

Legal and Institutional Mechanisms

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EXECUTIVE SUMMARY

- 1) The coordinators' report has as its primary objective the compilation of elements that might be included in a future framework Convention on Climate Change, and a discussion of the issues that are likely to arise in the context of developing those elements.
- 2) There is a general view that while existing legal instruments and institutions with a bearing on climate should be fully utilized and further strengthened, they are insufficient alone to meet the challenge. A very broad international consensus has therefore emerged in the IPCC, confirmed notably at the 44th United Nations General Assembly, on the need for a framework Convention on Climate Change. Such a Convention should generally follow the format of the Vienna Convention for the Protection of the Ozone Layer, in laying down, as a minimum, general principles and obligations. It should further be framed in such a way as to gain the adherence of the largest possible number and most suitably balanced spread of countries while permitting timely action to be taken; it should contain provision for separate annexes/protocols to deal with specific obligations. As part of the commitment of the parties to action on greenhouse gas emissions and the adverse effects of global warming, the Convention would also address the particular financial needs of the developing countries, the question of the access to and transfer of technology, and institutional requirements.
- 3) The paper points out a number of issues to be decided in the negotiation of a Convention. In general these are:
 - the political imperative of striking the correct balances: on the one hand, between the arguments for a far-reaching, action-oriented Convention and the need for urgent adoption of such a Convention so as to begin tackling the problem of climate change; and, on the other hand, between the cost of inaction and the lack of scientific certainty;
 - the extent to which specific obligations, particularly on the control of emissions of carbon dioxide and other greenhouse gases, should be included in the Convention itself or be the subject of separate protocol(s);
 - the timing of negotiation of such protocol(s) in relation to the negotiations on the Convention.
- 4) In particular, within the Convention the following specific issues will need to be addressed:
 - *financial needs of developing countries*. The need for additional resources for developing countries and the manner in which this should be addressed, particularly in terms of the nature, size, and conditions of the funding, even if detailed arrangements form the subject of a separate protocol, will have to be considered by the negotiating parties;
 - *development and transfer of technology*. The basis on which the promotion of the development and transfer of technology and provision of technical assistance to develop-

- ing countries should take place will need to be elaborated, taking into account considerations such as terms of transfer, assured access, intellectual property rights, and the environmental soundness of such technology;
- *institutions*. Views differ substantially on the role and powers of the institutions to be created by the Convention, particularly in exercising supervision and control over the obligations undertaken.
- 5) The inclusion of any particular element in the paper does not imply consensus with respect to that element, or the agreement of any particular government to include that element in a Convention.
- 6) The coordinators have not sought to make a value judgment in listing and summarizing in the attached paper the elements proposed for inclusion in a framework Convention: their text seeks merely to assist the future negotiators in their task. They note, however, that a readiness to address the foregoing fundamental problems in a realistic manner will be a prerequisite for ensuring the success of the negotiations and the support of a sufficiently wide and representative spread of nations.

POSSIBLE ELEMENTS FOR INCLUSION IN A FRAMEWORK CONVENTION ON CLIMATE CHANGE

11.1 PREAMBLE

In keeping with common treaty practice including the format of the Vienna Convention, the Climate Change Convention would contain a preamble that might seek to address some or all of the following items:

- a description of the problem and reasons for action (need for timely and effective response without awaiting absolute scientific certainty);
- reference to relevant international legal instruments (such as the Vienna Convention and Montreal Protocol) and declarations (such as UNGA Resolution 43/53 and Principle 21 of the Stockholm Declaration);
- recognition that climate change is a common concern of mankind, affects humanity as a whole, and should be approached within a global framework, without prejudice to the sovereignty of states over the airspace superadjacent to their territory as recognized under international law;
- recognition of the need for an environment of a quality that permits a life of dignity and well-being for present and future generations;
- reference to the balance between the sovereign right of states to exploit natural resources and the concomitant duty to protect and conserve climate for the benefit of mankind, in a manner not to diminish either;
- endorsement and elaboration of the concept of sustainable development;
- recognition of the need to improve scientific knowledge (e.g., through systematic observation) and to study the social and economic impacts of climate change, respecting national sovereignty;
- recognition of the importance of the development and transfer of technology and of the circumstances and needs, particularly financial, of developing countries; need for regulatory, supportive, and adjustment measures to take into account different levels of development and thus differing needs of countries;
- recognition of the responsibility of all countries to make efforts at the national, regional, and global levels to limit or reduce greenhouse gas emissions and prevent activities that could adversely affect climate, while bearing in mind that:
 - most emissions affecting the atmosphere at present originate in industrialized countries where the scope for change is greatest;
 - implementation may take place in different time frames for different categories of countries and may be qualified by the means at the disposal of individual countries and their scientific and technical capabilities;
 - emissions from developing countries are growing and may need to grow in order to meet their development requirements and thus, over time, are likely to represent an in-

