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Item 11 of the provisional agenda

Accelerated access to critical mitigation and adaptation technologies and related intellectual property rights

Item 12 of the provisional agenda

Equitable access to sustainable development

Item 13 of the provisional agenda

Unilateral trade measures

Proposals by India for inclusion of additional agenda items in the provisional agenda of the seventeenth session of the Conference of the Parties

Note by the secretariat

Addendum

This addendum contains a submission received from India on 7 October 2011 on items 11–13 of the provisional agenda of the seventeenth session of the Conference of the Parties. This submission is attached and reproduced here in the language in which it was received and without formal editing.

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Annex

Annotations to Agenda Items 11, 12 & 13

India

In accordance with Rule 10 of the draft rules of procedure being applied by the Parties to the United Nations Framework Convention on Climate Change (FCCC), India submitted three agenda items for inclusion in the provisional agenda of the seventeenth meeting of the Conference of Parties (COP-17). These are featured in the provisional agenda as:

Agenda Item 11: Accelerated access to critical mitigation and adaptation technologies and related intellectual property rights

Agenda Item 12: Equitable Access to Sustainable Development

Agenda Item 13: Unilateral Trade Measures

Relevant Documents

Proposals by India for inclusion of additional agenda items in the provisional agenda of the seventeenth session of the Conference of the Parties, Note by the secretariat, FCCC/CP/2011/INF.2

Provisional Agenda and Annotations, Conference of the Parties Seventeenth session Durban, 28 November to 9 December 2011, Note by the Executive-Secretary, FCCC/CP/2011/1

These annotations seek to provide a context for the COP's consideration of India's agenda items. In particular it seeks to explain the underlying concerns that inspired the inclusion of these items in the provisional agenda, as well as the goals sought to be advanced by considering these items.

Process, Forum and Time frame

India is seeking to foster a constructive discussion on these three important agenda items. In raising and seeking to address issues of central importance to India as well as other developing countries, India is hoping to catalyze, through discussion and debate, a progressive and well-founded agreement that Parties can take ownership of. India does not wish to impede the work of the Conference in any way. In particular, India does not wish either to hinder the operationalization of the Cancun Agreements or to prompt an unhelpful 'agenda-fight.' In this spirit and in order to ensure efficient management of the COP's time, India is willing to consider a range of fora and process options for addressing the three agenda items India has identified. These include:

- o Discussions in the COP Plenary, its contact groups, and/or in informals reporting back to the COP
- o Discussions in the AWG-LCA, its contact groups, and/or in informals reporting back to the AWG-LCA

Although India is willing to demonstrate flexibility in the choice of process and forum, it is of critical importance that the chosen forum has the ability to take formal decisions or at the very least recommend decision text that will form an integral part of any eventual composite decision text that emerges on these and related issues.

India is also willing to demonstrate flexibility on the timeframe taken to resolve these substantive issues. While an early resolution of the issues identified in India's three agenda items will unlock disagreements in other areas, India is willing to accept that these matters may only be resolved in subsequent meetings of the Conference of Parties. It is essential, however, that Parties identify at COP-17 a forum and process to address these issues, as well as ensure that these remain on the agenda for subsequent meetings of the Conference of Parties.

India would like to take this opportunity to assure Parties of its renewed commitment to the fundamental principles of the Convention and its Kyoto Protocol, as well as to the multilateral process.

Agenda Item 11: Accelerated access to critical mitigation and adaptation technologies and related intellectual property rights

Background: FCCC Article 4(5) requires certain developed countries to promote, facilitate and finance the transfer of environmentally sound technologies and know-how to developing country Parties to enable them to implement the provisions of the FCCC. Given the serious energy poverty and developmental challenges many developing countries face and are compelled to prioritize, access to critical mitigation and adaptation technologies is central to their ability to address climate change. The Bali Action Plan recognizes this and requires Parties to develop, 'effective mechanisms and enhanced means for the removal of obstacles to, and provision of financial and other incentives for, scaling up the development and transfer of technology to developing country parties', as well as to 'accelerate deployment, diffusion and transfer of affordable environmental technologies.' The Bali Action Plan also posits, in keeping with FCCC Article 4(7), that the provision of measurable, reportable and verifiable technology transfer is a pre condition to nationally appropriate mitigation actions in developing countries. At Cancun, Parties agreed to set up a Technology Mechanism and Networks of Climate Technology Centers. Whilst, if appropriately operationalized, these institutional interventions will help build capacity for deployment of existing technologies, they do not address the issue of access to intellectual property rights (IPRs) of critical climate friendly technologies.

