



AFB/EFC.3/6
November 29, 2010

Ethics and Finance Committee
Third Meeting
Cancun, December 13, 2010

Agenda item 5

**DRAFT STANDARD LEGAL CONTRACT BETWEEN THE
ADAPTATION FUND BOARD AND THE IMPLEMENTING
ENTITIES**

I. BACKGROUND

1. The Board at its eleventh meeting decided

To request the secretariat to hire an independent legal counsel to draft the standard legal contract that the Board and the implementing entities would enter into once the Board acquired legal capacity; and to submit it for consideration and approval by the Board at its twelfth meeting. In order to inform the process, the secretariat would circulate the approved MOU among the accredited implementing entities and request comments on the text by October 16, 2010. The independent legal counsel hired by the secretariat could seek further clarifications from the implementing entities, if need be. The standard legal contract should include a provision that guaranteed that the Operational Policies and Guidelines, and other rules and procedures approved by the Board, prevailed in case of any conflict with the implementing entities rules and procedures. If the conflict cannot be resolved, any disbursement made shall be refunded to the Adaptation Fund Trust Fund;

2. Pursuant to the mandate above, the secretariat circulated the MOU approved by the Board at its ninth meeting among the accredited implementing entities and requested comments. The secretariat further hired an independent legal counsel who considered the comments received and prepared the following documents: a) an explanatory note on the draft standard legal agreement contained in Annex I to the present document; and b) a draft standards legal agreement contained in Annex II.

II. RECOMMENDATION

3. The EFC may wish to consider the draft standard legal contract as contained in Annex II to the present document and recommend it to the Board for approval.

Explanatory Note on the Draft AFB Agreement

At its eleventh meeting, by its Decision B.11/14, the Adaptation Fund Board (Board) requested the secretariat to hire an independent legal counsel to draft the standard legal contract that the Board and the Implementing Entities (IEs) would enter into once the Board acquired legal capacity, and to submit it for consideration and approval by the Board at its twelfth meeting in Cancun in December 2010. The secretariat engaged the services of Dr. Herbert V. Morais, a senior international lawyer, who had previously advised the GEF and its Secretariat, to draft the new contract.¹

The Secretariat was also requested to circulate the initial Board-approved draft of the Memorandum of Understanding (MOU) to the accredited IEs for their comments. Comments were received from the six multilateral IEs (World Bank, UNDP, UNEP, ADB, IFAD and WFP) (MIEs). No comments were sent by the national implementing entities.

Dr. Morais has now prepared a draft of the Agreement to be entered into between the Board and the IEs, a copy of which is attached for your information. This new draft is substantially similar in format and content to the initial MOU but every effort has been made to take into account the principal or common comments and suggestions received from the MIEs. In particular, some key provisions have been reformulated to bridge any remaining differences, in particular to recognize that the MIEs would, in addition to following the *Adaptation Fund (AF) Operational Policies and Guidelines*, also need to adhere to their own standard practices and procedures in administering the grant.

Please note that the intention is to produce a generic agreement, and not to incorporate specific references to each MIE's individual policies, practices and procedures. This draft also introduces several drafting improvements, elaborations and clarifications. To facilitate your review of the draft, the following points may be highlighted:

1. The draft is now called an Agreement (instead of an MOU), as earlier indicated by the Board. This change is also in line with established international practice.
2. **Preambles.** These have been slightly expanded to state more explicitly the Board's commitment to make the grant, and to clarify the role of the World Bank as the trustee of the AF Trust Fund that will disburse the grant funds to the IEs on the written instructions of the Board.
3. **Paragraph 1.** A definition of "Implementing Entity" has been added and some of the other definitions have been slightly elaborated or clarified (e.g., "Grant," "Executing Entity," and "Secretariat.")
4. **Paragraphs 2, 3 and 4.** The original provisions in paragraphs 2, 3 and 4 of the MOU have been rearranged and reorganized to provide for a better order or

¹ Dr. Morais has served as Assistant General Counsel of the International Monetary Fund, Chief Counsel in the World Bank, Assistant General Counsel in the Asian Development Bank, and Partner in Dewey Ballantine LLP, an international law firm. Most recently, he was the Tunku Abdul Rahman Professor of International Law at the University of Malaya, Kuala Lumpur, Malaysia.

sequence of provisions. They have also been elaborated on or clarified as indicated below.

