

T3

From: Das, Himamauli
To: "Biniaz, Susan N"
Subject: FW: Antw: call
Date: Friday, November 05, 2010 3:25:00 PM
Attachments: 20101015_establishing_v7_CLEAN.doc

RELEASED IN PART B5,B6

Let's discuss this

-----Original Message-----

From: Pizer, William (Billy)
Sent: Friday, November 05, 2010 3:24 PM
To: Das, Himamauli
Subject: Fw: Antw: call

----- Original Message -----

From: [Redacted]
To: Pizer, William (Billy)
Sent: Fri Nov 05 14:50:05 2010
Subject: Antw: call

B6

Billy,

please find attached some thoughts from the EU lawyers on the legal implicatiosn for astablishin the new fund.

[Redacted]

B6

>>> <William.Pizer@do.treas.gov> 05.11.2010 15:41 >>>

I just tried you but no answer. Give a holler when you have a minute.
202 622 0173. This afternoon I'll be on my cel [Redacted]

B6

On the UN thing: We just had a long talk with state folks.

[Redacted]

B5

In my mind there are three key features:

1. Board is independent, we can select our board members, and the COP only has the normal responsibilities for guidance, etc.
2. Secretariat is professional and capable; operating procedures are sensible, have safeguards, etc.
3. Trustee is World Bank (we do not see another candidate capable of enforcing our legal needs)

Separately, there seems to be an issue about the actual documents establishing the fund being something other than a COP decision. E.g., the GEF instrument is actually a document of the trust fund itself. Not a lawyer, so not sure I fully get this point, but has to do with having the fund be legally separate from the COP.

[Redacted]

B5

REVIEW AUTHORITY: Adolph Eisner, Senior Reviewer

RELEASED IN FULL

T3A

21 July 2011 @ 16:26

- 1 of 2 -

Subject: legal implications of establishing the new fund

Date: 8 Oct 2010

1 Questions presented

1. Most parties now support the establishment of a Fund, but also acknowledge that the details of the fund are unlikely to be agreed in time for Cancun. Three legal questions arise:

- a. Can the COP establish the Fund in Cancun without having first agreed on the details of its design, leaving the negotiations on the details for later?
- b. What are the legal implications of establishing a Fund without having first agreed the all or at least some details of the Fund?

2. This note is based on the understanding that "establishing" a fund means bringing it into existence. In this context where the details of the Fund would not have been agreed, the Fund would exist but not yet be operational.

2 Can the COP establish the Fund in Cancun?

3. Yes. The COP has already exercised its authority under Article 7(2)(i) to establish two funds, the SCCF and LDCF: Decision 5/CP.7 para 12 and 7/CP.7 para 2.

4. In each circumstance, the fund was established as a more or less empty shell. Details on its design were agreed by decisions of subsequent COPs, including decisions that effectively outsource the day-to-day governing board, trustee, secretariat and project cycle management functions.

5. The use of the phrase "shall be established" rather than "is established" in these previous COP decisions was intended to recognize that the funds had not yet been designed, but introduced legal ambiguities as to *when* the funds were considered to be established. These legal ambiguities were resolved by subsequent COP decisions indicating that the funds came into existence through the original decisions.

3 What are the legal implications of the COP establishing the Fund in Cancun?

6. A number of delegations have begun to draw the distinction between a "political" decision to establish a Fund in Cancun, and the legal act of establishment. The distinction might be useful to resolve any uncertainty as to whether the Fund has been established, while leaving the legal means by which it will be established (within or outside the UNFCCC) for a later date. This note focuses on the legal act of establishment of the Fund.

7. If the COP establishes the fund by a COP decision, it will be a subsidiary body of the COP and therefore "under" the Convention, and under the COP's ultimate authority. However, the COP could devolve much of its authority to the Fund's governing body, and outsource important functions to other "existing" institutions. As a legal safeguard against

REVIEW AUTHORITY: Adolph Eisner, Senior Reviewer

20 June 2010 @ 23:13

- 2 of 2 -

political interference with the day-to-day operation of the Fund, a COP decision should specify that the COP's authority would be limited to providing guidance and the Fund's being accountable to the COP. Once such a COP decision setting out the limits of COP intervention has been adopted, this could afterwards only be changed by consensus. (see previous note on meaning of authority/guidance/accountable).

8. A Fund established by COP decision (whether in Cancun or subsequently), rather than by treaty instrument or under the auspices of international institution (such as the World Bank), will have some specific inherent legal limitations. It will not have international or domestic legal personality, unless Parties take further steps. It will therefore have to rely on the COP (and its own limited personality) or outside institutions (such as trustees and Implementing Agencies) to carry out certain functions. However, this limitation also applies to some extent to funds and institutions established outside the convention, such as the GEF and the CIFs, which rely on the World Bank, as trustee for legal personality.

9. A Fund established by the COP would be directly accountable to the COP. By contrast, for any fund established outside the Convention, the COP's ability to guide and hold that fund accountable would be limited to relatively weak arrangements such as a MOU.