

Legal form should not re-write Climate Convention – say developing countries

Panama City, 5 October (Meena Raman) – Several developing countries including China, India, Saudi Arabia, Bolivia, Venezuela, Egypt and the Philippines expressed strong views that the legal form of the outcome of the negotiations of the working group under the United Nations Framework Convention (UNFCCC) should not re-write the Convention. They also stressed that the UNFCCC and its Kyoto Protocol were existing legally-binding treaties for the global climate change regime and there should be no new mandate for a new agreement to replace them.

These views were expressed at an informal group meeting held on October 4 in Panama City under the Ad-hoc Working Group on Long-term Co-operative Action (AWG-LCA) to discuss legal options for an agreed outcome based on the Bali Action Plan.

The United States however wanted a legally agreement that binds all “major economies” in a symmetrical fashion where the commitments of Parties were unconditional and not linked to the provision of finance. The US wanted a revision in the current differentiation between non-Annex 1 and Annex 1 countries “to reflect today’s and tomorrow’s economic realities”.

The US said clearly that it will not agree to launch negotiations in Durban on an agreement that it could not join.

Many countries stressed that the discussion on the legal form was premature, as the form of the legal outcome depended on the substance of the agreement reached.

Several developed countries such as Australia, the European Union, Norway, Japan and New Zealand wanted a new single binding treaty for all Parties which would replace the KP, arguing that the Protocol was “not comprehensive” as it did not include all “major emitters”. (The US is not a party to the KP and the mitigation actions of developing countries are not part of the Protocol).

Venezuela and Bolivia expressed opposition to the replacement of the KP with a weak mitigation regime under a new agreement for developed countries that allows for a “pledge and review” system that advanced a “do as you please approach” in terms of determining emission reduction targets instead doing so through a top-down science based system as is in the KP.

The Alliance of Small Island States wanted a ratifiable legally binding treaty under the Convention that would co-exist with the Kyoto Protocol.

The **United States** said that it continues to support a legally binding agreement that contains mitigation commitments that are symmetrically binding for all Parties with respect to their mitigation commitments. Aspirations must face reality and the reality is that an outcome in Durban must fulfil the promise of Cancun and meets Parties’ bottom lines. The form of the outcome is related to content. The US contemplated a legal agreement that binds all major economies in a symmetrical fashion with respect to their mitigation commitments being unconditional to the provision finance and a revision of the Annex 1, non-Annex 1 categories to reflect today’s and tomorrow’s economic realities, and not that of 1992. It expected that the content of the Parties’ commitments would differ, but not its character.

For the US, a legally binding approach cannot mean that the US is bound and others are not (in an obvious reference to developing countries). It said that there was no basis for such an approach in the Convention as all Parties had obligations under Article 4.1. It was inconsistent with the present economic realities and with solving the climate problem to have such an approach, it said.

The US did not see any meaningful compromise on this issue by Durban. It said that it heard many big developing countries take a position that the obligations fall only on Annex 1 countries and cite the Bali Action

Plan for that proposition. The US disagreed with that reading and since others have that reading, this meant that it could not negotiate a legal agreement that is tied to the Bali Action Plan.

The fundamental question was whether Parties have agreement on the kind of regime that the US is envisioning. The US needed a clear and explicit mandate that incorporates the ideas it had spelt out and it was clear that others do not accept that. The US said it would like to avoid entering into a deep cul de sac in Durban because of this.

It said that in Cancun, the Parties agreed to carry out undertakings on mitigation, adaptation, finance, and technology. Those undertakings represent real action and real progress on climate change. The US did not see how Parties can move to have mandate for a legally binding agreement in Durban. The US will not agree to launch negotiations on an agreement that it could not join. It did not want to dismiss the possibility of making a statement in Durban about a collective aspiration for the future regime provided that it was on terms it could accept.

China said that it was important to have a discussion of the legal options with the aim to complete the agreed outcome (of the AWG-LCA) based on the Bali Action Plan, the Kyoto Protocol and the Convention. The principle guiding the discussion should be the Bali Roadmap and the two-track process recognizing the principle of common but differentiated responsibilities.

(The Bali Roadmap refers to the mandate of the AWG-LCA under the Bali Action Plan and the mandate of the working group under the Kyoto Protocol).

China said that the discussion must focus on the mandate of the informal consultations, which relates to the legal options to complete an agreed outcome of the Bali Action Plan. It was not useful to discuss matters outside this mandate. On the legal form of the agreed outcome, China said that this could be in the form of decisions of the Conference of Parties, a protocol or an implementing agreement. The essential point was what Parties were going to do to ensure the full effective and sustained implementation of the Convention. The mandate does not allow the re-writing of the Convention.

China said that commitment of Annex 1 Parties to a second commitment period under the Kyoto Protocol for emissions reductions was essential for any outcome in Durban and beyond. It said that the KP and the UNFCCC form the legally binding global regime on climate change and there was no need to create a new

one. It said that there were proposals by some Parties to create a new mandate for starting a new process to replace the UNFCCC and the KP. This was not the mandate of the AWG-LCA. Parties had the right to make any proposal and they could do that under the Convention or the KP but this was not within the mandate of the Bali Roadmap. Such a new mandate would tantamount to creating a cemetery for the KP, the UNFCCC and the principle of common but differentiated responsibility. In an obvious reference to the US call for symmetry in the commitments of developed and developing countries, China said that “cemetery and symmetry were quite different.”