5. **Paragraph 2.03.** This new provision clarifies that the IE will make the grant funds available to the Executing Entity in accordance with its standard practices and procedures.
6. **Paragraphs 3.02-3.04.** The MIEs had stated that, while they are willing to follow the *AF Operational Policies and Guidelines*, they would also have to adhere to their own standard practices and procedures for administering grants of this nature. These more detailed provisions recognize that reality and provide a mechanism for resolution of any material inconsistency that may arise between the AF and IE “rules” during implementation through discussion between the IE and the Board and the taking of any necessary or appropriate action to resolve such inconsistency.
7. **Paragraph 4.01.** This provision responds to the suggestion from some MIEs that they be given an opportunity to explain any “unauthorized” disbursements (*i.e.*, for purposes other than the Project/Programme) before the Board decides whether to demand a refund of such funds.
8. **Paragraph 4.03.** This provision responds to a request from some MIEs for a definition of what constitutes a material change in budget allocation. A change involving ten per cent (10%) or more of the total budget is proposed as the standard.
9. **Paragraph 4.05.** Some MIEs have stated that they do not normally provide or cannot provide an indemnity as required by the former paragraph 2.03 of the MOU.
10. This new alternative provision states instead that the IE shall be fully responsible for the acts of its employees, agents, representatives and contractors and, conversely, that the Board shall not be responsible or liable for any losses, damages or injuries to third parties under the Project/Programme.
11. **Paragraph 5.01.** This provision responds to the suggestion from some MIEs that they be given an opportunity to present their views and propose any rectification measures to the Board before it decides whether to suspend the Project/Programme.
12. **Paragraph 6.01.** This provision responds to the suggestion from some MIEs for an opportunity to be heard in the event that any procurement actions are considered by the Board to be inconsistent with the *AF Operational Policies and Guidelines*.
13. **Paragraph 8.01.** As requested by some MIEs, this new provision explicitly clarifies that the IEs may deduct from the grant amount and pay to itself the management fee stipulated in Schedule 2 to the Agreement (Project/Programme Proposal).
14. **Paragraph 9.01.** This new provision states that the ownership of any assets or equipment purchased under the Project/Programme shall, upon completion of the Project/Programme, be transferred to the Executing Entity or Executing Entities or such other entity designated by the Designated Authority.
15. **Paragraph 13.03.** This provision responds to the concern expressed by some MIEs about the need to honor any outstanding commitments incurred under the Project/Programme in the event of termination of the Agreement and before a refund of unused grant funds to the Board.

DRAFT: November 19, 2010

AGREEMENT

(The _____ [Project] [Programme] in [Country])

between

THE ADAPTATION FUND BOARD

and

[IMPLEMENTING ENTITY]

AGREEMENT

[The _____ Project in [Country]]

between

THE ADAPTATION FUND BOARD

and

[IMPLEMENTING ENTITY].

Whereas, the Conference of the Parties (COP) of the United Nations Framework Convention on Climate Change (UNFCCC) in its Decision 10/CP.7 decided that an Adaptation Fund (AF) shall be established to finance concrete adaptation projects and programmes in developing countries that are parties to the Kyoto Protocol to the UNFCCC (Kyoto Protocol);

Whereas, the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol (CMP) in its Decision 1/CMP.3 decided that the operating entity of the AF shall be the Adaptation Fund Board (Board), with the mandate to supervise and manage the AF under the authority and guidance of the CMP;

Whereas, in its Decisions 5/CMP.2 and 1/CMP.3, paragraph 5 (b), the Board adopted the *AF Operational Policies and Guidelines for Parties to Access Resources from the Adaptation Fund*, including the *Fiduciary Risk Management Standards to be Met by Implementing Entities* (AF Operational Policies and Guidelines), as set out in Schedule 1 to this Agreement (Agreement); and

Whereas, the proposal submitted by the [Implementing Entity] to the Board seeking access to the resources of the AF in support of the [Project] [Programme], as set out in Schedule 2 to this Agreement, has been approved by the Board, and the Board has agreed to make a grant (Grant) to the [Implementing Entity] for the [Project] [Programme] under the terms of this Agreement; and

Whereas, the International Bank for Reconstruction and Development (IBRD) has agreed to serve as the Trustee of the AF Trust Fund (Trustee) and, in that capacity, to make disbursements of the Grant to the [Implementing Entity] on the written instructions of the Board;

The Board and the [Implementing Entity] have agreed as follows:

1. DEFINITIONS.

Unless the context otherwise requires, the several terms defined in the Preamble to this Agreement shall have the respective meanings set forth therein and the following additional terms shall have the following meanings:

- 1.01. “Grant” means the AF resources approved by the Board for the [Project] [Programme] under this Agreement and to be disbursed by the Trustee to the Implementing Entity on the written instructions of the Board;
- 1.02. “Designated Authority” means the authority that has endorsed on behalf of the national government the Project proposal by the Implementing Entity seeking access to AF resources to finance the [Project][Programme];
- 1.03. “Executing Entity” means the entity that will execute the [Project] [Programme] under the overall management of the Implementing Entity;
- 1.04. “Implementing Entity” means the [Implementing Entity] that is the party to this Agreement and the recipient of the Grant;
- 1.05. “Implementing Entity Grant Account” means the account to be established by the Implementing Entity to receive, hold and administer the Grant;
- 1.06. “Secretariat” is the body appointed the CMP to provide secretariat services to the Board, consistent with decision 1/CMP.3, paragraphs 3, 18, 19 and 31, which body is currently the Global Environment Facility (GEF); and
- 1.07. “AF Trust Fund” means the trust fund for the AF administered by the Trustee in accordance with the *Terms and Conditions of Services to be Provided by the International Bank for Reconstruction and Development as Trustee for the Adaptation Fund*.

