TWN
Panama News Update 3
www.twnside.org.sg
Published by
Third World Network
1 October 2011

Third meeting of Climate Fund's design committee ends with roadmap to Durban

The third meeting of the Transitional Committee to design the Green Climate Fund met in Geneva from the 11th -13th September and ended with the adoption of a roadmap for the adoption of a draft report for the 17th meeting of the COP in Durban.
The meeting also saw the emergence of divergences between developed and developing countries over key issues in the design of the GCF.

Panama City, 1 October (Meena Raman) - The third meeting of the Transitional Committee (TC) to design the Green Climate Fund (GCF) under the United Nations Framework Convention on Climate Change (UNFCCC) ended in Geneva on September 13, with the adoption of a roadmap that sets out the process for the preparation and possible adoption of a draft report of the Committee for the 17th meeting of the Conference of Parties (COP) to be held in Durban, South Africa, late November this year.

The fourth and final meeting of the TC is to be held in Cape Town, South Africa, from 16-18 October, where the members will consider and adopt the draft report, which will include any operational documents that the TC deems appropriate for the approval of the COP.

Given the strong and divergent views among TC members on several key aspects in the design of the GCF and with only two negotiating days set for the final meeting in Cape Town, some members of the TC from developing countries have expressed grave concerns over the process for the drafting of the final report.

Ms. Bernarditas Mueller of the Philippines stressed the need for a transparent and inclusive process that will ensure a balanced outcome.

The 40-member TC was mandated by the decision in Cancun last year to develop operational documents according to its terms of reference for the design of the GCF and make recommendations for the COP's approval.

For the meeting in Geneva, the Co-chairs and Vice-chairs of the TC had prepared a "Draft outline of the report" which contained various elements.

From the start of the meeting on 11 September till the morning of the final day (on 13 September), TC members had intense discussions on five key issues: (i) the relationship between the GCF and the COP; (ii) legal status of the GCF; (iii) the establishment of an independent secretariat including the selection of its head; (iv) the use of funding windows; and (v) engagement of the private sector.

There were major disagreements among TC members in several key areas as in the relationship between the GCF and the COP, the legal status of the GCF and the engagement of the private sector.

The Co-chairs, Vice-chairs and Co-facilitators (of four work-streams) presented a document in the afternoon on their "reflections", which they said was "based on the work done in previous sessions, discussions held and submissions presented".

The document states that "it reflects areas that would be included in the final outcome of the TC and, to the extent possible, provides guidance on the content without prejudice to the specific language, placement or final format. It is expected that this document be complemented by the TC members, through further discussions and interactions, and serves to facilitate the preparation of the draft report that would be considered" at the next TC meeting in Cape Town.

The "reflections" document is basically similar to the earlier "draft outline report" prepared by the Co-chairs for the Geneva meeting, with some changes in the details.

The main headings of the elements in the document are: objectives, guiding principles, scope, governance and institutional arrangements, legal status, participation/membership, financial instruments, operational modalities, engagement of the private sector, environmental and social safeguards, monitoring and evaluation, accountability mechanism and stakeholder input and participation.

There were strong initial reactions from several TC members, both from developed and developing countries, on critical aspects of the elements which showed a clear divergence of views on areas such as the objectives, guiding principles, governance and institutional arrangements, legal status and engagement of the private sector. (Further details will be in a forthcoming article).

According to the roadmap, the Co-chairs, Vice-chairs and the Co-facilitators (comprising a group of 12 persons) will prepare an initial draft report by 23 September, based on the discussions held at the Geneva meeting and submissions received.

From 23 September to 5 October, the group of 12 persons "will consult all TC members, individually or in groups, on elements of the draft. The draft will reflect the outcome of these consultations."

The draft report will then be circulated on 7 October for consideration at the fourth TC meeting.

At the fourth meeting in Cape Town from 16-18 October, the draft report will be considered for adoption.