creasingly significant percentage of global emissions;

- recognition of the need to develop strategies to absorb greenhouse gases, i.e., protect and increase greenhouse gas sinks; to limit or reduce anthropogenic greenhouse gas emissions; and to adapt human activities to the impacts of climate change.

Other key issues that will have to be addressed during the development of the preambular language include:

- Should mankind's interest in a viable environment be characterized as a fundamental right?
- Is there an entitlement not to be subjected, directly or indirectly, to the adverse effects of climate change?
- Should there be a reference to the precautionary principle?
- In view of the inter-relationship among all greenhouse gases, their sources and sinks, should they be treated collectively?
- Should countries be permitted to meet their aggregate global climate objectives through joint arrangements?
- Should reference be made to weather modification agreements such as the ENMOD treaty as relevant legal instruments?
- Is there a common interest of mankind in the development and application of technologies to protect and preserve climate?
- Does the concept of sustainable development exclude or include the imposition of new conditionality in the provision of financial assistance to developing countries, and does it imply a link between the protection and preservation of the environment, including climate change, and economic development so that both are to be secured in a coherent and consistent manner?
- Should the preamble address the particular problems of countries with an agricultural system vulnerable to climate change and with limited access to capital and technologies, recognizing the link with sustainable development?
- Is there a minimum standard of living that is a prerequisite to adopting response strategies to address climate change?

11.2 DEFINITIONS

As is the practice, definitions will need to be elaborated in a specific article on definitions. The terms that will need to be defined will depend on the purpose of the Convention and thus the language used by the negotiating parties.

11.3 GENERAL OBLIGATIONS

Following the format of such treaties as the Vienna Convention, an article would set out the general obligations agreed to by the parties to the Convention. Such obligations may relate to, for example:

- the adoption of appropriate measures to protect against the adverse effects of climate change, to limit, reduce, adapt to, and, as far as possible, prevent climate change in accordance with the means at the disposal of individual countries and their scientific and technical capabilities; and to avoid creating other environmental problems in taking such measures;
- the protection, stabilization, and improvement of the composition of the atmosphere in order to conserve climate for the benefit of present and future generations;
- taking steps having the effect of limiting climate change but that are already justified on other grounds;
- the use of climate for peaceful purposes only, in a spirit of good neighborliness;
- cooperation by means of research, systematic observation, and information exchange in order to understand better and assess the effects of human activities on the climate and the potential adverse environmental and socio-economic impacts that could result from climate change, respecting national sovereignty;
- the encouragement of the development and transfer of relevant technologies, as well as the provision of technical and financial assistance, taking into account the particular needs of developing countries to enable them to fulfill their obligations;

- cooperation in the formulation and harmonization of policies and strategies directed at limiting, reducing, adapting to, and, as far as possible, preventing climate change;
- cooperation in the adoption of appropriate legal or administrative measures to address climate change;
- provision for bilateral, multilateral, and regional agreements or arrangements not incompatible with the Convention and any annex/protocol, including opportunities for groups of countries to fulfill the requirements on a regional or subregional basis;
- cooperation with competent international organizations effectively to meet the objectives of the Convention;
- the encouragement of and cooperation in the promotion of public education and awareness of the environmental and socio-economic impacts of greenhouse gas emissions and of climate change;
- the strengthening or modification if necessary of existing legal and institutional instruments and arrangements relating to climate change; and
- a provision on funding mechanisms.

