoto Protocol. Parties need to come to an understanding of how to make

incremental progress on that question in Cancun in order for progress on developed country mitigation in the context of the AWG-LCA. Agreement on a step forward on developed country mitigation in the context of the LCA is also dependent on progress on actions by developing country Parties. In turn, progress on developing country mitigation depends strongly on progress on mitigation by developed country Parties as well as on long-term finance. This creates a series of interconnected chicken and egg situations, which calls for compromise and political leadership to seek a middle ground.”

This conclusion by the Chair is highly problematic as the developed country mitigation commitments should not be predicated on the mitigation actions of developing countries.

Firstly, the obligation under the Kyoto Protocol by Annex 1 Parties is an independent legal obligation and should not therefore be tied to what developing countries do (as this depends also in turn depends on what finances and technology are made available to them, in line with Article 4.7 of the UNFCCC).

Secondly, there is nothing in paragraph 1(b)(i) of the Bali Action Plan, which conditions the mitigation actions of the United States (which is not a Party to the Kyoto Protocol) on the actions of developing countries. What paragraph 1(b)(i) of the Bali Action Plan requires is the comparability of efforts among developed countries as regards their mitigation commitments or actions.

The tying of the mitigation commitments of developed countries to the actions of developing countries is a political strategy by the developed countries. It should not be accepted as a legal interpretation or as a principle of the negotiations. Its apparent acceptance by the Chair of the AWGLCA is thus troubling.

The developing countries have strongly and justifiably insisted that unlocking the current impasse in the negotiations can be possible if developed countries who are Parties to the Kyoto Protocol commit to take the deep emission cuts needed for the second commitment period of the Kyoto Protocol. A commitment to make a comparable mitigation effort by the US under the Convention, since it is not a KP member, is also expected.

The Chair in her speech further states that “this circle can be broken by working simultaneously on incremental progress on Annex I mitigation under

the Convention and under the Protocol. This can be done by adopting a decision capturing the information on mitigation targets and actions currently on the table and providing direction to further work in both AWGs post-Cancún.”

What this apparently seeks to do is to adopt and legitimise the Copenhagen Accord approach in which developed countries have pledged their mitigation targets in a pledge and review system. This is problematic for a number of reasons.

The voluntary pledge system of the Copenhagen Accord is contrary to the top-down obligatory approach as agreed to under the AWGKP in which there would be an aggregate target accompanied by individual country commitments, both of which have to be adequate and consistent with what science requires. If the voluntary pledge system is accepted in the Convention process, it would undermine the negotiations under way in the AWGKP, and eventually alter and restructure the existing climate change architecture.

This approach also seems to indicate that the negotiations on a second commitment period of Kyoto Protocol can be dealt with post-Cancun in an incremental way with the mitigation targets for the Protocol being established in Cancun through the voluntary pledge approach via a bottom-up process. This is contrary to the principle-based top-down approach for determining the cuts needed by the Annex 1 Parties.

Such an approach holds the danger that the weak targets and low ambition levels of most of the Annex 1 Parties would become the new commitments in the Kyoto Protocol. Analysis by the UNFCCC Secretariat shows that the Copenhagen Accord pledges of the Annex 1 Parties (not including the US) will amount to only 17-25% below 1990 levels by 2020, without taking into account the loopholes.

If the US pledge is taken into account, the emission target of developed countries would only amount to 12-18% below 1990 levels by 2020. Taking into account loopholes, there would hardly be any reduction. The voluntary-based approach of bottom-up pledges by developed countries will lead to a temperature rise of 3 degrees Celsius or more, a disastrous outcome.

If the Chair’s suggestion is also to apply to the developing countries, this would then oblige developing countries to reflect their mitigation

pledges in an appendix in the style of the Copenhagen Accord, in a format placed under the Convention. This opens the door to setting targets for developing countries, which could be as binding or non-binding as the pledges of developed countries. Developing countries would be placed in a status quite similar to that of developed countries, and blurring the lines would be counter to the common but differentiated responsibilities principle.

In addition, many of the pledges made by developing countries since Copenhagen are conditional and not comparable to one another as there is no standard methodology to express their voluntary mitigation actions.

This information is already available on the UNFCCC website and can be contained in the national communications of developing countries without further need to inscribe this in a separate appendix that begins the slippery slope of establishing semi-binding targets for developing countries.

International consultations and analysis (ICA)

The Chair in her speech further states that in her assessment, “agreement is possible on enhancing reporting, on guidance to develop rules for reporting, including detailed reporting on the provision of support, on accounting and review, and on the purpose and scope of international consultations for developed country Parties, bearing in mind that ICA is part and parcel of MRV.

“Similarly, for developing country Parties, agreement is possible on enhanced reporting, including predictability of support for reporting efforts, on guiding principle for domestic verification, and on the purpose and scope of MRV including international consultations and analysis for developing country Parties. Agreement in these areas would enable Cancún to launch of a process to develop specific guidelines and modalities.”

The Chair’s conclusion that the ICA is part and parcel of MRV is a major presumption that has not been agreed to by the AWGLCA. Legally, this is not correct as paragraph 1(b)(ii) of the Bali Action Plan introduced the concept of MRV but not ICA. The latter is a concept arising from the Copenhagen Accord and is meant to apply to mitigation actions, which are not internationally supported.

But the Bali Action Plan only mandated that an international MRV procedure be applied to internationally supported mitigation actions of developing countries. The ICA is a Bali-Plus obligation that many developing countries do not subscribe to. It is problematic for the Chair to assume that the ICA is part of the MRV system and that this is something agreed to by all. Instead, this attempt to transfer a key aspect of the Copenhagen Accord into the Convention through the AWGLCA may cause serious problems.

Will the new fund be agreed to, or be held hostage to agreement on mitigation?

In her scenario note for the organization of work for the AWGLCA, the Chair was of the view that “the appropriate way for the AWGLCA to present its outcome to the COP 16 would be through one draft decision that encompasses the full scope of the outcome of the work of the AWGLCA.”

The way the Chair’s 24 November text is presented, it seems that there needs to be consensus on all the elements of the Bali Action Plan and in a single decision.

The most contentious of all the elements has been the mitigation issue, relating to paragraphs 1(b)(i) and (ii) of the Bali Action Plan on the mitigation commitments of developed countries and actions of developing countries respectively.

A fundamental concern is whether advances in other elements will be held hostage to decisions on mitigation in Cancun. In Tianjin, developing countries had already expressed concern that the decision to set up a new climate fund would be held up by the United States which wanted its demands on mitigation (including the MRV and ICA of developing country actions) to be accepted in return.

The United States has clearly indicated that for it no agreement is possible without agreement on the entire package of elements as contained in the Copenhagen Accord (which was not adopted in Copenhagen but only taken note of). This presents a major obstacle in achieving good outcomes in Cancun, such as the establishment of a new climate fund and of the technology mechanism. Such outcomes could be in the form of separate decisions or as annexes in an overall decision.