The Co-chair of the current meeting, Mr. Trevor Manuel from South Africa (who co-chaired the Geneva meeting with Mr. Ketjil Lund from Norway) described the process as "putting members in a pressure cooker" so that the final meeting will have a document for members to consider.

Ms. Bernarditas Mueller from the Philippines, in response to the roadmap, stressed the need for a transparent and inclusive process to ensure the participation of TC members in the development of any text of the report.

She said that the co-facilitators had an important role to play in ensuring this. Referring to the joint submission by 13 countries on the design of the GCF, she said that it covered all aspects of the elements and hoped that the Co-chairs, Vice-chairs and Co-facilitators would produce a balanced document, reflecting all the submissions.

Mr. Jorge Ferrer of Nicaragua expressed concerns over how the process was going to incorporate the views of 40 TC members. He was also worried about the duration of the final meeting (which was only set for two days), as the draft report will have serious legal implications.

Legal personality

Several members from both developed and developing countries called for the Fund to be endowed with legal personality so as to enable it to fulfill its objectives and functions effectively.

This call was made during the third meeting of the TC in Geneva on Monday, 12 September.

Most of the developing countries on the TC including Egypt, Pakistan, Philippines, Brazil, China, India, the Democratic Republic of Congo (DRC) and Barbados called for the GCF to have legal personality, learning from the experiences of other funds such as the Multilateral Fund under the Montreal Protocol.

Barbados drew reference to the Global Environment Facility (GEF) which was disadvantaged by not having a legal status and depended on the World Bank for its legal capacity.

Some developed countries echoed the sentiments of developing countries and this included Sweden, Switzerland and Russia. Sweden said that if the TC members were serious about the GCF being ambitious, then the issue of it having legal personality could not be avoided.

The United States wanted more consultations with its lawyers on the matter, saying that the issue was complex. This drew sharp criticisms from DRC, Brazil and China, while Russia said that the problem was political and not legal.

Day two of the meeting saw an intense exchange of views on 4 of the 5 issues identified as key by the co-chairs. The four issues discussed were (i) the relationship between the GCF and the Conference of Parties (COP); (ii) legal status of the GCF, which involves the issue of the legal personality or legal capacity, as well as privileges and immunities for the GCF and/or its officials; (iii) issues related to the establishment of an independent secretariat including the selection of its head and (iv) the use of funding windows.

The 5th issue on "the structures and processes for the engagement of the private sector" was expected to be discussed on 13 September, which is the final day of the meeting.

In considering the issue of the legal status of the GCF, Mr. Trevor Manual of South Africa who co-chaired the meeting with Mr. Ketjil Lund of Norway provided 3 options.

Option 1 is for the GCF not to have any legal personality, in which case the Fund would depend on another body for its legal capacity as is the case with the GEF and the World Bank.

Option 2 is for the GCF to have legal capacity but not juridical personality as is the case with the Adaptation Fund (established under the Kyoto Protocol) where legal capacity is derived through German law. (The Adaptation Fund Board has been granted legal capacity by the Government of Germany under its national laws) and option 3 is for legal personality to be endowed through a decision of the Conference of Parties (COP) or through a new treaty or the national law of a Party.

Dr. Omar El-Arini of Egypt (who served as the first Chief Officer of the Secretariat of the Multilateral Fund of the Montreal Protocol from 1991 till 2003) stressed the need for the GCF to have legal personality so that it has capacity to enter into agreements with international, regional and national organizations; have capacity to enter into contracts with implementing entities and with the trustee; to enable the Fund to be able to borrow or lend money; issue guarantees; to employ staff; acquire property and institute legal proceedings in defence of its rights. It was necessary for the GCF to act as an independent entity. He said that it was not difficult for the GCF to be conferred juridical personality and referred to the experience of the Multilateral Fund (MF) where a simple decision of the Meeting of Parties of the Montreal Protocol conferred such personality.

