

AWG-KP legal matters group deadlocked over mandate

Tianjin, 7 October (Lim Li Lin) - The legal contact group of the 14th session of the Ad hoc Working Group on Further Commitments for Annex I Parties under the Kyoto Protocol (AWG-KP) was deadlocked over the issue of the mandate of the group. Two sessions were held on Thursday, following an initial session on Tuesday (*see TWN Tianjin News Update No. 4*) but the group was still unable to resolve differences.

The issue that has bogged down the group is the long-standing issue over the mandate of the AWG-KP. The mandate of the AWG-KP (contained in Decision 1/CMP.1 that established the working group) is for determining further emission reduction commitments for Annex I (developed country) Parties for the second commitment period in accordance with Article 3.9 of the Kyoto Protocol. Article 3.9 sets out the legal obligation of Parties to establish commitments for subsequent periods for Annex I Parties in the form of an amendment to Annex B to the Kyoto Protocol, which contains the individual commitments of Annex I Parties for the first commitment period (2008-2012).

Over the course of the negotiations, other issues have been introduced into the work programme of the AWG-KP. These relate to land use, land use change and forestry (LULUCF), market mechanisms, methodological issues, and potential consequences of response measures. These issues are contained in the draft text proposed by the Chair of the AWG-KP (John Ashe from Antigua and Barbuda). They are contained in Chapters II to V, in the form of draft CMP (Conference of the Parties serving as the meeting of the Parties) decisions.

Chapter I contains the proposed amendments to Annex B of the Kyoto Protocol for the second commitment period as well as related consequential amendments to a few Articles of the Kyoto Protocol (in Option A). Option B contains the

same consequential amendments as well as other proposals by some Parties for further amendments to the Kyoto Protocol that are not consequential amendments arising from the amendment to Annex B for the second commitment period.

In the AWG-KP Chair's scenario note for this session, he had proposed that the legal contact group consider the parts of the Chair's proposed text relating to entry into force of any amendments to be adopted by the CMP as well as those that are not considered by any of the other contact groups. He outlines a number of sections that are contained in Option B for discussion.

The understanding, based on past practice at previous session of the AWG-KP, has been that the legal contact group only convenes when there are legal matters referred to it by the other contact groups (on the scale of Annex I Parties' emission reductions, on the other issues and on potential consequences).

After the hotly disputed session on Tuesday, the Co-Chairs Gerhard Loibl from Austria and Daniel Ortega from Ecuador conducted informal consultations with the Parties. They opened the second session of the contact group by announcing that there is an emerging consensus that the group could work on some text, and proposed dropping a couple of sections from the list in the Chair's scenario note (which contains Option B issues that are not consequential amendments).

This prompted firm reactions from developing countries.

Brazil speaking on behalf of the G77 and China said that they were only prepared to discuss legal matters relating to the amendment to Annex B and consequential amendments that are within the mandate of the AWG-KP.

China, Micronesia, Ghana, Sudan, Bolivia, Bangladesh, Egypt, India and Benin all spoke up in support of the G77 and China position.

China said that it was not authorized to discuss any amendments to the Kyoto Protocol other than to Annex B. With regards to “improving” the rules of the Kyoto Protocol, it said that “A more beautiful Kyoto Protocol without the second commitment period is a dead treaty. This is a way of blocking the process, and under no circumstances can we do that.”

It proposed that instead of selecting issues in Option B, to first focus on issues in Option A, as that is our focus and mandate. Only with consensus and progress in Option A, then we can move on to discuss a better second commitment period. It suggested doing this line by line in the text, and then to have a discussion on how to avoid a gap between the first and second commitment period in the next session of the contact group.

Brazil went on to say that the mandate of the AWG-KP was very precise and that amendments proposed to Article 21 for example in Option B are not consequential amendments, and was a diversion. This does not prevent any Party from discussing the issue in the CMP. It said that the issue of the mandate of the group should be discussed in the AWG-KP plenary. We are not here to make a new protocol, or make it a beautiful instrument, it said.

