

The Adaptation Fund

AFB/B.2/11
June 9, 2008

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

Agenda Item 6(i)

DRAFT LEGAL ARRANGEMENTS BETWEEN THE CONFERENCE OF
THE PARTIES SERVING AS THE MEETING OF THE PARTIES TO THE
KYOTO PROTOCOL AND THE INTERNATIONAL BANK FOR
RECONSTRUCTION AND DEVELOPMENT (WORLD BANK)
REGARDING THE SERVICES TO BE PROVIDED BY THE TRUSTEE FOR
THE ADAPTATION FUND

(Prepared by Invited Trustee)

**Legal Arrangement to be concluded between
the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol and
the World Bank as Trustee for the Adaptation Fund**

1. The Conference of Parties serving as the meeting of the Parties to the Kyoto Protocol (COP/MOP) decided in paragraph 31 of Decision 1/CMP.3 to request the Adaptation Fund Board to develop the necessary legal arrangements to be concluded between the COP/MOP and the trustee servicing the Adaptation Fund, and present the legal arrangements for adoption by the COP/MOP.
2. In response to the above decision, the draft terms and conditions of services to be provided by the International Bank for Reconstruction and Development (the World Bank) as interim trustee for the Adaptation Fund (the World Bank in such capacity, the Trustee) (the Terms and Conditions), attached as Annex 1, are submitted to the Adaptation Fund Board for its consideration and for further consideration and approval of the COP/MOP.
3. It is recommended that pursuant to paragraph 31 of Decision 1/CMP.3, the Adaptation Fund Board (i) approve the draft Terms and Conditions, as attached; (ii) invite the World Bank to take any necessary action to accept the invitation to serve as the Trustee, based on the draft Terms and Conditions approved by the Adaptation Fund Board, and to approve the Terms and Conditions, subject to approval by the COP/MOP of the same; and (iii) subject to the acceptance by the World Bank of the invitation to serve as the Trustee, recommend to the Fourth Session of the COP/MOP to conclude the legal arrangement between the COP/MOP and the World Bank by approving and accepting the Terms and Conditions.

**DRAFT TERMS AND CONDITIONS OF SERVICES TO BE PROVIDED BY THE
INTERNATIONAL BANK FOR RECONSTRUCTION AND DEVELOPMENT AS
TRUSTEE FOR THE ADAPTATION FUND**

RECITALS

- (A) A clean development mechanism (the CDM) was established under Article 12 of the Kyoto Protocol to the United Nations Framework Convention on Climate Change (the Convention)(the Kyoto Protocol).
- (B) The Conference of the Parties to the Convention decided in its decision 10/CP.7 that an adaptation fund (the Adaptation Fund) shall be established to finance concrete adaptation projects and programmes in developing country Parties that are Parties to the Kyoto Protocol, as well as activities identified in paragraph 8 of decision 5/CP.7.
- (C) The decision was further endorsed by the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol through its decision 28/CMP.1.
- (D) In decision 1/CMP.3, the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol decided that the Adaptation Fund Board shall be established as the operating entity of the Adaptation Fund and invited the International Bank for Reconstruction and Development (the World Bank) to serve as the trustee for the Adaptation Fund (the World Bank in such capacity, the Trustee) on an interim basis.
- (E) The Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol requested, in its decision 1/CMP.3, that the Adaptation Fund Board develop the necessary legal arrangements to be concluded between the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol and the Trustee, and present such legal arrangements for adoption by the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol at its fourth session.
- (F) The Adaptation Fund Board approved at its [second] meeting in [June], 2008, the draft of these terms and conditions of services to be provided by the Trustee on an interim basis (the Terms and Conditions), to be submitted to the Parties serving as the meeting of the Parties to the Kyoto Protocol for adoption following approval of such terms and conditions by the World Bank.
- (G) The Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol and the World Bank wish to conclude the legal arrangements necessary for the World Bank to serve as Trustee on an interim basis by way of approving and accepting the Terms and Conditions in the manner set forth below.