Mr. Farrukh Khan of Pakistan (who was former Chair of the Adaptation Fund Board) also supported the call for the GCF to have legal personality, as this would enable the GCF to enter into contractual agreements with the private sector and have capacity to float climate bonds. This was also important to ensure direct access for to enable direct contractual agreements with entities. He stressed the need to identify the host country of the GCF and for criteria to be developed to determine this.

Mr. Jan Cedergren of Sweden said that if members were serious about the GCF's objectives of being ambitious, then the issue of the Fund having a formal legal personality could not be avoided. The TC should declare its intent to create the legal personality and how this was to be done was another matter.

Ms. Bernarditas Muller of the Philippines also echoed the need for the GCF to have legal personality and referred to the joint submission of 13 countries in Tokyo, which supported this. She also said that there was no need for a memorandum of understanding between the GCF and the COP as suggested by some developed countries as it was the COP that established the GCF and the legal personality of the GCF could be conferred through a COP decision.

Ambassador Sergio Serra of Brazil echoed support for the call for the GCF to have legal personality, stressing that it was the only route to achieve the objectives of the Fund. He said that legal personality should be conferred by a decision of the forthcoming COP.

Dr. Yaga Reddy of India also echoed the call for the GCF to have legal personality.

Mr. Selwyn Hart of Barbados agreed with Sweden and said that it was clear, from the experience with the GEF that the GCF needed legal personality. He said that members had heard from a senior official of the GEF that one of its disadvantages or failings was the absence of legal personality and TC members should not replicate this mistake in the case of the GCF.

The representative from Switzerland made similar comments as Barbados in relation to the disadvantages of the GEF and supported the need for the GCF to have legal personality.

Alexey Kvasov of Russia said that there were many legal options but the issue was a political. He said that there was need for an interim solution as a full-fledged international treaty to confer legal status was not possible. There was need for high aspirations and he was "inspired" by "hints of a solution" by Dr. El-Arini.

Mr. Andrzej Ciopinski of Poland said that it was premature to decide on the issue of legal personality and the best way to enable such personality was through an international treaty.

Mr. Gilbert Metcalf of the United States US said that the issue was complex and wanted more time for consultations with lawyers before deciding on the issue. He said that legal attributes of GCF would depend on the key operational attributes of the Fund. If legal personality is to be through a treaty, this could take years, as there would have to be negotiations with every country.

In response to the US, Mr. Tosi Mpanu Mpanu of the Democratic Republic of Congo (who is also Chair of the African Group) said that it was unacceptable that members were being asked to go home and consult their lawyers before deciding at this 3rd meeting of the TC and delay the possibility of a successful outcome. He said that much reference has been made to the example of the establishment of the Multilateral Fund and members can learn from that.

Ambassador Serra of Brazil supported the DRC representative saying that the decision is political and as suggested by Sweden, if the TC members were serious, a decision can be made to confer legal personality on the GCF.

Mr. Wu Jinkang of China echoed the sentiments of DRC, Brazil and Sweden that if members were serious about the GCF, legal personality can be conferred and a way out for this could be found, as suggested by Egypt. This was an issue for the TC members and not for lawyers.

Germany also wanted more information and clarity on the issue. Ms. Alicia Santamaria of Spain said that there was no need for a legal discussion now as form followed functions, but it was open to all options and possibilities. Bangladesh also echoed similar concerns as Spain and the US. France also was not ready to take a decision on the issue and wanted more clarity.

Mr. Manuel said that it was clear that members knew what was wrong with the GEF and do not want to take that route. He wanted the issue of the legal personality to be concluded at this meeting in Geneva. He proposed that the matter be discussed further on 13 September.

Divergences on key issues

Views from members of the TC to design the GCF revealed clear disagreements on critical aspects of the elements for the design of the Fund.

There was divergence of views on elements such as the objectives, guiding principles, governance and institutional arrangements, legal status and engagement of the private sector.

The Co-chairs, Vice-chairs and Co-facilitators (of four work-streams) presented a document on the final day of the meeting on September 13, which contained their "reflections", "based on the work done in previous sessions, discussions held and submissions presented".

