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Subseries:

OA/ID Number: 2572
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Folder Title:
Bliss Guest - Talking Points Clinton/Major - Biodiversity

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February 23, 1993

MEMORANDUM FOR KATIE MCGINTY

FROM: PATRICIA BLISS-GUEST 
RE: PRESIDENT'S MEETING WITH PRIME MINISTER MAJOR AND THE
BIODIVERSITY CONVENTION

As we discussed yesterday, I asked Melinda Chandler of State, OES/L, to prepare some materials on the biodiversity convention for inclusion in the President's briefing book for his meeting with Prime Minister Major on February 24, 1993,

This material is attached. Melinda has done an excellent job, and I agree with her assessment of the issues. I have revised the talking points slightly, and the revised text is included herein. Melinda in her talking points specifically raised an article 3 question which I thought was too legalistic for this particular meeting and detracted from our two main concerns: finance and technology transfer. If you don't agree with this assessment, I can put her article 3 point back in. (This point is explained in the fourth paragraph of the Background information.)

Melinda has also informed me that the UK Environment Minister Howard will be visiting Washington next week and has requested to meet with Tim Wirth, Carol Browner, and others to discuss these biodiversity issues. Therefore, we have included a reference to those meetings in the talking points.

In addition to the talking points, there is also a page of background information and an Attachment A which summarizes on an article by article basis are principal concerns with the text.

I would suggest that you run this material by Tim Wirth's office (and possibly Interior if they have been players to date) before sending it forward as final text for the President.

Let me know if this meets your request, and if you would like more work or revisions on this text.

TALKING POINTS REGARDING BIODIVERSITY CONVENTION

- The United States fully supports international efforts to promote the conservation of biological diversity. To this end, my Administration is interested in seeking ways to enable the US to sign the Biodiversity Convention.
- However, we continue to have serious concerns with respect to the provisions of the Convention concerning finance and technology transfer.
- I recognize that renegotiation of the Convention at this time is not feasible or desirable. However, I would like your support in seeking ways to explore these issues with other like-minded countries with a view to finding means to alleviate our concerns. It is my hope that such an effort could facilitate our becoming a party to the Convention.
- I understand that your Environment Minister, Michael Howard, will be meeting with senior environment officials of my administration next week. I hope that they will be able to advance our collaboration in resolving problems posed by the present text of the convention.

Finance

- The US and the UK share many of the same concerns with respect to the financial provisions, in particular the possibility of an open-ended funding obligation and the ambiguous relationship envisaged between the Convention parties and the Global Environment Facility. Do the other EC countries share your concern? Are you aware of the Japanese position on this issue?
- Have you considered the best means for resolving these concerns? It is our view that the interpretative statement that was made by you and others at the time of signing the convention does not address all the financial concerns raised by the Convention's text.

Technology Transfer

- We are equally concerned with this issue, including the proposed terms of technology transfer, treatment of proprietary business information, and protection of intellectual property rights.
- Is the UK equally troubled by the technology transfer issues in the convention?

- We understand that the Swiss have stated that they are encountering ratification problems on these issues and that they have proposed negotiation of a protocol or convening of an international working group. We have been informed that France and Germany have supported the proposal to convene a working group, and that the United Nations Environment Program (UNEP) may propose a new working group on these matters later this spring.
- Do you think that such a working group would be a good forum to begin addressing these issues?

BIODIVERSITY CONVENTION

Background

The United States has two principal concerns with respect to the Convention on Biological Diversity. These include:

1. The financial provisions, including the relationship between the Convention and the Global Environmental Facility
2. Access to/transfer of technology and sharing of benefits derived from genetic resources, including:
 - The adequate and effective protection of intellectual property rights
 - The terms of transfer of technology
 - The scope of the Parties' obligations with respect to the private sector

A further explanation of our concerns is attached as an Annex.

We understand that the U.K. shares our concerns on the financial provisions. It is less clear the extent to which the U.K. shares our concerns on technology transfer issues.

The U.K. also has a concern with Article 3 of the Convention. The U.S. shares the U.K. concern, although our concern does not rise to the same level as finance and technology transfer. Article 3, entitled "Principle," restates Principle 21 of the 1972 Stockholm Declaration verbatim. While the U.S. (and the U.K.) generally support Stockholm Principle 21, the Convention is flawed because the Principle is not limited to the context of the Convention. It thus allows the interpretation that the Parties are obligated to apply the Principle on matters outside the scope of the Convention.

In late 1992, while the U.K. was President of the EC, the U.K. offered to play a role in forging EC consensus on issues of concern to the United States. EPA Administrator Reilly thanked them for their interest, but stated that the U.S. was not in a position to pursue specific language or particular modalities during the transition period.

The U.S. agrees that renegotiation of the Convention is not feasible or desirable. However, clarification of key issues can be achieved several ways, ranging from unilateral interpretive statements to negotiation of a protocol clarifying the existing provisions of the Convention.

ATTACHMENT A

EXPLANATION OF PRINCIPAL CONCERNS WITH
BIODIVERSITY CONVENTIONFINANCIAL PROVISIONS

We have four principal concerns.

1. Open-Ended Funding Obligation

Article 20, paragraph 2 allows the interpretation that developed countries must fund all measures taken by developing countries in implementation of the Convention once the cost of such measures are agreed. Article 20 requires only that the incremental costs of a measure must be agreed between the recipient and the financial mechanism. In the Climate Change Convention, by contrast, there is also a requirement that the measures themselves (in addition to costs) must be agreed between the recipient and the financial mechanism (ideally, the GEF).