TERMS AND CONDITIONS

Role and Responsibilities of the Trustee

1. The World Bank shall act as the Trustee on an interim basis in accordance with the Terms and Conditions set forth herein, based on the understanding that the interim arrangement between the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol and the Trustee shall be reviewed at the sixth session of the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol in accordance with paragraph 32 of decision 1/CMP.3.
2. The Trustee shall perform its functions under the Terms and Conditions in accordance with the applicable provisions of the World Bank's Articles of Agreement, by-laws, policies and procedures. Further, subject to paragraph 9 below, the Trustee shall comply with the principles and modalities for operations stipulated in the relevant decisions of the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol and decisions of the Adaptation Fund Board.
3. The Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol hereby confirms its designation, under its decision 1/CMP.3, of the Adaptation Fund Board as its designee and delagatee in respect of the Adaptation Fund and imbues the Adaptation Fund Board with the capacity, power and authority to render decisions and provide instructions and guidance to the Trustee hereunder, including but not limited to the capacity, power and authority to enter into or cause to be entered into any and all contracts of sale of certified emission reductions (CERs) collected as the share of proceeds for the Adaptation Fund and to establish and agree guidelines and manners, according to which sales of CERs shall be conducted. The Trustee shall not be responsible for inquiring or investigating if such decisions and instructions do not contravene an existing decision or act of the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol, and shall have no liability for relying in good faith on any instruction or direction of the Adaptation Fund Board without further inquiry or investigation on its part.
4. The Trustee shall establish a trust fund for the Adaptation Fund (the Trust Fund), and shall hold in trust, as a legal owner, and administer the funds, assets and receipts, which constitute the Trust Fund, both on behalf of the Adaptation Fund supervised and managed by the Adaptation Fund Board under the authority and guidance of the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol.
5. Subject to paragraph 2 above, the Trustee shall administer the funds, assets and receipts of the Trust Fund only for the purpose of, and in accordance with the Terms and Conditions and the relevant decisions of the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol and the Adaptation Fund Board.
6. Notwithstanding paragraph 21 of decision 1/CMP.3, the Trustee shall hold the funds, assets and receipts that constitute the Trust Fund separate and apart from the funds of the World Bank, but may commingle them for administrative and investment purposes with other trust fund assets maintained by the World Bank.

7. For the purpose of the monetization of CERs for the Adaptation Fund, the Trustee, in its capacity as agent of the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol, is hereby authorized by the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol to administer sales of CERs pursuant to paragraphs 19, 20, 21 and 22 below.

8. The Trustee shall be responsible only for performing those duties and responsibilities specifically and expressly set forth in the Terms and Conditions and shall not be subject to any other duties or responsibilities (express or implied), including, without limitation, any duties or obligations that might otherwise apply to a fiduciary or trustee under general principles of equity, trust or fiduciary obligations and/or any other legal or equitable principles. The Trustee shall not be responsible for the value obtained from the sales of CERs conducted pursuant to paragraphs 19, 20, 21 and 22 below or any expenses or liabilities incurred in connection with such sales, and shall be fully indemnified in connection with same.

9. Any decision by the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol or the Adaptation Fund Board shall be made only with the written consent of the Trustee, to the extent that such decision relates in any way to the functions of the Trustee performed or to be performed under the Terms and Conditions. For this purpose, the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol requests the Adaptation Fund Board to consult with the Trustee, prior to taking any decisions or recommending any draft decisions for consideration by the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol, on any issues relating to the functions of the Trustee. The Trustee shall not be bound by any decision of the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol or the Adaptation Fund Board to the extent that such decision relates in any way to the functions of the Trustee performed or to be performed under the Terms and Conditions and in respect of which the written consent of the Trustee was not obtained.

10. The Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol agrees that the Trustee shall be fully indemnified, out of the assets held for the Adaptation Fund, including the Trust Fund resources, for any liabilities, claims, losses, costs and expenses, including attorneys' fees and expenses incurred by the Trustee in connection with or in any way arising out of its activities as Trustee, including but not limited to any activities of the Trustee in connection with the sale or the facilitation of the sale of the CERs. Such indemnity shall not include any liabilities, claims, losses, costs or expenses incurred by the Trustee as a direct result of its own gross negligence or willful misconduct.

11. The privileges and immunities accorded to the World Bank shall apply to the property, assets, archives, operations and transactions of the Trust Fund. Nothing in the Terms and Conditions shall be considered a waiver of any privileges or immunities of the World Bank under its Articles of Agreement or any applicable law, all of which are expressly reserved.