The document states that "it reflects areas that would be included in the final outcome of the TC and, to the extent possible, provides guidance on the content without prejudice to the specific language, placement or final format. It is expected that this document be complemented by the TC members, through further discussions and interactions, and serves to facilitate the preparation of the draft report that would be considered" at the next TC meeting in Cape Town to be held on 16-17 October 2011.

The main headings of the elements in the document are: objectives, guiding principles, scope, governance and institutional arrangements, legal status, participation/membership, financial instruments, operational modalities, engagement of the private sector, environmental and social safeguards, monitoring and evaluation, accountability mechanism and stakeholder input and participation.

Co-chair Mr.Trevor Manuel from South Africa told members that the document was "not for adoption but for enrichment". He asked for reactions to the document, which saw many TC members expressing their views.

Mr. Gilbert Metcalf of the US and Mr. Remy Rioux of France expressed strong reservations over the whole document.

Metcalf said that the "reflections" document did not reflect a consensus or convergence. He said that there were many issues that were not discussed. Rioux said that he could not agree to a "standalone instrument" and that he could not agree to the "package" and "had strong reservations".

Among the elements that drew much reaction from developing countries was reference to "transformational change" in several parts of the elements including the objectives, guiding principles, and funding windows.

Mr. Wu Jinkang of China said that "contribution to transformational change" as an objective was not in the Convention and asked for deletion of the phrase. He noted a similar reference in the "guiding principles" which referred to "catalyze transformational changes". He said that trillions of dollars would be needed to make this happen which is more than what the GCF could handle. He also called for the deletion of reference to "activities for transformational change" under the element of "funding windows".

Mr. Jorge Ferrer of Nicaragua said that there was no definition of what is meant by "transformational change" and that everyone had a different interpretation. Ambassador Sergio Serra of Brazil, Dr. Yaga Reddy of India, Ms. Bernarditas Mueller of the Philippines and Dr. Omar El-Arini of Egypt all expressed similar views in this regard.

On the "guiding principles", some members had concerns over the term "results-based approaches". Serra of Brazil said that "results-based approaches" should not be a principle as this could hinder access to funds, especially for adaptation and it was better for this to be reflected under "monitoring and evaluation". Muller of Philippines also expressed similar concerns, adding that several aspects of the "guiding principles" appeared to be conditionalities.

In relation to the "scope" which had a reference to "mobilizing and leveraging of private sector investment and other finance, especially domestic private sector", Wu of China questioned what "other finance" was and whether the reference "to domestic private sector" meant that the private sector in developing countries are expected to make contributions to the GCF. Serra of Brazil said that there was no mention at all under the scope to "public funds" and this was "an obvious imbalance."

On the "engagement of the private sector," the document provided three elements, which were: the "GCF to engage the private sector through a private sector facility; advisory committee of private sector actors and non-voting members of the Board". These proposals were mainly advanced by developed country members of the TC.

Mr. Ahmad Abdulkader of Saudi Arabia said that there was no consensus on the engagement of private sector in the GCF.

Ferrer of Nicaragua said that the Cancun decision made no reference to "non-voting members" and to call for this now would "open a Pandora's box." He said that some developed countries had called for the private sector to be a non-voting member of the Board but there was no consensus on this as the issue of private sector engagement had been controversial during the discussions.

Wu of China had similar views, saying that the Cancun decision had no reference to the private sector being represented on the Board. In his earlier intervention during the day, Wu referred to comments from some developed country delegates who talked of the private sector being involved in "bankable activities". He said that climate change projects are not bankable nor are they all economically viable. Mitigation, technology development and transfer are not necessarily economically viable or financially bankable unless supported by governments. He referred to the Chinese government's decision to close some coal power plants which involved the government having to pay for this. Wu said that the role of the private sector should not be over-emphasised. On the suggestion by some developed countries that the GCF should be attractive to pension funds, he said that if such funds could have done the job in the first place (in climate financing), there was no need for the GCF.