Ghana also wanted the legal contact group to discuss the possible implications of a gap between the first and second commitment periods.

Bolivia contended that the Chair’s scenario note is just a note, and it was up to Parties to decide.

Egypt agreed that the issues have to be discussed in the right place, and urged to focus first on the scale of Annex I Parties’ emission reductions.

However, **Micronesia** had a broader understanding of consequential amendments and considered that proposals dealing with the level of ambition such as those by AOSIS relating to the carry over of surplus AAUs (assigned amount units), extending the share of proceeds from other market mechanisms, etc. are relevant.

(The AOSIS proposals relate largely to the scale of Annex I Parties’ emission reductions and are linked

to determining the second commitment period in so far as the second commitment period relates to Annex I emission reductions after 2012. They are however, not direct consequential amendments.

Many of the proposals by Annex I Parties for additional amendments to the Kyoto Protocol would result in a quite a different legal instrument. Most developed countries would like to terminate the Kyoto Protocol and replace it with another treaty. Parties can, at any time, propose amendments to the Kyoto Protocol in accordance with Article 20, and these proposals are taken up by the CMP.)

Tuvalu requested the Co-Chairs to rule on this matter so that the group could proceed, and said that the mandate was established by the Chair to have a discussion on the entire text.

Developed countries urged for a broader view on the mandate.

Australia considered that everything in the Chair’s scenario note (including issues mentioned in Option B) is within the mandate of the AWG-KP and wanted to discuss its proposal on conditional application of the Kyoto Protocol. It said that it did not see the point of discussing the scale of Annex I emission reduction commitments (“numbers”) unless this was discussed. It accused developing countries of blocking progress in the AWG-KP by not allowing the opportunity to discuss other issues. It suggested that the impasse may have to be dealt with at an AWG-KP plenary session with the Chair, and said that it had no idea what we are intending to have as the Cancun outcome.

Belgium, speaking for the European Union, expressed that the CMP may not be able to handle all the issues that needed to be discussed under Option B. It said that the mandate discussion had a good track record of blocking progress, and that we have different interpretations of the mandate, and in the past have found a way to move forward. Without improved rules, the Kyoto Protocol is also a dead treaty, it said. As long as we discuss all issues, it could live with addressing Option A first. It also wanted to discuss implications of a possible gap between the commitment periods.

New Zealand contended that it was necessary to discuss all that is necessary to do to bring a new commitment period into being, and that legal certainty is very important. It said that Option B

did not reflect on what the mandate is, but were proposals that were not allowed to be included in Option A. It accused Brazil of being inconsistent as it had a proposal in Option B.

Brazil responded by saying that opening each and every Article of the Kyoto Protocol, would create uncertainty. It said that its proposal is in Option B as it is not a consequential amendment. It had made this proposal to put some ideas on the table, but not to engage on it. However, it could be discussed if Parties want to, when the time comes. It said that the intention of killing the Kyoto Protocol by trying to reopen all the Articles of the Kyoto Protocol at this late hour, is what is blocking the negotiations.

China said that the legal issues relating to the Annex B amendment are quite straightforward, and rejected the delaying tactics by developed countries. It said that the mandate of the AWG-KP, adopted in a decision in Montreal is very clear. Until we discuss Option A, we should not be distracted. Option A and the discussion on numbers, will set the necessary basis for the CMP decisions in Cancun.

Switzerland requested for the AWG-KP Chair to join the group in order to understand his proposal so that the group can continue working.

The Co-Chair announced that the AWG-KP Chair was not available. He said that the group was given the mandate at the start of the AWG-KP session to look at option B, and that it had no mandate to look at Option A.

China challenged the fact that that a mandate for the legal group had been adopted, and said that there was nothing in the Chair's scenario note that suggested that we cannot address Option A. It said that the Chair's scenario note is not a decision for the mandate of the organisation of group's work. We did not know what should be discussed, and how much time was being allocated to the group, it said. If necessary, another AWG-KP plenary was needed to take a decision on this matter.

