

Deep divide over legal form

Durban, 2 Dec (Meena Raman) – Parties in the informal group on “legal options” for the form of the agreed outcome under the Ad-hoc Working Group on Long-term Cooperative Action (AWGLCA) under the UNFCCC were divided over form of the legal outcome.

The informal group met on Thursday, 1 December, which saw a deep divide on the way forward. While some developing and developed countries wanted a new legally binding protocol to reflect the outcome, others wanted the form to be determined following the substance of the outcome of the AWGLCA, which has yet to complete its work.

Several developing countries expressed concern over proposals from developed countries, which were viewed as attempts to re-negotiate or re-write the Convention.

They were also concerned about the fate of the Kyoto Protocol (KP), in the light of new proposals for a mitigation treaty. Some were also concerned about the weakening of the mitigation regime, contrary to the rules systems under the KP.

Developing countries from the Alliance of Small Island States and the LDCs on the other hand wanted a new protocol alongside the KP to strengthen the existing regime.

The facilitator of the group, Ms. Maria del Socorro from Mexico wanted Parties to move towards a text for a decision.

(The Chair of the AWGLCA has said that an amalgamation text on all the elements under the AWGLCA will be produced by Saturday, 3 December).

Socorro provided Parties with a non-paper on a “menu of legal options” which included (i) legally binding instrument(s) (ii) COP decisions with the following sub-bullets – continue discussions to identify the appropriate form of the different elements of the agreed outcome; mandate to

conclude a legally binding instrument with a clear roadmap/content; affirm the importance of a legally binding outcome to provide clarity and vision; statement/declaration regarding future instrument(s) leaving open the legal form or continue substantively addressing all pillars of the Bali Action Plan through COP decisions.

Venezuela stressed that the KP was the only legally binding treaty regulating emissions and it has been calling for more an ambitious agreement to reinforce KP and not to destroy it. All the options so far (from developed countries) move towards a lowering of ambition. Those who are calling for a new regime should explain why they want a new regime and if leads to non compliance of the KP. Referring to under the international law and law of treaties, not having the KP could be interpreted as non-performance of international obligations. It recalled the case of the Arbitral Tribunal on *Rainbow Warrior* on circumstances precluding wrongfulness that could provide an excuse for non-compliance of a legal treaty. The AWGLCA has become that circumstance. Venezuela therefore proposed a 3rd option to be added to the “legal options” which was “Exception of non-performance”.

(In general terms, this is the principle that performance of an obligation may be withheld if the other party has itself failed to perform the same or a related obligation.)

India referring to proverbs, said that the past is guide to the future and those who don't learn from the past are condemned to repeat the same, referring to the experience with the KP. It said that it's faith in legally binding treaties was shaken. On the form and substance issue, India asked if Parties were sure on what the treaty contained. It referred to context, coverage, compliance and consequences. It asked if it only related to mitigation (as this is what developed countries stress). Referring to developed country proposals for a future mitigation

regime to reflect “economic realities” of developing countries and the need for symmetry (of same legal character as proposed by the US), it asked what the content of the treaty was going to be. On the legal options, it should be about implementation of the Convention and not about reinterpreting or rewriting it.

Egypt said that there was a mitigation gap of 12 Gt and developing country pledges amount to 5 Gt, and this leaves developed countries to contribute 7 Gt but the developed countries pledges amount to only 4 Gt and there also had loopholes. Referring to calls by developed countries for a new regime that reflected “current realities”, it asked if this reflected current realities and commitments under the Convention. It asked if this made the world safe and ensured environmental integrity. Calls to move to a new legally binding instrument, which was lop-sided and locks in low ambition and transfers the burden to developing countries was not what it wanted.

Saudi Arabia stressed the need to keep the KP alive and was not for re-negotiating the principles and provisions of the Convention. It saw the intention of some Parties to re-negotiate the principles, the Annexes and the commitments of Parties. It could not judge the form without the content and could not accept the various proposals and going into the details of the options was not an option. There was need to see the full package of the content of the discussions under the AWGLCA. The issue was on how to effectively implement the Convention and not to rewrite it.