Other key issues that will have to be addressed in the process of elaborating this article include the following:

- Should there be a provision setting any specific goals with respect to levels of emissions (global or national) or atmospheric concentrations of greenhouse gases while ensuring stable development of the world economy, particularly stabilization by industrialized countries, as a first step, and later reduction of CO₂ emissions and emissions of other greenhouse gases not controlled by the Montreal Protocol? Such provision would not exclude the application of more stringent national or regional emission goals than those that may be provided for in the Convention and/or any annex/protocol.
- In light of the preambular language, should there be a provision recognizing that implementation of obligations may take place in different time frames for different categories of countries and/or may be qualified by the means

- at the disposal of individual countries and their scientific and technical capabilities?
- Should there be a commitment to formulate appropriate measures, such as annexes, protocols or other legal instruments, and, if so, should such formulation be on a sound scientific basis or on the basis of the best available scientific knowledge?
- In addressing the transfer of technology, particularly to developing countries, what should be the terms of such transfers (i.e., commercial versus non-commercial, preferential versus non-preferential, the relationship between transfers and the protection of intellectual property rights)?
- Should funding mechanisms be limited to making full use of existing mechanisms or also entail new and additional resources and mechanisms?
- Should provision be made for environmental impact assessments of planned activities that are likely to cause significant climate change as well as for prior notice of such activities?
- What should be the basis of emission goals (e.g., total emission levels, per capita emissions, emissions per GNP, emissions per energy use, climatic conditions, past performance, geographic characteristics, fossil fuel resource base, carbon intensity per unit of energy, energy intensity per GNP, socio-economic costs and benefits, or other equitable considerations)?
- Should the particular problem of sea level rise be specifically addressed?
- Is there a link between nuclear stockpiles and climate change?

11.4 INSTITUTIONS

It has been the general practice under international environmental agreements to establish various institutional mechanisms. The parties to a Climate Change Convention might, therefore, wish to make provision for a Conference of the Parties, an Executive Organ, and a Secretariat.

The Conference of the Parties may, among other things: keep under continuous review the implementation of the Convention and take appropriate decisions to this end; review current scientific infor-

mation; and promote harmonization of policies and strategies directed at limiting, reducing, adapting to, and, as far as possible, preventing climate change.

Questions that will arise in developing provisions for appropriate institutional mechanisms include:

- Should any of the Convention's institutions (e.g., the Conference of the Parties and/or the Executive Organ) have the ability to take decisions *inter alia* on response strategies or functions in respect of surveillance, verification and compliance that would be binding on all the parties, and, if so, should such an institution represent all of the parties or be composed of a limited number of parties (e.g., based on equitable geographic representation)?
- What should be the role of the Secretariat?
- What should be the decision-making procedures, including voting requirements (e.g., consensus, majority)?
- If a trust fund or other financial mechanism were established under the Convention, how should it be administered?
- Should scientific and/or other bodies be established on a permanent or ad hoc basis, to provide advice and make recommendations to the Conference of the Parties concerning research activities and measures to deal with climate change?
- Should the composition of the above bodies reflect equitable climatic or geographic representation?
- Should there be a provision for working groups (e.g., on scientific matters as well as on socio-economic impacts and response strategies)?
- Is there a need for innovative approaches to institutional mechanisms in the light of the nature of the climate change issue?
- What should be the role of non-governmental organizations?

11.5 RESEARCH, SYSTEMATIC OBSERVATIONS, AND ANALYSIS

It would appear to follow general practice to include provision for cooperation in research and systematic monitoring. In terms of research, each party

might be called upon to undertake, initiate, and/or cooperate in, directly or through international bodies, the conduct of research on and analysis of:

- physical and chemical processes that may affect climate;
- substances, practices, processes, and activities that could modify the climate;
- techniques for monitoring and measuring greenhouse gas emission rates and their uptake by sinks;
- improved climate models, particularly for regional climates;
- environmental, social, and economic effects that could result from modifications of climate;
- alternative substances, technologies, and practices;
- environmental, social, and economic effects of response strategies;
- human activities affecting climate;
- coastal areas, with particular reference to sea level rise;
- water resources; and
- energy efficiency.

The parties might also be called upon to cooperate in establishing and improving, directly or through competent international bodies, and taking fully into account national legislation and relevant ongoing activities at the national, regional, and international levels, joint or complementary programmes for systematic monitoring and analysis of climate, including a possible worldwide system; and cooperate in ensuring the collection, validation and transmission of research, observational data and analysis through appropriate data centers.

