



Divergent views in contact group on new protocols under the UNFCCC

Cancun, 4 December (Chee Yoke Ling) – Divergent views remain over proposed new protocols under the UN Framework Convention on Climate Change, with several developing countries concerned that a new protocol would undermine or even replace the Kyoto Protocol.

The contact group established by the plenary of the 16th meeting of the Conference of the Parties (COP) on 1 December to consider proposals by Parties under Article 17 of the Convention, met from 11.30 am to 1 pm on Friday (3 December) under the chairmanship of Michael Zammit Cutajar of Malta. (See TWN Cancun News Update # 8.)

At the end of the exchange of views, Cutajar said that he did not think it would be productive to have further discussions, and proposed to convey his summary of the views of the Parties to the COP 16 President, Patricia Espinosa, Minister of Foreign Affairs of Mexico. The Alliance of Small Island States (AOSIS) expressed their disappointment, preferring to continue discussions in the afternoon. Cutajar said that there was no facility for another contact group meeting, but for informal consultations that he decided would not be held.

Many countries are seeking a new treaty instrument under the UNFCCC as the outcome of the working group on long-term cooperative action under the Convention (AWG-LCA). However, there is no consensus yet on the form of that outcome, with options including COP decisions and a protocol.

Over the past 18 months, six new protocols have been proposed under Article 17 of the UNFCCC by Japan, Tuvalu, the United States, Australia, Costa Rica, and Grenada (on behalf of AOSIS). The proposal by Grenada was officially notified to the Secretariat and the Parties in May 2010. The other five proposals were notified in 2009, considered but not adopted by COP 15 in Copenhagen.

(Article 17 of the UNFCCC provides that the COP may, at any ordinary session, adopt protocols to the Convention.)

Echoing the words of the COP 16 President when she wound up the 1 December plenary session, Cutajar said at the start of the contact group meeting that the contact group is an opportunity for the proponents of the six proposals to explain the main thrust of their proposals, taking into account developments over the past months. It was a chance for those proponents to update the UNFCCC Parties.

He reminded Parties of the President's call to bear in mind efficiency, time and avoidance of overlap with the work in other bodies (the AWG-LCA and the working group on further commitments for Annex 1 Parties under the Kyoto Protocol), and also the related consultations being conducted by the President.

He said there was another time slot in the afternoon (for informal consultations if needed) but he hoped that there would be no need to use it. He then invited proponents to make presentations of about 5 minutes each.

Grenada on behalf of the Alliance of Small Island States (AOSIS) welcomed further dialogue on the matter, and said that this process must anchor the legal form for South Africa. Its proposal submitted in May 2010 is an input to the work of the AWG-LCA to enhance the implementation of UNFCCC, and it stressed that the AOSIS position on the continuation of KP in a second commitment period (of emission reductions) is very clear.

It said that its proposal is not only a compromise, but also to provide a package that the group thinks can be suitable for Parties, and its draft protocol covers all the key elements of the Bali Action Plan with additions.

Grenada reminded all delegates that a few weeks ago, the international community, the multilateral process, successfully adopted two new protocols based on clear mandate and the willingness of parties (referring to the access and benefit sharing protocol as well as the supplementary protocol on liability and redress adopted under the Convention on Biological Diversity and the

Cartagena Protocol on Biosafety respectively, in Nagoya, Japan in October).

It said that with deep respect to complete our work in the AWGs (the LCA and Kyoto Protocol tracks), SBSTA and SBI, we wish this contact group to reflect on how to take the process forward.

Japan agreed that the contact group should not duplicate work and said that in May last year Japan submitted its proposal with the objective to adopt a single legally binding framework that involves participation of all major economies. It said that it is committed to continuing in the AWG-LCA for a concrete outcome.

Tuvalu emphasised that its proposal submitted in June 2009 does not replace the KP, and is part of the 2-track process, saying that it has also proposed amendments to the Kyoto Protocol. It said that its proposed protocol text has many elements including definitions, pointing out that one definition that could help the AWG-LCA work is on Parties vulnerable to climate change.

It added that its proposal is for a global framework, and an attempt to ensure that all Parties play a role. It acknowledged that certain Parties will play a role in the Kyoto Protocol and other Parties will play a role in this (new) protocol (referring to the United States in particular that is a UNFCCC Party but not a Kyoto Protocol Party).