12. The Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol agrees that the Trustee shall be reimbursed annually from the assets held for the Adaptation Fund, including the Trust Fund resources, the fees and expenses incurred by it in connection with performing its functions under the Terms and Conditions, including without limitation the costs

and expenses incurred in connection with the establishment and administration of the Trust Fund (including attorneys' fees and expenses and external auditors' costs) and any and all services provided hereunder, including consultation with relevant experts and advisors from time to time. For this purpose, the Trustee shall submit to the Adaptation Fund Board a proposal for the services and activities to be provided by the Trustee and estimated fees and expenses to carry out such services and activities for the upcoming fiscal year. Upon approval of the proposal by the Adaptation Fund Board, the Trustee may deduct and transfer the amount of the estimated fees and expenses to its own account from the Trust Fund resources or such other assets held for the Adaptation Fund; provided that the amount of the fees and expenses transferred shall be subject to an end of year adjustment based on an actual cost incurred.

13. In order to enable the Trustee to carry out its functions enumerated in the Terms and Conditions, the Trustee shall be entitled to attend, as an observer, any meetings of the Adaptation Fund Board, and any meetings of the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol, which may concern operations and activities of the Adaptation Fund. Further, the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol hereby instructs the secretariat servicing the Adaptation Fund Board and the Adaptation Fund in accordance with decision 1/CMP.3 and the secretariat of the Convention (the UNFCCC Secretariat) to cooperate fully with the Trustee.

Administration of the Trust Fund

14. The Trustee shall receive and hold in the Trust Fund any proceeds from sales of the CERs conducted pursuant to paragraphs 19, 20, 21 and 22 below. Further, if so requested by the Adaptation Fund Board, the Trustee may accept, on terms agreed with the Trustee, contributions from donors to support the operations of the Adaptation Fund. For the avoidance of doubt, no CERs shall be held in the Trust Fund.

15. The Trustee shall invest the funds held in the Trust Fund, pending their transfer, in accordance with the Trustee's policies and procedures for the investment of trust funds administered by the World Bank. The Trustee shall credit all income from such investment to the Trust Fund to be used for the same purposes as other funds held in the Trust Fund.

16. The funds held in the Trust Fund may be freely exchanged by the Trustee into other currencies as may facilitate their administration and transfer.

17. The Trustee shall establish and maintain separate records and accounts to identify the resources of the Trust Fund, the commitments financed out of the Trust Fund, and the receipts and transfers of funds in the Trust Fund.

18. The Trustee shall prepare and furnish the Adaptation Fund Board with periodic financial reports of the Trust Fund, and cause records and accounts of the Trust Fund to be audited by its external auditors, in accordance with the policies and procedures of the Trustee. Further, the Trustee shall prepare and furnish the Adaptation Fund Board with periodic reports on sales of the CERs for the Adaptation Fund and status of commitments and transfers of Trust Fund funds.

Sales of CERs

19. An account has been established and maintained at the CDM registry in the name of the Adaptation Fund to receive CERs collected as the share of proceeds for the Adaptation Fund (the CDM Account). The Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol hereby authorizes the sale of the CERs from the CDM Account in the manner set forth in paragraphs 20, 21 and 22 below.

20. Pursuant to the authority provided under paragraph 3 above, the Adaptation Fund Board may enter into or cause to be entered into any and all contracts of sale on behalf of the Adaptation Fund under the authority of the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol, and may grant an unlimited power of attorney to the Trustee so that the Trustee may execute such contracts of sale with the relevant third party CER purchasers, at the direction of the Adaptation Fund Board.

21. Pursuant to the authority provided under paragraph 7 above, and in furtherance of paragraphs 19 and 20 above, the Trustee may, at the direction of the Adaptation Fund Board pursuant to paragraph 22 below, (i) cause the transfer of title to the CERs to the relevant third party purchasers upon receipt of payment in respect of same, (ii) enter into arrangements with the CDM registry administrator to effectuate such transfers of the CERs, and (iii) take such other actions as are necessary to effectuate sales of the CERs pursuant to paragraphs 19, 20 and 22, for the benefit of the Adaptation Fund under the authority of the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol.