New Zealand said that as they did not hear anyone object to Chair's proposal for work at the AWG-KP opening plenary, they assumed that that was the consensus at that time.

Brazil said that the scenario note is not decision, but a suggestion by the Chair. When it was time to consider it, we said that we are not willing to

discuss Option B. The Chair has no authority to go against the mandate of the AWG-KP.

Ghana then made a proposal to start work from Option A, then to move on to work that flows from that, and then if there is time, other issues. This was supported by Benin and Bangladesh.

Switzerland and the EU wanted to have certainty and agreement that there would be a space to discuss all the issues that are contained in the text.

Ghana further proposed asking the Secretariat to identify what are the consequential amendments.

Micronesia suggested that those who do not want to discuss do not have to engage or say anything, but those who do, can discuss.

At the start of the third session of the contact group in the afternoon, the Co-Chairs announced that they would like to have informal consultations with the Parties on the Ghanaian proposal.

China said that while it appreciated the Ghanaian suggestion as a way to move forward, it doubted that the Secretariat should undertake the task, as that is the job of Parties. It said that it is clear that Option A contains the consequential amendments. It urged for sequencing and focusing the work of the group, as Option A together with progress in numbers contact group, could be basis for draft decisions in Cancun.

Australia and the EU agreed that it would not be useful for the Secretariat to undertake the task, as Parties would still disagree.

The Legal Advisor of the Secretariat, Dan Ogolla said that the task would be putting the Secretariat in a difficult position. He referred to a previous paper by the Secretariat that identified possible elements for an amendment to the Kyoto Protocol pursuant to Article 3.9 that informs on the Secretariat's view on what are consequential amendments.

(The document FCCC/KP/AWG/2009/3, confirms that only the Articles in Option A are consequential amendments, as it deals with Article 3.1, 3.7 and 3.9. Two other provisions that are contained in Option A are not considered in the Secretariat's paper (Article 4.2 and 4.3) and Mr. Ogolla stated that in his view, they are also consequential amendments, and the Secretariat's document should have included those Articles.)

The Co-Chair said that they would conduct consultations to see what are elements in Option A and then in Option B that Parties are willing to discuss.

This immediately led to Parties re-stating their positions. Australia said that it would expect everything to be addressed.

Brazil and Bolivia said that Option B is not in the mandate of the AWG-KP.

China said that it preferred Option A and that it was not simply an issue of time whether or not Option B is discussed, and that confirmation by the Chair of the AWG-KP is needed that the legal contact group should follow the mandate of the AWG-KP.

New Zealand said that it was disingenuous to say that we are not supposed to discuss anything not in the mandate, but that yesterday the Brazilian proposals on how to deal with carry over of surplus AAUs were discussed. (These were discussed in the contact group on numbers.)

The Co-Chair said that in Option A the group could only discuss what is not being discussed in other contact groups. Then it could move on to Option B. The issue of the mandate would have to be discussed in a plenary session of the AWG-KP.

Brazil said that it could not accept the Co-Chair's proposal and agreed with China that the mandate of the AWG-KP would have to be clarified in a plenary session of the AWG-KP. China also said that the status of the AWG-KP Chair's scenario note had to be clarified.

The Co-Chair said that they would conduct informal consultations and that the AWG-KP would have to consider the issue of mandate.

This led to further disagreement. The Chair of the AWG-KP appeared in the room and was greeted with applause.

The AWG-KP Chair said that the legal contact group was convened based on recommendations he made. There was no a priori assumption that everything he referred to was what Parties could agree to. He was inviting the Parties to engage in discussions without prejudicing the outcome. He said that at a minimum, Parties could exchange views on those items, and had not intended for a discussion of mandate, which is for the CMP. He

said that the Parties should engage in a discussion and report to CMP 6, on the basis of the report from CMP 5 which contained all the proposals from Parties. He said that he would be happy to make proposals and was in the Parties' hands on how to proceed. He urged Parties to listen and hear the rationale, and not to refuse to even before beginning, even if some proposals may be difficult to accept.