India agreed with China and said that the problem was the faith or loyalty some Parties had to the idea that a legal treaty was binding and good and a decision of the Conference of Parties was bad. It drew reference to the Marrakech Accords (which were decisions) of the Kyoto Protocol that created the Clean Development Mechanism in which billions of dollars worth of trade is involved. India said that substance and form must go together and Parties needed to know what they are deciding and then clothe it in the form whether as a COP decision or treaty. To have a new law and to get it ratified by Parties may be a problem involving constitutional issues and despite the best of intentions, there could be problems of ratification for some countries.

On the issue of the “economic realities” of countries, India said that its first priority was to eradicate poverty where each human being would have a roof over one’s head and a next meal. Anything, which stands in the way of poverty reduction, was not doable. There was also need to have a sense of reality of the real world in terms of GHG emissions, it said. Referring to how it was common for a bus in India to have 50 people inside and another 20 on its top, the emissions from this bus could not be compared with the emissions of a limousine in a rich country with one person in it that included a bar.

Philippines said that the mandate of the informal group was to continue to discussions on the legal options consistent with the Bali Action Plan and the Cancun decision. The objective was not to launch new negotiating process. The objective was to discuss what the legal options are to conclude the work on substance. There is a range of instruments under the UNFCCC, which Parties could use to reflect the substantive content. For the moment, there was no clarity on the substantive content and hence, the issue of what was the appropriate legal instrument was still up in the air.

Venezuela said that the G77 and China has been repeating that the second commitment period of the KP is a key outcome. There are “conditions and prices” that developing countries are being asked to pay for this to happen. Some Parties were willing to pay anything while some are not. In the consideration of legal options, Venezuela asked if Parties were going to have a legally binding agreement in the AWG-LCA that would legalise and a “pledge and review” regime that would not limit rise in temperatures and could lead to a 4 degree C world, contrary to the ultimate objective of the Convention. That was not a price it was willing to pay for a second commitment period under the KP.

Bolivia agreed with Venezuela and said that in order to advance on the legal form, there needs to be advance on substance. It expressed concerns over proposal for a single legal instrument that could undermine the KP. It was also against a legal instrument that would legalise a “pledge and review” system on mitigation. In response to countries that say that the KP was “not comprehensive as it did not have all the major emitters”, Bolivia expressed concern that the new mitigation framework that was emerging was for all countries to pledge and review their actions where they would do what they liked and determine as they please their mitigation pledges. This did not preserve the environmental integrity and it was misleading to say that this was a comprehensive framework that would lead to high mitigation ambition when what it does is to downgrade the top-down approach of the KP (in determining emissions reductions targets) to a “do as you please” approach. Bolivia also did not want the Annex 1 Parties who are in the Kyoto Protocol to “jump-ship” to a weaker regime that would replace the KP.

Egypt said that it was open to discuss the legal form after it was sure of the content. It agreed with Bolivia, as it was not really sure what the substance would be. Parties could not say that a COP decision was not legally binding. It also said that it was not useful to only focus on mitigation. There were many other building blocks under the AWG-LCA referring to adaptation, finance, technology transfer and capacity building. It said that movement in the negotiations on these other elements was not reassuring. In the KP, Parties were withdrawing from commitments, shifting the burden on to developing countries and dismantling the KP with a new system. Egypt drew reference to the WTO where developed countries were “constantly shifting the goal

post” and carry on re-negotiating and nothing is achieved.

Saudi Arabia said that there were divergent views on this issue and others have indicated that it was premature to talk about a legally binding agreement. Some say that there is no legally binding agreement but there was the KP, which was comprehensive and consistent with the principle of common but differentiated responsibility. There was reluctance by some Annex 1 Parties to engage in the second commitment period and others were laying conditions for making the commitment. There needs to be seriousness on the part of Parties under the KP if they will make the commitment and ratify it. Only then was there a possibility to see if there could be a legally binding agreement under the Convention. The Convention cannot be re-written on the notion that the world economic reality has changed.

Grenada for the Alliance of Small Island States wanted a mandate for a comprehensive legally binding agreement that is ratifiable. It had submitted a proposal for such a new agreement under the Convention, which would not replace the KP.

Uganda supported the two track approach and said that it was better to “deal with the devil you know than the devil you don’t” referring to the KP. It said that some Parties said that the KP was good but they want to abandon it. It supported the need for the second commitment period under the KP and for non-KP developed countries (referring to the US) to do comparable mitigation efforts.

The **European Union** agreed with AOSIS for a comprehensive legally binding framework. It was willing to commit to a second commitment period as part of a wider legal framework under the AWG-LCA. It was in favour of a single legally binding outcome. It also stressed the need to take into account economic realities that have changed since 1992. It said that most Parties wanted such a framework and if there were some who do not want progress, there was need to consider how to make progress and maintain a roadmap for that.

Norway, Switzerland, Australia and New Zealand made similar comments as the EU.

Ms. Maria del Socorro of Mexico facilitated the informal group and proposed that discussions proceed on 5 October.