

(b)(6)

From: (b)(6)
Sent: Friday, January 23, 2015 6:53 PM
To: (b)(6)
Subject: FW: Kyoto Negotiating History

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From: (b)(6)
Sent: Tuesday, January 13, 2015 9:51 AM
To: (b)(6)
Cc: (b)(6)
Subject: Re: Kyoto Negotiating History

Great - thanks so much for doing this. Interesting, and potentially useful, that a short version was prepared 'w/o prejudice' to all the proposals on the table. Fyi, as I recall it, we were keeping open the amendment option because it only requires 2/3 (I think) of Parties to adopt -- and we were worried about Saudis/others blocking consensus. I don't remember another option being considered, as Cop 2 had already decided on legally binding targets.

From: (b)(6)
Sent: Monday, January 12, 2015 09:26 PM Eastern Standard Time
To: (b)(6)
Cc: (b)(6)
Subject: Kyoto Negotiating History

Dear All,

For your reference and consideration, a few initial points and issues about the 1997 Kyoto negotiating history.

Content of a "Negotiating Text": The Kyoto "negotiating text by the Chairman" was a 100+page compendium of, in essence, Party proposals (see first attachment). For example, there are 10 separate proposals for the preamble; 7 for the objective. Titles are still included, but a footnote notes that they are "solely to assist the reader." The document was characterized in the covering report as "organizing" the texts adopted at the previous (sixth) AGBM session as well as additional proposals submitted up until 1 April. (NB: The text had previously evolved through various stages, including a quasi-narrative "synthesis of proposals" in November 1996, to a "framework compilation" in February 1997. During this process, the Chair had employed various techniques including organizing "roundtables" for informal discussions of Parties' proposals and of issues such as differentiation.)

Subsequent evolution of the text: At the session following the issuance of the negotiating text, in July/August, the Chair convened informal consultations on various topics (quantified emission limitation and reduction objectives; policies and measures; introductory and final clauses; etc), and subsequently issued a report in the form of bracketed and non-bracketed material with some editorial observations/notes to the reader. (FCCC/AGBM/1997/INF.1.) At the same July/August session, the Chair was given a mandate to issue a "consolidated negotiating text." This consolidated negotiating text, issued prior to the October session, is 23 pages long, and it includes some brackets and, for Art 14, two alternatives (see second attachment). Notably, it was issued "without prejudice" to the original negotiating text or original proposals from Parties "which remain before the Group." The consolidated text is characterized as drawn from the work of the AGBM at the previous session as well as "informal consultations conducted by the Chairman."

Legal Form: The legal form of the instrument was not decided until the December COP. Documents through the year mentioned two possible types of legal instrument -- a protocol and amendment -- but left open the door to other (unspecified) options. Presumably one other option could have been a COP decision. It is not clear what additional options might have been possible/considered. Notably, both the attached documents (at paras 7 and 5, respectively) state that the negotiating text has been "structured as a protocol," and flag that if another option, such as an amendment, is selected, the text would need to be restructured accordingly. Apparently, at one point quite late in the process, a version structured as an amendment was issued. (In pitching an agreement rather than a protocol, we will likely face questions about structure, and whether there is a substantive difference between the two instruments, or whether it is simply an issue of nomenclature/arguably avoiding the 6-month rule.)

Applicability of 6-month Rule: Under the Convention, the six-month rule applies to protocols and amendments, per Art 15.2 and 17.2 respectively (in fact it applies to annexes, too). Specifically, the Convention provides that "text of any proposed [amendment]/[protocol] shall be communicated to the Parties by the secretariat at least six months [before the session/meeting at which they are to be adopted.]" During the Kyoto process, there was clearly an emphasis on making sure the rule was met. As a practical matter, the rule needed to be met in order not to foreclose options and limit the choice of the Parties. But perhaps Parties did not truly conceive of any alternative to a protocol or an amendment, and so did not need to think through whether there were possible instruments that did not require the six-month rule. Indeed, at times the approach seems sloppy or inconsistent. For example, at one point the Chair seemed to equate "another legal instrument" with an amendment ("The AGBM will recall that the text of a proposed protocol or another legal instrument must be circulated in all six official languages of the United Nations by 1 June 1997 in order to meet the requirements of Articles 15.2 or 17.2 of the Convention") whereas later he implied that an amendment was only one possible category of "another legal instrument" ("Parties may wish to note, however, that other options are still open to the AGBM and that, were agreement to be reached on another legal instrument, for example an amendment..." (See FCCC/AGBM/1997/2 at para 9, emphasis added; and FCCC/AGBM/1997/7 at para 5.)

Interpretation of 6-month Rule: The Chair interpreted the 6-month rule as follows: "Parties will recall that, in accordance with Article 15.2 or 17.2 of the Convention, the negotiating text produced to meet the 1 June 1997 deadline should include all the basic concepts on which the AGBM will negotiate up to the third Conference of the Parties (COP 3). Therefore, whilst proposals additional to this negotiating text may be put forward, these should be clearly derived from the submissions already within it and should not introduce substantially new ideas" (first attachment, para 2). The Executive Secretary's view appeared broader, at least as paraphrased in the report of the March session -- the last session before the negotiating text would need to issue: "the main characteristics of the text would therefore need to be agreed [here]. He further observed that, whilst additional proposals could be accepted after 1 June, these should fall within the conceptual framework of the text prepared by that deadline." (FCCC/AGBM/1997/3 at para 3; emphasis added.)

Working method and process: The documents from the sessions leading up to the COP in Kyoto are worth a look for what they reveal about working methods and related issues, eg: the Chair's use of groups; the frequent requests for input from Parties, eg, to submit proposals and/or views on specific issues; the fact that the Chair was mandated to produce a negotiating text and a consolidated text/seemed to hold on to control of the text; the carefulness and caveating with which all textual options and issues of legal form remained open, etc. Documents can be found at <http://unfccc.int/cop3/resource/agbm.htm> Also, a brief history of the process can be found at <http://www.iisd.ca/vol12/enb1276e.html>

It might be useful to prepare a timeline of the Kyoto process and, as (b)(6) has noted, try to analyze how the six-month rule worked in practice (eg, it seems new ideas were incorporated post negotiating text, such as the CDM).

It would also be useful to do some further thinking on what lessons can be learned from the process, and what will or must be different this time around. For instance, any calls for submissions by Parties are bound to generate far more proposals, given that we are working on an agreement that will require commitments from all, and given the demands/concerns we have heard from Parties as to the content of the new agreement.

It is also interesting to note that "negotiations" did not technically start until issuance of the negotiating text, although Parties were encouraged in their review of the "framework compilation" to "narrow the range of proposals and concentrate on the major options" in order to aid the development of a negotiating text. Parties were also told at the stage of the Kyoto process that roughly correlates to where we are now: "While it would be premature at this stage to embark on a word-by-word analysis of text, Parties may find it useful to exchange views on their preferred proposals on a section-by-section basis, in order to identify both areas of convergence and options that can be put aside for future consideration." (FCCC/AGBM/1997/2 at para 9.)

Best,

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