It highlighted three tiers of nationally appropriate mitigation actions for developing countries (those financed internationally, financed nationally, and pledged) and how these relate to emissions trading, adding that the current AWG-LCA text on safeguards can be considered.

It said that one thing that has not come up in the AWG-LCA is to “climate-proof” development assistance.

Its proposal on risk management and risk reduction is not un-similar with the AOSIS proposal, and is a better elaboration, closer to where Parties are in discussion now (in the AWG-LCA).

Tuvalu endorsed the AOSIS statement on how it sees the way forward – that these proposals are a guide for work forward and the need for a mandate for a legally binding agreement.

Australia said it believed in a legally binding outcome at the AWG-LCA. It has heard how developing countries are justifiably worried about how they can develop and that there are different national circumstances and capabilities. It sees national schedules as how this can be done, as a way a way to gain national consensus.

It said schedules can be accompanied by flexibilities, and should recognise that developed and developing countries are not the same. Its proposal would build on the Kyoto Protocol. We can take the AWG-LCA process to take decisions that can be the next steps and building blocks for a final outcome, and that this is best place to take this forward and also decide on the legal form.

Costa Rica said that its proposed Protocol submitted in June 2009 is intended to complement and not to replace the Kyoto Protocol but to complement it. It said it does not claim full ownership over this protocol as it also considered the text in its entirety prepared by the AWG-LCA chair. It said its text constitutes a good starting point for inputs from other Parties both with regard to content and the structure of the framework.

It said its proposed protocol is consistent with common but differentiated responsibilities and capabilities, and the leadership of developed countries to achieve quantified reduction based on science.

It also said that the AWG-LCA should continue work with a renewed sense of urgency and a mandate to work on the legal form of its outcome, and in COP 17 to adopt a legally binding instrument to attain enhanced and long term implementation of the Convention.

The **United States of America** said it would not go through its proposal, explaining that it continued to like many elements of its proposal for a legally binding agreement and that some are essential for any such future agreement. It referred to the evolving capability of Parties to take on mitigation commitments.

It said that its proposal was in a specific context, and that if Copenhagen (COP 15 in 2009) had no AWG-LCA outcome then a protocol would provide an option.

It said that the elements in its proposal almost overlap completely with those at the AWG-LCA, and that many key issues relate to the way the Bali Action Plan will be given form.

“Our thinking and the thinking of many other Parties have developed. It won’t be productive at this time to take these issues into a new process,” the US said.

It added that it is most focused to achieve progress at this (Cancun) meeting and not to have diversion that could very well lead to incoherence.

It welcomes more discussion in the AWG-LCA track saying that discussion should continue under that track.

At this point, chair Cutajar observed that each proponent in his way has related the content and objective of the respective original proposals and relate this to what is going on now. They refer in that context to what is going on in the AWG-LCA, with some Parties mentioning gaps in the AWG-LCA work.

He said that the main distinction in substance is not new – some are looking at a unified decision, and some on a 2-track approach of the AWG-KP and the AWG-LCA. He said it may be useful to further discuss in this contact group the process.

India said the presentations were clearly illuminating. It said that we are essentially meeting to discuss Article 17 amendments; we are already discussing the issues in the Kyoto Protocol and LCA tracks.

It did not agree that “binding-ness” only comes from a protocol. Whatever we have decided – Bali Action Plan, the Marrakesh Accord – these are decisions that we are all bound by and abide to, it said. The intention is extremely important, and India has always intended to be bound by the UNFCCC and the decisions of the COP.

It said further that the subject matter of the contact group’s discussion is already under discussion in the 2 working groups and that we really should be spending time to work towards deliverables in Cancun. It asked whether Parties really believe that we should be scattered in different places at this point, agreeing with the US on this.

India stressed that the continuation and fate of the Kyoto Protocol is at stake. How can we even consider Article 17 amendments when the fate of Kyoto Protocol is hanging in the air?

It repeated its statement at the COP plenary session on 1 December, that the form follows the substance – if we know the substance and we have a clear picture of our capacity then we can decide on the form.

It also said that actions will be taken nationally and the UNFCCC, the Kyoto Protocol, the Bali Action Plan, etc are all binding.