Reddy of India clarified that during the discussions, the proposal for an advisory committee for the private sector was an alternative proposal to the private sector being a non-voting member of the Board. Serra of Brazil expressed concerns over the suggestion for an advisory committee for the private sector. He suggested both the private sector and civil society could be called for advice if the Board needs it. El-Arini of Egypt also said that he did not understand what an advisory committee for the private sector was.

Mueller of Philippines said that the engagement of the private sector should be considered under the element of "stakeholder input and participation" along with civil society.

(Several developed countries including the US had also suggested that CSO's have a seat on the Board as a non-voting member but this was not reflected in the document).

In contrast to the views of developing countries, Metcalf of the US wanted more modalities to deal with the private sector. He said that a funding window for the private sector should be part of this. Ms. Naoko Ishii of Japan stressed the need for private sector engagement and asked how the private sector facility related to the GCF. Mr. Nick Dyer of the United Kingdom also echoed the need for the right modalities for the engagement of the private sector. He said that "engaging the private sector must signal to business that we mean business."

Another problem issue was the "relationship of the COP" to the GCF, which is addressed under "governance and institutional arrangements".

Mueller of Philippines was of the view that this element was the "weakest part of document." She said that the GCF must be guided by and be accountable to COP and this means a "strong relationship and touches upon the activities of the GCF". "Ensuring accountability is not simply about reporting by the GCF to the COP and there was need to address this."

Similar sentiments were expressed by Wu of China who said that the Board of the GCF was accountable to the COP and the Board therefore must have clear obligations in relation to its role and functions in decision-making. El-Arini of Egypt said that the Geneva meeting did not conclude discussions on the relationship between the Board and COP.

While developing countries stressed the need for a strong relationship between the GCF and its Board with the COP, Metcalf of US expressed concerns. In his earlier intervention during the meeting on this issue, Metcalf said that the COP should have no role in choosing the members of the Board, on issues related to the trustee or in the hiring of the head of the secretariat. The accountability mechanism is for the Board to report to the COP as is the case with the Global Environment Facility. This view was supported by several other developed countries including France, the UK, Germany and Australia.

In relation to the legal status of the GCF, the document refers to two elements: the GCF to be endowed with legal status and form of legal identity to be based on specific functions of the GCF. It states that the form of the legal status of the GCF should be discussed.

Most developing country members of the TC want the GCF to be endowed with legal status, while many developed countries including the US, UK and France want its "form to follow function," and not decide the issue at this stage.

In his reactions to the document, Reddy of India drew attention to the proposals from several developing countries to follow the model of the Multilateral Fund of the Montreal Protocol and said that this should be flagged as an option.

Another area of contention related to the issue of "financial instruments". The document has two elements in this regard: the GCF to provide grants, non-grant instruments, including concessional loans, guarantees and others; and results-based financing mechanisms, including payment for verified results.

El-Arini of Egypt said that he was unclear as to what "results-based financing mechanisms, including payment for verified results," was and added that this was outside the scope of the terms of reference of the TC. Mueller of Philippines expressed similar views and said that if this element was to be applied, then there could be no adaptation funding, and this concept was totally contrary to the provisions of the Convention.

Serra of Brazil said that there was convergence among members that grants would be the most important instrument and suggested that the GCF should provide mainly grants. Reddy of India said that in dealing with "financial instruments" it was important to consider the type of risk that the GCF would bear and there was need to address what risks are permitted and what are not. He said that there should not be "currency risks" and there were also "reputational risks". Hence, there was need to introduce the concept of risk and to address who bears what.

The representative from Zambia said that the GCF should not be another institution that leaves LDCs in debt and stressed the importance of grants.

Given the lack of convergence on key issues relating to the design of the GCF, there are concerns among some developing country members as to how the drafting of the final report by the Co-chairs, Vice-chairs and Co-facilitators is going to reflect a balanced outcome for the consideration of the members at their final two-day meeting in Cape Town in October.