2. THE PROJECT AND THE GRANT

2.01. The Board agrees to provide to the [Implementing Entity] the Grant in a maximum amount equivalent to _____ United States Dollars (US \$_____) for the purposes of the [Project] [Programme]. The [Project] [Programme] document, which details the purposes for which the Grant is made, is set out in Schedule 2 to this Agreement. The disbursement schedule and special conditions that apply to the implementation of the Grant are set out in Schedule 3 to this Agreement.

2.02. The Trustee shall disburse the Grant funds to the [Implementing Entity] on the written instructions of the Board. Disbursements shall be made to the following bank account of the [Implementing Entity] in accordance with the disbursement schedule set out in Schedule 3 to this Agreement:

[Insert Implementing Entity's bank account details]

2.03. The [Implementing Entity] shall make the disbursed Grant funds available to the [Executing Entity] in accordance with its standard practices and procedures.

2.04. The [Implementing Entity] may convert the Grant into any other currency to facilitate its disbursement to the [Executing Entity].

3. ADMINISTRATION OF THE GRANT

3.01. The Implementing Entity shall be responsible for the administration of the Grant and shall carry out such administration with the same degree of care used in the administration of its own funds, taking into account the provisions of this Agreement.

3.02. The [Implementing Entity] shall carry out all its obligations under this Agreement in accordance with:

- (i) the AF Operational Policies and Guidelines; and
- (ii) the [Implementing Entity's] standard practices and procedures.

3.03. If, during the course of administering the Grant, the [Implementing Entity] identifies any material inconsistency between the AF Operational Policies and Guidelines and its own standard practices and procedures, the [Implementing Entity] shall: (a) immediately notify the Board, through the Secretariat, of such inconsistency, and (b) the [Implementing Entity] and the Board shall discuss and promptly take any necessary or appropriate action to resolve such inconsistency.

3.04. In the event that the [Implementing Entity] makes any disbursements of the Grant in a manner inconsistent with the AF Operational Policies and Guidelines, and these inconsistencies cannot be resolved as provided in paragraph 3.03, the [Implementing Entity] shall refund to the Board, through the Trustee, any such disbursements.

4. [PROJECT] [PROGRAMME] IMPLEMENTATION

4.01. The Implementing Entity shall be responsible for the overall management of the [Project] [Programme], including all financial, monitoring and reporting responsibilities.

4.02. The Implementing Entity shall ensure that the Grant is used exclusively for the purposes of the [Project] [Programme], and shall refund to the Board, through the Trustee, any disbursements made for other purposes. Where the Board believes that the Grant has been used for purposes other than the [Project] [Programme], it shall inform the [Implementing Entity] of the reasons supporting its view and provide the [Implementing Entity] an opportunity to provide any explanation or justification for such use.

4.03. Any material change made in the original budget allocation for the Project by the [Implementing Entity], in consultation with the Executing Entity, shall be communicated to the Board for its approval. "Material change" shall mean any change that involves ten per cent (10%) or more of the total budget.

4.04. The [Implementing Entity] shall promptly inform the Board, through the Secretariat, of any conditions that may seriously interfere with its management, or the Executing Entity's execution, of the [Project] [Programme] or otherwise

jeopardize the achievement of the objectives of the [Project] [Programme], providing detailed information thereof to the Board for its information.

4.05. The [Implementing Entity] shall be fully responsible for the acts, omissions or negligence of its employees, agents, representatives and contractors under the Project. The Board shall not be responsible or liable for any losses, damages or injuries caused to any persons under the Project resulting from the acts, omissions or negligence of the [Implementing Entity's] employees, agents, representatives and contractors.

5. [PROJECT] [PROGRAMME] SUSPENSION

5.01. The Board may suspend the [Project] [Programme] for reasons that include, but are not limited to:

- (i) financial irregularities in the implementation of the [Project] [Programme], or
- (ii) a material breach of this Agreement and/or poor implementation performance leading the Board to conclude that the [Project] [Programme] can no longer achieve its objectives;

provided, however, that before the Board makes its final decision (a) the [Implementing Entity] shall be given an opportunity to present its views to the Board, through the Secretariat; and/or (ii) the [Implementing Entity] may make any reasonable proposal to promptly remedy the financial irregularities, material breach or poor implementation performance.