It said that it does not want any new instrument that will dilute, supplant, marginalise the Kyoto Protocol. We must very clearly focus our attention and not be writing a new instrument.

The **European Union** said that in the ongoing discussions on mitigation proposals, it shared the view that when deciding on those proposals we should also capture the legal binding nature of paragraph 1b(ii) of the Bali Action

Plan (referring to the nationally appropriate mitigation actions of developing countries).

It said that its position on the legally binding outcome of the AWG-LCA goes hand in hand with a second commitment period under the Kyoto Protocol. The Cancun outcome should clearly express legally binding outcomes for both tracks, and not in form of (COP) decisions.

It also said that on second commitment period, it supports a global framework engaging all major economies, that addresses weaknesses in the Kyoto Protocol and there we see work progressing such as on the base year (from which to measure emission reductions) and constructive discussion on AAUs that for the EU is very important.

The EU said it is also willing to take a step forward and that the numbers in the information paper by the Secretariat can be captured in the Annex of the Kyoto Protocol to show we are moving in the KP track.

It said that it can be seen from discussions in both the working groups that there is support for legally binding outcomes in both tracks, and that from the COP Presidency can be seen that there might be work for next year after Cancun.

Marshall Islands in associating with Grenada said that the AOSIS proposal reflects an outcome that is legally binding. The AOSIS proposal submitted this year and amendments to the Kyoto Protocol are aimed at a balanced outcome. It said that careful comparability is included and the US proposal also allows for developing countries to come forward with NAMAs.

However, it said that Parties are still faced with a question before us – how does form follow substance?

It said the COP can include in a decision the guide towards South Africa (venue of COP 17 in 2011) and a clear orientation can be provided for our work. The AWG-LCA work should be extended taking into account proposals under Article 17 of the Convention.

Chair Cutajar sought clarification that Marshall Islands is asking for a decision from COP on organization of work for COP 17, explaining that a contact group has no life beyond a COP session.

China supported India, saying that the AWG-LCA is already discussing all these hard nutshells – without understanding all these difficult issues how can we discuss legal form? If we cannot have a clear understanding on the usefulness of the substance how can we discuss form, it asked.

It said that at this critical point Parties should not be diverted or distracted from work that is needed. It expressed full sympathy with the proposals from AOSIS, Costa Rica and Tuvalu, and assured the Parties concerned that these will be discussed in the AWG-LCA.

Every issue we are discussing here is being discussed in the AWG-LCA – so how are we avoiding duplication, China asked.

Singapore in supporting AOSIS (of which is it a member) highlighted the issue of architectural form, saying that a legal architecture underpins the UNFCCC and this must be ensured. It supported comprehensive coverage and global participation. It said that it is essential to implement pledged actions and a multilateral rules-based framework to ensure actions.

It hopes that Cancun will crystallize consensus for a legally binding agreement to implement the Bali Road Map.

South Africa said it had a practical suggestion that it also raised in (the COP) plenary. We have to be very pragmatic – this is the elephant in the room and that is the legal form of the outcome (of the AWG-LCA).

It said that most of those elements heard in the contact group presentations can be brought into the AWG-LCA work. The key to resolving these issues is a balanced outcome: for the Kyoto Protocol we need an amendment, in the AWG-LCA we need the same legal weight. It said that without the clarity of what the outcome of the AWG-LCA will be, it is not fair to ask proponents (of the protocol proposals) to take their issues to the AWG-LCA.

It also said that because these matters link to the COP and the CMP, we need to take them to that level. If we decide to dissect the proposals we would waste a lot of time and won't come up with any outcome that we would like. So, it called for taking this to COP consultations for a bigger blueprint and to be ensured that sovereign states can have their proposals fully taken into account. It said again that we should be pragmatic in our approach.

Colombia said we need a decision in Cancun that will lead to a legally binding agreement. It sees many difficulties in reaching agreement if we do not have legal certainty as to where we going. That was the problem last year (at COP 15). If there is legal certainty then negotiators know where to go, it added.

Mexico said that it has listened carefully to the opinion of the Parties and that the COP President created this contact group as an acknowledgement of the importance to listen to the proposals – there had been no space to consider

these and there is legitimate interest. It hoped that the chair will convey all these views to the COP President.