Brazil said that the legal contact group is not supposed to discuss proposals, as these should be discussed in the substantive contact groups. Option B is not in the mandate of the AWG-KP and at this late point in time, it should not discuss other amendments to the Kyoto Protocol as these should be discussed in the CMP.

China said that it was right to conduct substantive discussions to fulfill the mandate of the AWG-KP. It said that issues relating to the scale of emission reductions for Annex I Parties should be discussed in the numbers contact group. In the Chair's scenario note, the issues listed from Option B are legal issues but have nothing to do with the mandate of the AWG-KP. Legal issues are confusing, but they should not be used to change the mandate of the contact group. The legal group is not supposed to discuss all legal matters relating to the Kyoto Protocol. It does not have the authority to amend the whole Kyoto Protocol.

It said that the issues listed in the Chair's scenario note has changed the mandate of the AWG-KP and prejudged its outcome. Option A is not mentioned, but it cannot be that we cannot discuss Option A. We had a very rushed and quick opening plenary without an opportunity to discuss what would be discussed, it said. There was no clear understanding of the time allocation.

India agreed that what the legal group is supposed to do flows from the AWG-KP mandate.

Micronesia, speaking for AOSIS, said that Parties should be allowed to explain why they have made proposals.

New Zealand said that it was not possible to discuss the other amendments at the CMP as Ministers would not understand. (However, the regular meetings of the CMP is at the negotiators level.)

The AWG-KP Chair said that the purpose of legal group is to consider proposals by Parties, and not

for Parties to say prior to that that they are not prepared to consider those proposals. He said that “You could give common courtesy to that Party to listen to their proposals. You could let them know that you don’t agree.”

(However, this is not the agreement of the AWG-KP on the nature of the legal group, which is to consider legal matters that are referred to it by the other contact groups.)

He referred to the work programme adopted in Poznan. (This work programme contains “other issues” that are being taken up in the other contact groups, and are addressed in draft CMP decisions in the Chair’s proposed text. This is distinct from the additional proposals to amend the Kyoto Protocol.)

Ghana said that it agreed with China and Brazil and suggested starting with Option A, then using the Secretariat’s paper as a guide, to consider Option B to see if there are other consequential amendments there, as perhaps the Secretariat’s paper was not exhaustive.

The AWG-KP Chair proposed that the group should consider Ghana’s proposal and discuss when it meets again.

China expressed concern that three slots had already been used by the contact group and if there was sufficient time for the numbers discussion. It asked if there would be another legal contact group.

Australia said that it wanted a clear understanding that everything will be discussed, and it might be necessary to carve out some time from the other contact groups. It asserted that as the legal group

did not progress, other groups had not been able to progress.

The AWG-KP Chair said he would consult on all these matters.

Postscript

At the closing plenary on Saturday, the Co-Chair of the legal contact group reported that the group had met again that morning. He said that some Parties raised the issue of mandate of the AWG-KP and that proposals contained in Option B are out of the mandate of the legal contact group. The issue was resolved when the contact group agreed to go through Chapter I of the text, starting with Option A, and then to Option B, with the understanding that the objective was to hear the thinking behind the purpose of text, and to streamline or clarify the text as necessary.

The Co-Chair said that the views of the Parties on this matter will be reflected in the report of the AWG-KP for this session. The discussion on all the relevant parts of the text did not imply that the text was endorsed or accepted by the contact group or Parties.

He said that Parties provided clarifications, and views were expressed both on the wording of the text and the concepts behind that, and that some Parties would like to discuss some of the provisions at the next session of the AWG-KP.

China, which has strong views on this mandate issue has requested that its own specific language to be reflected in the report.