Many of the technologies that can help India and other developing countries achieve a lower carbon growth are out of their reach due to IPRs and prohibitive costs. The India firmly supports a facilitative IPRs regime that balances rewards for the innovators with the common good of humankind and thereby enables developing countries to take early and effective mitigation and adaptation actions at the national level. In the absence of such a facilitative IPRs regime the objective of advancing nationally appropriate mitigation and adaptation actions at the scale and speed warranted by the Convention will not be achievable. The Prime Minister of India recently noted that climate justice in India's view means 'a fair, equitable and transparent global regime for technology transfers.' India's National Action Plan on Climate Change also underscores the importance of a global IPR regime that enables technology transfer to developing countries under the FCCC. Such a regime will catalyze more effective and numerous climate-based interventions in India and other developing countries and must be diligently pursued in the multilateral process.

Proposed Actions: A facilitative IPRs regime relating to climate-critical mitigation and adaptation technologies must form a cornerstone of a regime for advancing global actions to address climate change. Should negotiations on the Bali Road Map remain immature or unbalanced across the two tracks, emerging understandings on a facilitative IPRs regime relating to critical mitigation and adaptation technologies must be reflected in the operational provisions of intervening COP decision texts.

At COP-17, Durban, Parties will need to decide on a process and time frame that would best suit such a discussion. The ongoing AWG-LCA work programme on technology development and transfer is scheduled to complete its work in 2011 and report to COP-17. In any case it is not mandated to consider IPRs issue, hence an alternative dedicated process must be found. Among the options are the following:

- o Launching a process under the COP or AWG-LCA clearly tasking it with crafting a facilitative IPRs regime relating to critical mitigation and adaptation technologies, and identifying desired inputs, eventual outcome and timeframe to reach it
- o Reintroducing the IPRs issue under the relevant AWG-LCA agenda item/process on technology

Relevant Documents

The Cancun Agreements: Outcome of the work of the Ad Hoc Working Group on Long-term Cooperative Action under the Convention, Decision 1/CP.16, FCCC/CP/2010/7/Add.1, paras 113-129

Relevant Indian Submissions

Agenda Item 12: Equitable Access to Sustainable Development

Background: The FCCC and its Kyoto Protocol, as well as several COP and CMP decisions, contain numerous references in preambular and operational text to 'equity' and the related principle of 'common but differentiated responsibilities and respective capabilities.' Both these notions are highlighted in different contexts inter alia in the Berlin Mandate, 1995, the Delhi Declaration, 2002, the Bali Action Plan, 2007, the Copenhagen Accord, 2009, and the Cancun Agreements, 2010. Notwithstanding their frequent invocation, the core content of the notions of 'equity' and 'common but differentiated responsibilities and respective capabilities', the relationship between these notions, the nature of the obligations they entail, as well the applications they lend themselves to, have remained contested over the years.

There is agreement, however, that these notions, whatever their precise boundaries may be, form a fundamental part of the conceptual architecture of the climate change regime and must therefore guide interpretations of the obligations of the Parties as stipulated under the UNFCCC. There is also a recognition that these notions are intricately linked to FCCC Article 4(7) which endorses first, a delicate and equitable balance of responsibilities between developed and developing countries, and second, that economic and social development and poverty eradication are the first and overriding priorities of developing countries.