Bolivia, in considering the legal form options, asked what was going to happen to the KP and if its system of rules, institutions and commitments were going to be complied with. It raised concerns about the notion of “flexibility within the framework of the Convention” and of a “facilitative and non punitive framework” as suggested by some Parties.

China said the mandate of the informal group was to discuss what would be the legal form of the outcome to reflect the AWGLCA process. The options were either a legally binding instrument or through COP decisions. The sub-listing provided by the facilitator did not reflect the mandate and Parties should not be going into the substance of the legal form in this group.

Philippines asked why move from a legally binding instrument as the Convention to one that Parties were not sure of. The mandate under the AWGLCA was to strengthen implementation for strong action on environmental integrity and

sustainable development, which was fair and equitable. The content of the form needed to be faithful to the Convention as well as its principles of common but differentiated responsibilities and respective capabilities and historical responsibility. The Convention allowed for developing countries to bind themselves if they want in relation to mitigation commitments. Renegotiating the Convention would open a Pandora’s box.

Marshall Islands, in response to the Philippines said that knowing where Parties were in terms of the emissions pathway was important and hence the need for a protocol.

Grenada on behalf of the **AOSIS** reiterated its position on the need for a new protocol under the AWGLCA that will raise confidence in co-operative action for increased ambition.

Gambia, for the **LDCs** said that it was for a legally binding instrument, which sits alongside the KP without prejudice to the discussions. The outcome under the AWGLCA encompassed all the elements of the BAP and is not confined to the issue of mitigation alone. If there was no second commitment period under the KP, there would be no mandate under the AWGLCA for a legally binding outcome.

Bangladesh, Trinidad, Tuvalu, Singapore, Palau and Colombia supported a new legally-binding agreement.

The **European Union** said that it wanted a treaty as it was ambitious and wanted to provide confidence to governments and the market. It wanted to build on the Convention and the KP while reflecting the current and changing realities. More than 60% of the emissions are from developing countries in 2020 who have no commitments under the KP. It was open to a roadmap in the Convention track, which needed to be completed by 2015.

Australia wanted a new legal instrument, which had the broad participation of Parties and agreed with the EU on the need to reflect current realities. **Japan** echoed similar sentiments.

Switzerland echoed the sentiments of EU for a future regime that responds to evolving reality. Referring to India, it said that those who remain in the past will not lead the future and Parties could not live in the past. The regime cannot be effective otherwise, it said. Environmental integrity was important to avoid carbon leakages. It wanted a process to be launched in Durban for the new regime.

US said it that it was for a legally binding agreement that included commitments from all major economies in an equal way. The future regime needed to reflect current and future realities. The Cancun decision was political and could not be converted to a legal treaty. On the post 2020 regime, there was need for clarity on the content of the future regime in terms of the symmetry and modernization needed and not to freeze the Annex 1 - non-Annex 1 divide. It supported Australia and the EU in this regard.

Socorro, in response to comments by Parties said that the proposals on the table are aimed at strengthening the Convention and not about re-writing it as the Convention was not static and there were different interpretations.

Meanwhile, Ambassador Nozipho Joyce Mxakato-Diseko of South Africa also continued with open-ended informal consultations on “cross-cutting issues and how to ensure an enhanced multilateral rules- based system that will achieve the full, effective and sustained implementation of the

Convention” following from consultations held on Wednesday. (See TWN Update 8).

Several Parties from both developed and developing countries called for a Durban mandate to launch a process for a new legal regime to tackle climate change, while others were opposed to the idea as the mandate of the AWGLCA had not expired and work still needed to be done.

Diseko at the conclusion of the informal consultations said that she would prepare a broad set of bullet points which had no status and would be on the UNFCCC website under the responsibility of the COP Presidency. She said there was need for a different level of engagement in a different setting.

In the corridors, some observers and delegates expressed concerns about what was happening in what appeared to be “a great push” for a Durban mandate for a new climate treaty that would “kill the Kyoto Protocol” and create a new climate change regime.