2. Financial Mechanism Under Authority of COP

With respect to Article 21, paragraph 1, we have had serious concerns with the requirement that the financial mechanism of the Convention function under the "authority" of the Conference of the Parties (COP). This implies that all decision-making is made by the COP and that the institutional structure (i.e., the GEF) merely houses the funds without playing any substantive role. This was the precise term that developed countries opposed in the Climate Change Convention. We would like to clarify that in the context of the GEF or any other independent mechanism the "authority" of the COP only extends to determining policy, strategy, programme priorities and eligibility criteria, which are the specific tasks charged to the Conference of the Parties.

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3. COP Determines Amount of Resources Needed

Again with respect to Article 21, paragraph 1, the language implies that the COP will decide on the contributions that developed countries will have to make; this would be problematic, as, in the U.S. view, any contributions: 1) would have to be voluntary; and 2) would not be linked to the Convention, but directly to the GEF. This is a point on which sixteen countries (including the U.S.) made an interpretive statement upon adoption of the Convention.

4. Financial Mechanism Under Authority of COP

Article 21, paragraph 2 contains language that is linked to the issue of the "authority" of the COP over the financial mechanism (discussed above). Unlike the Climate Change Convention, which puts the COP and the financial mechanism on the same plane (given that the GEF is a separate legal identity), this paragraph provides that the COP itself will decide on the arrangements to give effect to the Article, after mere "consultation" with the entity that will operate the mechanism. This approach would only work under the scenario whereby the COP has all authority and the entity merely houses the fund, which is obviously inconsistent with the U.S. view.

ACCESS TO/TRANSFER OF TECHNOLOGY

There is a general philosophical concern with the approach the Convention takes to access to and transfer of technology, as well as four specific concerns with the text of the Convention. Although our concerns have come to be referred to in the short-hand as "intellectual property rights" concerns, in fact they are broader and include terms of transfer of technology, proprietary business information, and protection of intellectual property rights.

1. Philosophy of Convention at Odds with U.S. Policy

In terms of the intellectual property rights provisions, more than just language is at stake. There is a rather different philosophy reflected in the Convention than that supported by the United States. In the U.S. view, intellectual property rights are supportive of and indeed central to the conservation of biological diversity and the sustainable use of its components. Foreign investment, new product development, and research so crucial to the conservation of biological diversity is dependent upon adequate and effective intellectual property rights regimes in developing countries.

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2. Terms of Transfer of Technology

Article 16(2) provides that access to and transfer of technology shall be provided "under fair and most favourable terms, including on concessional and preferential terms where mutually agreed...." Because the phrase "where mutually agreed" can be read to modify only "concessional and preferential," it allows the interpretation that the obligation to transfer technology "under fair and most favourable terms" means something other than on whatever terms are mutually agreed. It should be clarified that fair and most favourable terms under Article 16(2) are whatever terms are mutually agreed between the participants in the transaction. (As may be recalled, in Chapter 34 (Technology Cooperation) of Agenda 21, this problem was fixed with a comma before "where mutually agreed," thus making that qualifying phrase modify "fair and favourable terms.")

3. Obligations Vis-a-Vis the Private Sector

The scope of a Party's obligations with respect to the private sector is unclear. Article 16(4) addresses the obligations of the Parties with respect to private sector technology. However, it contains language that could be read to imply that other provisions of Article 16 also relate to the private sector. Other article also raise questions: Article 15(7) (participation in research activities relating to genetic resources) and Article 19(1) (participation in biotechnological research activities). The full scope of a Party's obligations to influence the terms of private sector transactions should be clarified.

4. Protection of Intellectual Property Rights

Article 16(5) contains an obligation to cooperate to "ensure that [intellectual property rights] are supportive of and do not run counter to" the objectives of the Convention. This language is perhaps the single most objectionable language on IPR in the Convention. It can (and will, as has already been evidenced) be read by developing countries to erode intellectual property rights. For example, Article 16(2), which contains advantageous language on "adequate and effective" protection of IPR, is to be implemented "consistent with" with Article 16(5) -- this could have the effect of weakening the former provision. Further, Article 16(5) might be used to argue that the phrase "on mutually agreed terms"

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elsewhere in the Convention does not include the possibility of agreeing to adequate and effective protection of IPR. Theoretically, the language could be read to reach the opposite result: that the Parties' obligation is to cooperate in the development of IPR regimes so as to ensure that IPR is supportive of and does not run counter to the objectives of the Convention. However, such an interpretation is counter to many of interpretive statements made at the close of negotiations and would be virtually impossible to achieve. The rights and obligations of the Parties with respect to adequate and effective protection of IPR should be clarified.

5. Right to Participate in Biotechnological Research Activities

Article 19(1) obligates Parties to take measures for the participation in biotechnological research activities by those other Parties which provide the genetic resource for such research. This Article is problematic because it does not couple the obligation with adequate and effective protection for IPR and confidential business information. Moreover, it requires that "where feasible" such research shall be conducted in the territory of the Party that provided the genetic resources. It should be clarified that such research must be on mutually agreed terms (which can include the adequate and effective protection of intellectual property rights and the protection of confidential business information). Furthermore, it is for each particular research entity to determine whether and under what circumstances it would be "feasible" for such research to be conducted in the territory of the Party providing the genetic resource.