The Cancun Agreements (LCA), in addition to endorsing the notions of 'equity,' common but differentiated responsibilities and respective capabilities,' and elements of FCCC Article 4(7), in para 6, also use the term 'equitable access to sustainable development' to condition and qualify any identification of a timeframe for global peaking of greenhouse gas emissions. The term 'equitable access to sustainable development,' coined anew in the lead up to Cancun captures many dimensions of equity. In particular, India believes, it takes within its fold an approach premised on an understanding of the atmosphere as a global common to which all nations must have equitable access. Equitable access, for its part, must derive from the notion that all human beings have an equal entitlement to the global atmospheric space, and that in determining just shares of the remaining atmospheric space, past usage (or over

usage) of the global atmospheric space must be taken into account. For developing countries like India with serious energy poverty and developmental challenges, a climate regime built on principles that do not ensure equity will impose severe limitations on its ability to lift its people out of poverty. It is imperative therefore that the equitable basis on which the climate regime is to be structured first be discussed and fleshed out, and next be used as the optic through which the regime is interpreted and developed.

India hopes through a discussion under this agenda item to foster a constructive conversation on the equitable basis for future action in the climate regime. Until Parties arrive at an equitable basis for further climate action that builds on principles and provisions of the FCCC and the Kyoto Protocol there can be limited progress in the negotiations. Rote invocation of equitable principles or notions - which lend themselves to multiple interpretations and offer little substantive guidance - whilst important, is radically insufficient to provide either the reassurance developing countries need or to function as trigger to more ambitious climate actions.

Proposed Actions Shared understanding on an equitable basis for climate action emerging from these discussions must fundamentally shape the regime for addressing climate change. Indeed, it would be appropriate to caution at this point, that without such a shared understanding on an equitable basis for climate action, negotiations cannot reach a sufficient degree of maturity in the LCA track.

Should negotiations on the Bali Road Map remain immature or unbalanced across the two tracks, the shared understanding on an equitable basis for climate action emerging from these discussions must be reflected in the operational provisions of intervening COP decision texts.

At COP-17, Durban, Parties will need to decide on a process and time frame that would best suit such a discussion. Among the options are the following:

- o Launching a new dialogue/platform/process under the COP clearly identifying the task, desired inputs, eventual outcome and timeframe to reach it
- o Introducing 'equity checks' under relevant LCA agenda items/processes and sub-items including in particular on shared vision, mitigation, finance, technology and review

Relevant Documents

The Cancun Agreements: Outcome of the work of the Ad Hoc Working Group on Long-term Cooperative Action under the Convention, Decision 1/CP.16, FCCC/CP/2010/7/Add.1, para 6

Relevant Indian Submissions

Agenda Item 13: Unilateral Trade Measures

Background: Indira Gandhi, former Prime Minister of India, famously opined at the Stockholm Conference on the Human Environment, that poverty is the greatest polluter. It is in implicit recognition of this view that the FCCC endorses the value of sustainable economic growth and development, as these will enable developing countries to pull themselves out of poverty and better address climate change. Sustainable economic growth and development are best fostered by a supportive and open international economic system, which in turn requires countries to refrain, in India's view, from engaging in unilateral trade and other measures.

FCCC Article 3(5) provides that '[m]easures taken to combat climate change, including unilateral ones, should not constitute a means of arbitrary and unjustifiable discrimination or a disguised restriction on international trade.' This text is cited verbatim in the Cancun Agreements (LCA), in para 90, in the section on 'Economic and Social Consequences of Response Measures.' Although FCCC Article 3(5) provides some protection, given the growing number of unilateral trade and other measures sought to be imposed on developing countries - from border carbon adjustment measures to taxes - in the name of climate protection, India believes that any agreed outcome of the AWG-LCA process must contain a firm and unambiguous commitment from developed countries that they will not resort to unilateral trade measures.

There are several reasons to spurn unilateral trade and other measures in the name of climate protection. First, the climate regime - the FCCC and its Kyoto Protocol, and COP/CMP decisions - is and must remain the principal forum for fashioning international climate policy. The climate regime with near-universal membership, sophisticated multilaterally agreed principles, rules and institutions to draw on, and frequent negotiating opportunities offers the best chance of arriving at an equitable and effective solution to the climate change problem. Unilateral trade and other measures taken by countries and the retaliatory actions they spawn can only lead to fragmented, overlapping, transaction-intensive and sub-optimal climate policy.

