

## Major clash of paradigms in launch of new climate talks

Geneva, 13 December (Meena Raman) – The main outcome of the two-week Durban climate change conference was the launching of a new round of negotiations known as the Durban Platform aimed at a new regime (whether a protocol or other legal instrument or an agreed outcome with legal force) under the UN Framework Convention on Climate Change and involving all countries.

The draft decision on this was provided at an informal plenary late on the night of Saturday 10 December long after the Conference was scheduled to end and when many Ministers and senior officials had already left Durban.

It was given to participants as part of a package of four decisions on a take-it-or-leave-it basis with little time for the members to consider or discuss among themselves in an unusual and unprecedented set of procedures.

The decision on the Durban Platform and how it was reached will be debated for a long time to come. It was also unusual how a decision to launch such an important negotiation was made with very little terms of reference to frame the talks or the outcome that will come from it.

The details of the terms of reference are now scheduled to be worked out in the coming year. Given the circumstances in which the Durban Platform was launched, these talks on the framework to underpin the new regime can be expected to be tough and lengthy.

This is especially because different Parties have different paradigms on the substance and shape of a fair and effective climate change regime.

Many of the differences were papered over in the take-it-or-leave-it decision-making mode of the final plenary meetings, and the objections of developing countries, especially to many parts of the report and decision from ad hoc working groups on long-term cooperative action under the Convention

(AWGLCA) and Kyoto Protocol (AWGKP) were simply brushed aside by their Chairs (officials from the US and New Zealand respectively) and by the COP President herself.

However, the basic differences were most evident in the discussions on the reports of the working groups, and on the draft COP decision on Durban Platform during the plenary meetings on Saturday night and Sunday morning that preceded their adoption.

At the informal plenary discussion on the Durban Platform that launched the new round of talks, the highlight was a lengthy and eloquent plea by the Indian Environment Minister for equity to underpin any future regime, following a call by the European Union's chief climate official to alter the draft decision to ensure that the outcome of the new talks would be legally binding.

It was a long, intense and dramatic ending at the Durban climate talks which concluded only around 7am on Sunday, 11 December, when it was scheduled to finish on the evening of Friday, 9 December.

Negotiations were particularly intense over the push mainly by developed countries, led by the European Union, for a launch of a new process to develop a legally binding instrument aimed at mitigation efforts by all Parties, but without the usual reference (so prominent in previous such resolutions) to the principles of equity or common but differentiated responsibilities (CBDR). According to diplomatic sources, the United States was especially adamant that there be no references to these principles in the decision.

The draft decision proposed to the plenary by the South African Foreign Minister Ms. Maite Nkoana-Mashabane, in her capacity as President of the 17th session of the Conference of Parties (COP) to the UNFCCC was to “launch a process to develop a

protocol, another legal instrument or a legal outcome under the Convention applicable to all Parties, through a subsidiary body under the Convention hereby established and to be known as the Ad Hoc Working Group on the Durban Platform for Enhanced Action”.

This draft had been the outcome of a series of closed-door talks over the last few days and nights among 20 to 30 parties. The EU and other European countries and several developing countries including the Alliance of Small Island States were insistent on a legally binding regime (thus the terms protocol or other legal instrument) whereas India and China wanted to add the third option of “legal outcome”.

The third option was included in the final draft put by the COP17 Presidency to the plenary. Although an appeal was made to accept the texts of the four decisions as a whole, the EU’s chief climate official Ms. Connie Hedegaard asked for re-opening the Durban Platform decision to cancel the third option of “legal outcome.”

India’s Environment Minister, Ms. Jayanti Natarajan then made a strong plea for all options in terms of the legal form of the new process to remain on the table, including a “legal outcome” (instead of only a protocol or legal instrument as possible options) in the new process of talks, stressing the need for equity and the principle of CBDR to be the centre piece of the climate change debate.

In a strong and impassioned plea, the Indian Minister appealed to Parties not to push aside equity in the Durban outcome, as this would be the greatest tragedy. The Minister was not prepared to give a blank cheque and sign away the livelihoods of the poor when she did not know what the document (from the new process) would contain.

India’s position was supported by several developing countries including China, Pakistan, Bolivia, Egypt, Philippines and El Salvador.

In the draft given to the final plenary, the new process of negotiations is to commence work in the first half of 2012 and is to be completed no later than 2015 in order for the adoption of a protocol, legal instrument or legal outcome under the Convention, applicable to all Parties, at the 21st session (in 2015) of the COP and for it to come into effect and be implemented from 2020. The option of "legal outcome" was the bone of contention. It was eventually changed to "agreed outcome with legal force" after a on-the-floor negotiation by key Parties during a half-hour break. This left many

wondering what was the difference, if any, between "legal outcome" and "outcome with legal force."

