

The Adaptation Fund

AFB/B.2/7
May 27, 2008

Adaptation Fund Board
Second Meeting
Bonn, June 16-19, 2008

Agenda Item 6(e)

LEGAL STATUS OF THE ADAPTATION FUND

ENDOWING THE ADAPTATION FUND WITH LEGAL PERSONALITY: SUMMARY CONSIDERATIONS

Introduction

1. In order to enable the Adaptation Fund (AF) to carry out its essential work, it is necessary to consider the need to endow the AF with legal personality. Indeed, given the funding that is expected to flow into the AF, it will be important to vest it with the legal capacity to contract, hold assets, and pursue legal remedies. Through this note, the Secretariat is offering summary considerations towards a more comprehensive examination of this issue.

Capacity to Contract

2. Implementing the direct access provisions of the AF to enable the conveyance of Fund assets on projects and other activities will require the ability for the AF to enter into reciprocal contractual agreements and assume obligations. The current AF arrangements may not provide sufficient support for it to enter into such legal arrangements. In fact, the limited role of the Trustee as a mere financial intermediary which would have no further responsibility for use of AF funds could leave the AF without the fundamental ability to oversee and enforce agreements made with AF resources following their transfer to the implementing and executing entities. As a consequence, there is a need to consider conferring legal personality on the AF. This may also become necessary in relation to contractual arrangements with host countries, with states, and with other legal entities.

Capacity to Hold AF Assets and to Pursue Legal Remedies

3. While research is still under way on the precise nature of the legal rights relating to CERs, it is important, in any event, to consider the effect on the AF of a failure to confer the AF with the capacity to hold its assets. Indeed, given the newly developing legal status of CERs, and the desire of all participants for certainty in related monetization transactions, the absence of clear legal authority to hold or transact such assets could detract from their market value. Likewise, in the absence of conferred rights, the AF's limited capacity to pursue legal remedies (should AF funds be misused) would impede its ability to seek legal recourse. This issue becomes all the more important when considered in the light of 1/CMP.3, which, as noted above, limits the responsibility of the Trustee to act once fund assets have been transferred to the implementing or executing entities.

Conclusion

4. On account of the foregoing, the AF Board may want to consider recommending to the Fourth Session of the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol to endow the Adaptation Fund with legal personality. Conferring legal personality on a fund would not be unprecedented; the Parties to the Montreal Protocol, at their Sixth Meeting in 1994, adopted a decision whereby they conferred on the Multilateral Fund the capacity: (a) to contract; (b) to acquire and dispose of immovable and personal property; and (c) to institute legal proceedings. That decision also granted the Multilateral Fund the capacity to hold assets in its own name and to protect from suit and exempt from taxation these assets and the property of the Multilateral Fund, regardless of where they are held.