A second related reason to spurn unilateral trade and other measures is that climate policies crafted nationally/regionally and imposed beyond borders is unlikely to accurately reflect the principled balance of obligations in the climate regime. The European Union's extension of its Emissions Trading Scheme to aviation, and thereby to all carriers landing in or departing from EU airports offers a ready example. First, the EU scheme, subject to a few limited exceptions, applies to all airlines. The scheme stands in violation of the UNFCCC as it does not respect the principles of CBDR of developed and developing countries and proposes to operate the ETS outside the EU boundaries without multilateral or bilateral consent. Further, EU member states have the discretion to determine how revenues from the auctioning of GHG allowances will be spent. Although intended for EU mitigation activities, and adaptation in the EU and developing countries, there is no obligation to deploy the revenues thus. The FCCC balance of obligations requires developed countries to provide financial assistance to developing countries, yet here developing country airlines will be contributing to climate and other activities in the EU. In this instance, unilateral measures taken in the name of climate protection turn the FCCC-Kyoto balance of obligations on their head. Unilateral measures imposed beyond borders lend themselves to such perversions of multilaterally agreed frameworks for action.

Third, whilst multilaterally agreed policies - developed through negotiated compromises between consenting states - implicitly command legitimacy, unilateral measures that seek to govern actors beyond their borders raise serious legitimacy concerns. Unilateral policies and actions emerge from political processes that the actors, they seek to influence or govern, are not party to. Such policies and actions therefore represent particular strains of opinion and/or stem from mixed motives.

Given the opacity internationally of the domestic/regional political processes that lead to their adoption, unilateral policies lend themselves to a perception of partiality and hidden motives, and are therefore inimical to the confidence building that is central to the multilateral climate negotiations.

Finally, it is also worth bearing in mind that if nations are allowed to engage in unilateral trade and other measures to address climate change they will have little incentive to participate and reach compromise solutions in multilateral process. Far from furthering the fight against climate change, unilateral trade and other measures to address climate change chip away at the multilateral process and the principles on which the climate regime is built. Further, they threaten the outcomes that may be reached.

Proposed Actions: The CoP should decide and prohibit, in prescriptive language, Parties from engaging in unilateral trade and other measures in the name of climate protection. Should negotiations on the Bali Road Map remain immature or unbalanced across the two tracks, similar language must be captured in the operational provisions of intervening COP decision texts.

At COP-17, Durban, Parties will need to decide on a process and time frame that would best suit such a discussion. Among the options are the following:

- o Launching a process under the COP or AWG-LCA tasking it with drafting language prohibiting Parties from engaging in unilateral trade and other measures
- o Pursuing the issue under the relevant LCA agenda item/process on response measures, and/or on shared vision

At COP-17, Durban, in the chosen process, Parties will also need to discuss and agree on language addressing unilateral trade and other measures. In India's view the following language captures the key elements and offers a useful starting point:

Developed country Parties shall not resort to any form of unilateral measures, including tariff, non-tariff, and other fiscal and non-fiscal border trade measures, against goods and services from developing country Parties on any grounds related to climate change, including protection and stabilization of climate, emissions leakage and/or cost of environment compliance; recalling the principles and provisions of the Convention, in particular Article 3, paragraphs 1, 4 and 5, Article 4, paragraphs 3, 5 and 7, and taking into account the principles of equity, common but differentiated responsibilities and respective capabilities and the obligations of the developed country Parties to provide financial resource, transfer technology and provide capacity building support to the developing countries.

Relevant Documents

*The Cancun Agreements: Outcome of the work of the Ad Hoc Working Group on
Long-term Cooperative Action under the Convention, Decision 1/CP.16, FCCC/CP/2010/7/Add.1, para 90*

Relevant Indian Submissions