Other issues that will arise in developing this provision include:

- Should consideration be given to the establishment of panels of experts or of an independent scientific board responsible for the coordination of data collection from the above areas of research and analysis and for periodic assessment of the data?
- Should provision be made for on-site inspection?
- Should there be provision for open and non-discriminatory access to meteorological data developed by all countries?
- Should a specific research fund be established?

11.6 INFORMATION EXCHANGE AND REPORTING

Precedents would suggest the inclusion of a provision for the transmission of information through the Secretariat to the Conference of the Parties on measures adopted by them in implementation of the Convention and of protocols to which they are party. In an annex to the Vienna Convention, the types of information exchanged are specified and include scientific, technical, socio-economic, commercial and legal information.

For the purposes of elaborating this provision, issues having to be addressed by the negotiating parties include those below.

- Is there a need for the elaboration of a comprehensive international research programme in order to facilitate cooperation in the exchange of scientific, technological, and other information on climate change?
- Should parties be obliged to report on measures they have adopted for the implementation of the Convention, with the possible inclusion of regular reporting on a comparable basis of their emissions of greenhouse gases?
- Should each party additionally be called upon to develop a national inventory of emissions, strategies, and available technologies for addressing climate change? If so, the Convention might also call for the exchange of information on such inventories, strategies, and technologies.

11.7 DEVELOPMENT AND TRANSFER OF TECHNOLOGY

While the issue of technology has been addressed in the section on General Obligations, it might be considered desirable to include separate provisions on technology transfer and technical cooperation. Such provisions could call upon the parties to promote the development and transfer of technology

and technical cooperation, taking into account particularly the needs of developing countries, to enable them to take measures to protect against the adverse effects of climate change, to limit, reduce, and, as far as possible, prevent climate change, or to adapt to it.

Another issue that will arise is: should special terms be attached to climate-related transfers of technology (such as a preferential and/or non-commercial basis and assured access to, and transfer of, environmentally sound technologies on favorable terms to developing countries), taking into consideration the protection of intellectual property rights?

11.8 SETTLEMENT OF DISPUTES

It would be usual international practice to include a provision on the settlement of disputes that may arise concerning the interpretation or application of the Convention and/or any annex/protocol. Provisions similar to those in the Vienna Convention for the Protection of the Ozone Layer might be employed, i.e., voluntary resort to arbitration or the International Court of Justice (with a binding award) or, if neither of those options is elected, mandatory resort to conciliation (with a recommendatory award).

It would be the usual international practice to include clauses on the following topics:

- amendment of the Convention;
- status, adoption and amendment of annexes;
- adoption and entry into force of, and amendments to, protocols;
- signature;
- ratification;
- accession;
- right to vote;
- relationship between the Convention and any protocol(s);
- entry into force;
- reservations;
- withdrawal;
- depositary; and
- authentic texts.

11.9 ANNEXES AND PROTOCOLS

The negotiating parties may wish the Convention to provide for the possibility of annexes and/or protocols. Annexes might be concluded as integral parts of the Convention, while protocols might be concluded subsequently (as in the case of the Montreal Protocol to the Vienna Convention on Protection of the Ozone Layer). While it is recognized that the Convention is to be all-encompassing, the negotiating parties will have to decide whether greenhouse gases, their sources and sinks, are to be dealt with: individually, in groups, or comprehensively; in annexes or protocols to the Convention. The following, among others, might also be considered as possible subjects for annexes or protocols to the Convention:

- agricultural practices;
- forest management;

- funding mechanisms;
- research and systematic observations;
- energy conservation and alternative sources of energy;
- liability and compensation;
- international emissions trading;
- international taxation system; and
- development and transfer of climate change-related technologies.

Issues that will arise in connection with the development of annexes and protocols include:

- timing, i.e., negotiating parties advocating a more action-oriented Convention may seek to include specific obligations in annexes as opposed to subsequent protocols and/or negotiate one or more protocols in parallel with the Convention negotiations;
- sequence, i.e., if there is to be a series of protocols, in what order should they be taken up?