6. PROCUREMENT

6.01. The procurement of goods and services (including consultants' services) for activities financed by the Grant will be carried out in accordance with the [Implementing Entity's] standard practices and procedures, including its procurement and consultants' guidelines. In the event that the [Implementing Entity] makes any disbursements in a manner which the Board considers to be inconsistent with the AF Operational Policies and Guidelines, it will so inform the [Implementing Entity] giving the reasons for its view and seeking a rectification of

the inconsistency. If the inconsistency cannot be resolved, the [Implementing Entity] shall refund to the Board, through the Trustee, any such disbursements.

7. RECORDS AND REPORTING

7.01. The [Implementing Entity] shall provide to the Board, through the Secretariat, the following reports and financial statements:

- a) annual progress reports on the status of the [Project]/[Programme] implementation, including the disbursements made during the relevant period or more frequent progress reports if requested by the Board;
- b) a [Project]/[Programme] completion report, including any specific [Project]/[Programme] implementation information, as reasonably requested by the Board through the Secretariat, within six (6) months after [Project]/[Programme] completion;
- c) a mid-term and a final evaluation report, prepared by an [independent] evaluator selected by the [Implementing Entity]. The final evaluation report shall be submitted within nine (9) months after [Project]/ [Programme] completion. Copies of these reports shall be forwarded by the [Implementing Entity] to the Designated Authority for information; and
- d) a final audited financial statement of the [Implementing Entity] Grant Account, prepared by an independent auditor or evaluation body, within six (6) months of the end of the Implementing Entity's financial year during which the [Project]/[Programme] is completed.

8. MANAGEMENT FEE

8.01. The Board authorizes the [Implementing Entity] to deduct from the total amount of the Grant and retain for its own account the management fee specified in Schedule 2 to this Agreement.

9. OWNERSHIP OF EQUIPMENT

9.01. If any part of the Grant is used to purchase any [durable assets] [equipment], such [assets] [equipment] shall be transferred upon the completion

of the [Project] [Programme] to the Executing [Entity] [Entities] or such other entity as the Designated Authority may designate.

10. CONSULTATION

10.01. The Board and the Implementing Entity shall share information with each other, at the request of either one of them, on matters pertaining to this Agreement.

11. COMMUNICATIONS

11.01. All communications between the Board and the [Implementing Entity] concerning this Agreement shall be made in writing, in the English language, to the following persons at their addresses designated below, by letter or by facsimile. The representatives are:

For the Board:

Adaptation Fund Board Secretariat

1818 H Street, NW

Washington, D.C. 20433

USA

Attention: Adaptation Fund Board Chair

Fax: _____

For the [Implementing Entity]:

Attention: _____

Fax: _____

12. EFFECTIVENESS AND AMENDMENT OF THE AGREEMENT

12.01. This Agreement shall become effective upon its signature by both parties.

12.02. This Agreement may be amended, in writing, by mutual consent between the Board and the [Implementing Entity].

13. TERMINATION OF THE AGREEMENT

13.01. This Agreement may be terminated by the Board or the [Implementing Entity], by giving prior written notice of at least ninety (90) days to the other.

13.02. This Agreement shall automatically be terminated in the event of:

- a) cancellation of the [Implementing Entity's] accreditation by the Board; or
- b) receipt of a communication from the Designated Authority that it no longer endorses the [Implementing Entity] or the [Project] [Programme].

13.03. Upon termination of this Agreement, the Board and the [Implementing Entity] shall consider the most practical way of completing any ongoing activities under the [Project] [Programme], including meeting any outstanding commitments incurred under the [Project][Programme] prior to the termination. The [Implementing Entity] shall promptly refund to the Board, through the Trustee, any unused portion of the Grant, including any net investment income earned therefrom. No Grant funds shall be disbursed after termination.

14. SETTLEMENT OF DISPUTES

14.01. Any dispute, controversy or claim arising out of or relating to this Agreement, or the breach, termination or invalidity thereof, will be settled amicably by discussion or negotiation between the Board and the [Implementing Entity].

14.02. Any dispute, controversy or claim arising out of or relating to this Agreement, or the breach, termination or invalidity thereof, which has not been settled amicably between the Board and the [Implementing Entity] shall be settled by arbitration in accordance with the UNCITRAL Arbitration Rules as presently in force.

IN WITNESS WHEREOF, the undersigned, being duly authorized thereto, have signed this Agreement on _____ [201_]

THE ADAPTATION FUND BOARD

Chair

[IMPLEMENTING ENTITY]

[The following Schedules will be attached to the Agreement: Schedule1 (AF Operational Policies and Guidelines, including the Fiduciary Risk Management Standards; Schedule 2 ([Project] [Programme] Proposal); and Schedule 3 (Disbursement Schedule)].