22. Sales of the CERs and transfers of title in respect of same pursuant to paragraphs 19, 20 and 21 above shall be effected by the Trustee only in accordance with the guidelines, and in the manner, agreed between the Trustee and the Adaptation Fund Board. The Trustee shall have no liability for relying in good faith on any instruction or direction of the Adaptation Fund Board without further inquiry or investigation on its part.

Commitments and Transfers of Funds from the Trust Fund

23. The Trustee shall, subject to the availability of resources held in the Trust Fund, record commitments and make transfers of funds from the Trust Fund in the manner agreed between the Trustee and the Adaptation Fund Board, and only at, and in accordance with, the written direction provided to the Trustee by the Adaptation Fund Board or such other person designated in writing by the Adaptation Fund Board for this purpose. Upon transfer of funds, the Trustee shall have no responsibility for the use of Trust Fund funds transferred and activities carried out therewith. The Trustee shall have no liability for relying in good faith on any instruction or direction of the Adaptation Fund Board without further inquiry or investigation on its part.

Dispute Resolution; Notices

24. The parties to the Terms and Conditions shall, to the extent possible, strive to resolve promptly and amicably questions of interpretation and application of the Terms and Conditions and settle any disputes, controversy, or claim arising out of or relating to the Terms and Conditions.

25. Any dispute, controversy, or claim arising out of or relating to the Terms and Conditions, which has not been settled by agreement of the parties, shall be submitted to arbitration in accordance with the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL) in effect on the effective date of the Terms and Conditions, and the following provisions: (a) the appointing authority shall be the Secretary-General of the Permanent Court of Arbitration; and (b) the language of the arbitral proceedings shall be English.

26. Any arbitral award under paragraph 25 above shall be final and binding upon the parties. The provisions set forth in paragraphs 24 and 25 above shall be in lieu of any other procedure for the settlement of disputes between the parties to the Terms and Conditions.

27. Any notice or request required or permitted to be given or made under the Terms and Conditions and any other agreement between any of the parties contemplated by the Terms and Conditions shall be in writing. Such notice or request shall be deemed to have been duly given or made when it shall be delivered by hand or by mail or facsimile to the World Bank or the UNFCCC Secretariat, in case of the Conference of Parties serving as the meeting of the Parties to the Kyoto Protocol, to which it is required or permitted to be given or made at such party's address designated by notice to the World Bank or the UNFCCC Secretariat, in case of the Conference of Parties serving as the meeting of the Parties to the Kyoto Protocol, giving such notice or making such request. Deliveries made by facsimile transmission shall also be confirmed by mail.

Amendment and Termination

28. Any amendment to the Terms and Conditions shall become effective only upon approval and acceptance by the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol and the World Bank.

29. The Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol may at any time appoint a successor trustee servicing the Adaptation Fund, who shall succeed the role and responsibilities of the Trustee under the Terms and Conditions. The Trustee's role as trustee servicing the Adaptation Fund shall be terminated three months after receipt by the Trustee of the notice in writing of the appointment of such successor trustee.

30. The Trustee may at any time terminate its role as trustee servicing the Adaptation Fund, and after giving the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol a notice in writing no less than three months prior to any session of the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol. The Trustee's role as trustee servicing the Adaptation Fund shall be terminated immediately after the session of the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol immediately following the notice by the Trustee. In the event that no session of the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol is held within twelve months after the notice by the Trustee, however, the Trustee's role shall be terminated twelve months after the notice by the Trustee.

31. Following termination pursuant to paragraphs 29 or 30 above, the Trustee shall carry on no business for the Adaptation Fund except for the purpose of winding up its affairs. The Trustee shall take all necessary action for winding up its affairs in an expeditious manner, and for meeting

the commitments already made by the Trustee and the transfer of any remaining funds, assets and receipts in the Trust Fund, as directed by the Adaptation Fund Board. The Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol hereby mandates that in such circumstances the Adaptation Fund Board shall provide such direction to the Trustee without undue delay. All of the powers of the Trustee under the Terms and Conditions shall continue until the affairs of the Trustee shall have been wound up.

Effectiveness

32. The Terms and Conditions shall become effective and constitute agreement between the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol and the World Bank, upon decisions by the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol and the World Bank approving and accepting the Terms and Conditions.