Foley Hoag Climate Update

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The Boston office of Foley Hoag LLP, the Paris office of Foley Hoag AARPI and Matthieu Wemaere collaborated on the production of this white paper.

Only five weeks ahead of COP21, the Ad Hoc Working group on the Durban Platform for Enhanced Action (ADP) – the subsidiary body of the UNFCCC – held its 11th Part of its 2nd Session in Bonn, Germany, from 19th until 23rd October. This was the last scheduled technical negotiating session before the Paris Conference.

After the September session of the ADP, negotiators agreed to build upon progress made on substance and to task the ADP co-chairs with producing a concise "non paper". On October 5th, the ADP co-chairs released their "non paper", including a draft Agreement and draft accompanying Decisions of the Conference of the Parties (COP) to the UNFCCC for the adoption and implementation of this Agreement, including for the pre-2020 period to prepare for its entry into force by stimulating efforts to fill in the ambition gap with respect to the emission trajectory required by 2020 in order to meet the "2°C objective" (i.e. between 8 and 10 Gigatons of CO2 eq. according to the UNEP Emission Gap Report 2014).

With this "non paper", the ADP co-chairs managed to turn the 80-page document that came out of the June and September Sessions into a concise and readable 20-page document. The key question though was whether all Parties would accept this "non paper" as the basis for the negotiations of the new universal climate agreement and accompanying decisions at the October Session of the ADP.

It did not take long to get an answer. As soon as the session opened, most developing countries, very much influenced by the Like Minded Developing Countries Group led by China, immediately criticized the "non paper" as being imbalanced with respect to their demands, particularly on the most contentious issues of differentiation and climate finance.

After the second day, when Parties were invited to express their views on what should be added or removed into the draft Agreement proposed in the co-chairs' "non paper", the rest of the October session was spent in spin-off groups where, for each section of the draft Agreement, Parties could make and discuss proposals, adding a large number of options they deemed necessary to balance the text between developed countries and developing countries' expectations. In the end, the October Session produced a much more complex, but hopefully negotiable, 55-page document, including a draft Agreement and accompanying COP Decisions. Despite the attempts to rationalize options in spin-off groups, this 55-page document still contains more than 1500 brackets around various elements, showing how much the Parties remain in disagreement.

Given that the most recent draft has apparently failed to resolve any of the important outstanding political choices, some may have lost confidence in the capacity of this process to deliver in Paris. However, some others still believe that this new text better reflects the state of play of the negotiations, and that the parties are more knowledgeable and better prepared to finally engage in real negotiations.

On the positive side, four additional countries submitted their Intended Nationally Determined Contributions at the October Session, bringing the total of INDCs up to 155, covering 90% of global emissions. Unfortunately, the proposed contributions do not provide a basis for staying below the 2° Celsius objective. Indeed, some analysts and advocacy group estimate that global temperatures could increase between 2,7 and 3,4° Celcius by the end of this century.

On substance at the October ADP session, the most contentious issue remained how to differentiate rights and obligations between developed and developing countries, with South Africa chairing the G77&China Group, calling for a rigid binary differentiation and division of responsibilities as enshrined by the UNFCCC in 1992. This rigid position can be seen as a regrettable step back, because a number of developing countries had expressed interest in and support for self-nuanced differentiation based on national contributions, with some flexibility for each Party to define what is ambitious and equitable in the light of different national circumstances, an option that is largely supported by developed countries, including the USA.

On the collective long-term mitigation goal, the current text contains three options. However, it is clear that this is an issue that must be resolved at the ministerial level. In effect, there must be a political decision on how to refer to science; whether a global decarbonisation or transformation can be encouraged; if pathways to reduce emissions can be set, including a peak by a certain date and mid- and long-term levels or ranges of emission reductions by 2030 and 2050; and if a reference can be made to carbon or climate neutrality by a certain date (2050 or 2100).

Obviously, there is strong link between the collective long term goal summarized below and the purpose of the Paris Agreement:

> "*to hold the increase in the global average temperature [below 2 °C][below 1.5 °C][well below 2°C][below 2 °C or 1.5 °C] [below 1.5 °C or 2 °C][as far below 2°C as possible] above pre-industrial levels by ensuring deep cuts in global greenhouse gas [net] emissions; to pursue a transformation towards sustainable development, to foster societies that are resilient to climate change and economies that are low in greenhouse gas emissions and to ensure that food production and distribution are not threatened; and to increase their ability to adapt to the adverse impacts of climate change [and to effectively respond to the impacts of the implementation of response measures and loss and damage.].*

The text on climate finance has also expanded, with a number of complex additions requested by developing countries, which were upset with the text proposed by the co-chairs in their "non paper" of October 5. Basically, the latter suggested that any country in a position to do so should contribute to climate finance, with the target of USD 100 billion per year to be mobilized by 2020 as a minimum amount to be scaled up from 2020 and onwards. Developed countries, in particular the European Union, keep proposing that all Parties should take action to mobilize climate finance according to their respective and evolving capabilities and that such mobilization should be adapted to future changes, which should sound very reasonable from the other side of the Atlantic, keeping in mind the repeated demands from the US delegation to ensure the mobilisation of domestic climate finance and its effective use. In the end, this issue will be a crucial element of the deal. Developing countries rightly point out that developed countries have not demonstrated how they would mobilize USD 100 billion per year by 2020 and to scale up climate finance beyond 2020. Developed countries rightly point to the role and engagement of the private sector in mobilizing investments in climate mitigation and adaptation. The recent OECD Report on climate finance stating that USD 64 billion could be mobilized already did not reassure developing countries on this particular point.

These critical issues – differentiation, long-term goal, climate finance, and equity were discussed in Paris during the pre-COP meeting held on 8-10 November, bringing more than 80 Ministers at the invitation of the incoming French Presidency of COP21. This was the last window of opportunity for engagement from both sides before COP21 starts, in as far as not much can be expected from the forthcoming G20 Summit to be held in Antalya on 15-16 November, for which the draft communiqué in circulation only provides for one sentence wishing COP21 to be a success.