What was most worrying for Ministers and senior officials from several developing countries, who were interviewed, was that the Durban climate talks were marked by an attempt by developed countries to push aside the principles of equity and CBDR, especially on the issue for launching the negotiations for a new regime. The US in particular was opposed to any reference in equity and CBDR in the decision to launch the new process.

At the plenary, following the plea by the Indian Minister to retain “legal outcome” option, the EU’s climate change Commissioner, Hedegaard proposed discussions with India on how to accommodate her concerns over the issue of equity.

The COP17 President Ms. Nkoana-Mashabane then proposed a suspension of the session (at around 3.30 am on Sunday morning) for an “informal huddle” between the EU and India to discuss this issue. This huddle soon saw many other Parties joining the discussions, including the United States, China, and Brazil.

According to one source who witnessed what took place, India was willing to take out the words "legal outcome" if the principles of "equity and CBDR" were incorporated in the document. According to the source, the EU was willing to accept this but US chief negotiator, Mr. Todd Stern opposed this and said that the equity and CBDR “will never fly” for the US and thus blocked an agreement between the EU and India.

Following further wrangling, in the final compromise, the words “legal outcome” was replaced with “agreed outcome with legal force”, which was suggested by Brazil’s chief negotiator, Ambassador Luis Figueiredo Machado.

Despite the explicit absence of the words ‘equity’ and ‘CBDR’ in the text, several lawyers and senior negotiators were of the view that a protocol, legal instrument or agreed outcome with legal force under the Convention must be consistent with the existing principles and provisions of the Convention and therefore the principles of equity and CBDR can be implied to apply. However, this view can be expected to be challenged especially by the United States, when the negotiations start.

The EU’s strong push for a new mitigation treaty came as a quid pro quo for it to undertake a second commitment period under the Kyoto Protocol for emissions reductions. A decision was also adopted

on the Kyoto Protocol on Sunday morning. It however fell short of confirming a second commitment period of the Protocol.

According to one expert observer, the language of the Kyoto Protocol decision was only of the nature of “taking note” of the “intention” of Parties to convert targets to real commitments “with a view” to adopting them at the next climate conference in December 2012. It thus remains to be seen if the commitments will be made, and if so what the numbers and substance will be.

In return, developed countries succeeded in securing a new process of climate talks on mitigation efforts by all Parties, without explicit reference to equity and CBDR.

The often heated exchange on the Durban Platform took place at a joint informal meeting of the COP17 and the 7th session of the Conference of Parties serving as the meeting of the Parties to the Kyoto Protocol (CMP) which was convened by COP/CMP President Mashabane, late night on Saturday, 10 December, following the closing sessions of the AWGKP and AWGLCA.

Mashabane outlined the elements of what she called the “Durban package”, which were (i) the second commitment period (2CP) for emissions reductions by Annex 1 Parties under the KP; (ii) a decision on the work of the AWGLCA; (iii) a decision on the Green Climate Fund (GCF) and (iv) an agreement on the Durban Platform for enhanced action.

Mashabane asked Parties to adopt each of the decisions without further debate and amendments when they are presented during the formal sessions of the COP and the CMP respectively, saying that Parties required “assurances from each other to agree to all the draft decisions”, clearly suggesting a “take-it or leave- it” approach. She said that this was needed to “make history and strengthen multilateralism”.

Several delegations expressed frustration that their concerns were not being heard when they were first raised during the closing sessions of the AWGKP and the AWGLCA prior to the joint-informal meeting of the COP and CMP.

The **EU’s Climate Change Commissioner, Connie Hedegaard**, said the EU had a point of utmost concern on the Durban package. What was within reach was a legally binding deal or a prospect for such a deal. For the EU, there was need for a legally binding deal as voluntary means (in relation to emissions reductions) was not enough and

international legislation was needed. She said the KP did manage to reduce emissions reductions. The EU wanted further progress through another protocol or legal instrument but was concerned about the words “legal outcome” (in the Durban Platform which was suggested by India) as this puts in doubt whether Parties were ready to commit (to emission cuts). She said that the EU was ready to commit to a 2CP for another 5 years and was almost alone in the KP. It was not too much for it to ask that after the 2CP, all Parties (including the US and developing countries) would be legally bound to take emission cuts and called for a single! legal instrument or protocol by 2018.

**Colombia** supported the call by the EU and wanted a legal instrument under the Convention by 2018. **Switzerland** also expressed similar views, saying that this was a new page in history.

**India's Minister of Environment and Forests, Ms. Jayanti Natarajan** in a passionate and strong response to the EU said equity was a centre piece in the debate on climate change not only for India but also for the entire world. She said many Parties came to her in different tones and voices and told her that unless she dropped the option of a “legal outcome” (in relation to the Durban Platform) India would be blamed (for blocking the negotiations). She asked what the problem was in adding one more option.