Sri Lanka said that a legally binding protocol from the AWG-LCA is very important for it. If we do not know the legal form of the outcome it won't help us in moving the discussion forward. The UNFCCC is legally binding, the Kyoto Protocol is legally binding so we all know the difference between that and (COP) decisions.

Bolivia said it is important to remember that we have a mandate to finish our work in the 2 tracks and that is to discuss in the context of the Bali Action Plan, and clear compliance with the Kyoto Protocol. We are discussing now to complement or replace the Kyoto Protocol in the context of another protocol. If the Kyoto Protocol is not complied with then this discussion is out of the mandate given to us, it said.

It also said that we have to fulfill the great job of whether the Kyoto Protocol is complied with. In the AWG-LCA we are precisely in the middle of discussion. It agreed with India that it is premature to discuss an instrument that could replace the Kyoto Protocol. It added that on substance we are dealing with content, the issues that are important. So let us work on that and then see the context of legal form afterwards.

The **Philippines** said that it is still agnostic on the form. We believe that any decision on the process and the form of the agreed outcome must necessarily be determined by what kind of operationalisation and what kind of compliance regime we want to see and this will define the type of instrument we want.

It emphasized that the work of the AWG-LCA should not result in any weakening of the Convention or Kyoto Protocol, or the shifting of the balance of obligations. There should be an instrument with immediate effect and not one that will need waiting; with substantive obligations of developed countries and how they will implement those. There should be no replacement of the Convention or Kyoto Protocol.

Norway said that legal form is very important and there must be no duplication. It said the contact group is to prepare for next year and the work of this group should continue in 2011.

Chair Cutajar said again that this is a contact group and its life ends with the COP session.

St. Lucia supported other island state Parties for a legally binding treaty outcome at the AWG-LCA as well as in the AWG-KP to co-exist. But clearly we need a process to get us there, to achieve a legally binding agreement. It said that it

would be good to have a decision on intersessional work. In response to (South Africa's) suggestion to refer to the COP President, it said that this needs to stay within this contact group, and that this group could look at what is needed in intersessional work.

St. Kitts, Trinidad and Tobago, Jamaica and Nauru also spoke in support of a legally binding agreement from the AWG-LCA.

After further interventions by India, Tuvalu and the US chair Cutajar gave his summary. He said that the group had had some interesting presentations on the subject of the proposals on the table, situating those proposals in the context of ongoing work, especially the work in the AWG-LCA. Some Parties pointed out elements covered in the AWG-LCA, others pointed to legal elements not covered in the AWG-LCA.

He reminded Parties that the agenda item on consideration of amendments under Article 17 of the Convention will remain open at the next COP session unless it is completed in this COP session. For those who are concerned, as long as proposals are on table they remain open. Other Parties can put in proposals too.

He said that there are a few points of difference in the interpretation of what is meant by "legally binding" and the debate continues, so he will only take note of this.

He said that some Parties do not want to lose sight of legal gaps that are not dealt with in the AWG-LCA and that there should be a legally binding agreement.

On the question of one track or 2 tracks, he said that we are clearly committed to 2 tracks and that this is a well-known situation.

He said that Parties need to deal with process issues, and agreed with the South African delegate that this is part of the big picture. That is in the hand of the COP President – she is President of the COP and the COP MOP (CMP); she has the big picture and she has mentioned that there is a consultative process.

He then said that the important thing for all Parties is that this issue of legal form is not lost. There is one specific proposal from Costa Rica, a decision that could extend the mandate of the AWG-LCA. Some Parties want to have a decision on legal form here in Cancun. Some want to take the issue to the AWG-LCA and others want a distinct process.

He then said that given that difference of opinion and given that this is part of a big picture, and has been enjoined not to have duplication of work, he will convey as fairly as he can the views that he has summarized and seek the advice of the COP President.

He concluded that he did not think it would be productive to have informal consultations in the afternoon. But he would discuss more deeply with those Parties with interest so that he can have a better understanding if this work is to continue.

Grenada said that we hear you very clearly but would like to record our disappointment that there will not be a discussion this afternoon.

Chair Cutajar reiterated that there was no facility for the contact group but for informal consultations and he had decided not to do that.