The Indian Minister said that she will not be threatened by intimidation. Referring to calls for a legal instrument, she asked how she could give a blank cheque and sign away the livelihoods of the poor (and not lifestyles of the rich), when she did not know what the document will contain. She asked where the principle of common but differentiated responsibilities (CBDR) was reflected and had no doubt that efforts were being made to shift the entire burden of climate change on countries that did not contribute to the problem.

Referring to the Durban Platform document, she said it was weak on CBDR as it refers to “launching a process to develop a protocol or another legal instrument or a legal outcome under the Convention applicable to all Parties.” Natarajan emphasized that she represented 1.2 billion people and that India had a tiny per capita carbon footprint of 1.7 tons and its per capita GDP was also low.

She said that India must not be made a scapegoat of the multilateral process. Referring to the Durban Platform document, she said that it was a product of 6 days of talking and all ideas were put forward

and what was captured in the document was the sense of the Chair.

She reminded Parties that India had placed the issue of 'equity' on the agenda of the COP but this was pushed somewhere else and was not in the main text (of the AWGLCA outcome document). She made a plea for the issue of equity not to be held hostage and said that it would be a grave tragedy if equity was put aside in Durban.

She appealed to Parties to allow the word "outcome" to remain in the Durban Platform document as a further option. She asked how this could be a crime or for India to be accused of collapsing the talks.

**Mr. Xie Zhenhua, Vice Chairman/Vice-Minister of the National Development and Reform Commission of China** in a very strong response, supported India. He said that the existing Convention and Protocol are legally binding but questioned if Parties were implementing them. The existing legal instruments spell out the principles of CBDR, respective capabilities and equity. To deal with climate change, all countries need to collaborate towards common goals, in accordance with respective capabilities, strengthen cooperation, and respond collectively. Till now, some countries have made promises, but have not fulfilled them. They have not taken real actions. We are developing countries. We need to develop. We need to protect the environment and to mitigate climate change and to eradicate poverty. Developed countries have to fulfill their promises, take concrete actions, and truly achieve the objectives in coping with climate change. We do not care what they are saying! but what we need is to see what is being done. Many developed countries have not fulfilled their promises. We have done what we are supposed to do, whereas, they have not done their part. What position are they in to judge us, he questioned.

**Grenada, speaking for the Alliance of Small Island States** said that they wanted a 2CP with meaningful numbers under the KP but did not get that in Durban. Hence, the effort is to bring up the ambition level through the legal form. Referring to the options in the Durban Platform document, it said that it was difficult to accept the option of "legal outcome" as it appeared to be an option for climbing down the ladder in terms of mitigation ambition by allowing countries to continue the track that brought climate change. If there was no legal instrument, Parties would be relegating vulnerable economies to death, with beautiful words such as access to development. It said that if "they develop

we die". It could not accept terms with no limits on emissions.

**Bolivia** in supporting India said there is need to think of commitments to emission reductions but also to address the right to development, right to food, right to eradicate poverty etc. The work of the new working group for the Durban Platform must address this. There is also the right of countries to participate in the equitable access to the atmosphere which has been used by a small group of countries. In an apparent reference to the US, Bolivia said that it was a paradox that a country with a large share of the emissions is not in the KP. When a legal regime is being built, Parties must be careful as to how the atmospheric space is distributed as those who are rich do not want to cut emissions while they want others to do this. The notion of a legal instrument applying to all must take into account poverty and the right to development. Behind the issues of emissions, there is wealth, misery and poverty and vested interests.

**The Philippines** was concerned that the Convention and the KP were in danger of being a relic of the past. It expressed deep concern that after over 5 years of negotiations on the further commitments for Annex I Parties under the Kyoto Protocol, Parties had again come short of arriving at a ratifiable amendment to KP's Annex B that would have ultimately gotten the Kyoto Protocol out of intensive care and back into life. It was deeply concerned that Parties had come short of this and had once again procrastinated. Parties were expected to send a strong political signal to the world in the form of adopting fully ratifiable amendments for the establishment of the 2nd Commitment Period of the Kyoto Protocol. It was heart-broken to see Parties divided and made a plea for not pitting one against another. We are against one real cruel enemy – and that is climate change.

Philippines was for environmental integrity as well as for sustainable and equitable growth. It stressed that equity is a fundamental concept whose reflection in our processes will ensure that we obtain a fair just outcome that achieves the objective of the Convention. It was open to a legally binding instrument, as we agree that a legal regime is important, but it should have been with the view to save the Kyoto Protocol and has not gotten KP out of intensive care.

**Pakistan** also said that it stood behind equity and CBDR. No matter how much world has changed, CBDR is still applicable. It said that it was strange that there was no reflection in the document on

equity and CBDR. It said that real consensus was when everyone was on board and that no single view should force others to submit. True multilateralism should have everyone on board.

**El Salvador** stressed the need to raise the level of ambition and address the finance gap, the mitigation gap and the equity gap. It hoped that the process launched in Durban took Parties to where it was needed to go.

**Brazil** said that climate change is a huge challenge as is fighting poverty and said that no country has done more to reduce emissions than Brazil. On a legally binding deal, it said Parties were on the verge of approving potentially what was more than the Berlin mandate (where the process towards the KP was launched) and the adoption of the 2CP under the KP. It was open to a new era of cooperation.

**Egypt**, in response to the EU on the need for clarity (in relation to mitigation), said there was need also for clarity on the issue of financial support with predictability, additionality and transparency. It said that developed country Parties, who were calling for a new legally binding instrument, did not show the same passion for the KP. It also stressed the importance of equity and CBDR. It said that form of the legal outcome should follow the function. There was need for flexibility in the Durban Platform to allow for the form of agreement needed according to what agreements are reached.

**Senegal** supported Egypt and the need for CBDR. It said that the Durban package was weak.

**Gambia, speaking for the LDCs** reiterated the need for a legally binding instrument that must provide strong and binding enforce to address all the pillars of the Bali Action Plan.

**Bangladesh** supported the Durban package and a legally binding deal, in addition to the 2CP. Although the texts (in relation to the decisions) have been watered down, it was prepared to accept them.

**Norway** shared the view of India that equity is important but wanted a legal instrument in 2015 and did not support a mere “legal outcome”.

The **US** said it embraced the full Durban package, including the need for a new legal instrument.

The **Democratic Republic of Congo for the African Group** said that in Durban, the KP did not die; there were outcomes on adaptation, financing, technology transfer and capacity building and the operationalising of the institutions of the

Convention. It regretted the lack of ambition and balance but could support the move for further progress on increasing the mitigation ambition so that Africa was secure.

**Malaysia** said that it was not clear on how the outcome from the AWGLCA was going to be addressed when several Parties had expressed a serious lack of balance and need for further work before it could be adopted. It was looking for a good package that allowed the AWGLCA sufficient time to restore the balance needed next year.

The COP President did not address Malaysia’s concerns.

The formal sessions of the CMP and the COP were then convened one after another. At the CMP, several concerns were raised over the outcome of work from the AWGKP but these concerns were not addressed by Mashabane, who proceed to gavel the adoption of the outcomes.

At the closing sessions of the AWGKP and AWGLCA held before the COP/CMP joint informal session on Saturday, many Parties raised several concerns they had on the respective reports by the Chairs of the two working groups, which reflected the outcomes of the work. In the case of the AWGKP session, several developing countries wanted amendments to be made to the outcome document but none were entertained by the Chair, Mr. Adrian Macey from New Zealand, except for an amendment suggested by the EU on the duration of the 2CP from a 5 year period (2013-2017) to a 8 year period (2013-2020). Both these options are now on the table. The report and the outcome of the work of the AWGKP was presented “under the authority and responsibility of the Chair”, which was unprecedented.

Likewise, in the case of the outcome of the work of the AWGLCA, the Chair of the working group Mr. Daniel Reifsynder from the US ignored calls by several developing countries not to adopt the report and to allow for further work to be done next year on the outcome document to rectify the existing imbalances, especially when the document was only presented to Parties late morning on Saturday. The Chair did not agree with the proposal and proceeded to transmit the document to the COP President under his own responsibility although it did not receive consensus, which was also an unusual move.

During and after the meeting, negotiators of many developing countries expressed deep concern about the procedures for adopting decisions at COP17.

The conference had been extended for almost two days, and Ministers and officials of many countries had already left. The closed-door meeting of about 30 parties left many others that were not invited in the dark.

The documents for the decisions in the final plenary meetings were distributed late, and some Parties complained they did not have the papers. There was no time for the Parties to study the papers. The Chairs of the AWG-KP and AWG-LCA did not take into account the disagreements that most Parties registered on the draft decisions but decided to transmit their reports almost unchanged (the only changes were to accommodate the EU on Kyoto

Protocol) to the COP and CMP. When the COP and CMP meetings were convened, there was little opportunity to re-open the reports and some attempts made by developing countries were ignored, while the only opportunity to re-open was provided to the EU over the “legal outcome” issue.

While COP17 and the CMP7 did not fall apart as many had predicted in the last day of the conference, the manner in which the decisions were achieved may be debated including for what it means for the future of decision-making in a UN multilateral setting for years to come.

(More reports to follow).