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A NOTE IN TREATY LANGUAGE CONTAINING THE
DIFFERENT OPTIONS FOR A FINANCIAL MECHANISM
BASED ON SOLUTIONS ADOPTED IN OTHER
CONVENTIONS AND OTHER MULTILATERAL
FINANCIAL MECHANISMS

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I. INTRODUCTION

The present Note provides two alternative financial mechanisms in legal language for the Convention on Biological Diversity for the consideration of the Ad Hoc Working Group of Legal and Technical Experts on Biological Diversity.

The alternatives were chosen as most appropriate for the purpose of the Convention after research on existing financial mechanisms adopted in international conventions and other multilateral arrangements. Upon analysis of the relevance of these mechanisms to biological diversity two viable options emerged: (i) a multilateral trust fund and (ii) an international corporation. A comprehensive discussion of financial mechanisms is available in a background document UNEP/Bio.Div/WG.2/3/4 "A Note on Options for a Financial Mechanism to Meet the Requirements of a Convention on Biological Diversity". After consulting the background document, if delegations so desire, the Secretariat can translate other options into legal language.

UNEP/Bio.Div/WG.2/3/4
A Note on Options for a
Financial Mechanism to Meet the
Requirements of a Convention on
Biological Diversity
Background Document

II. ALTERNATIVE ONE: PROPOSED LEGAL LANGUAGE CONCERNING THE ESTABLISHMENT OF A MULTILATERAL TRUST FUND FOR THE CONSERVATION OF BIOLOGICAL DIVERSITY

A. General provisions

Definitions

1. "The Fund" shall mean the Multilateral Trust Fund for the Conservation of Biological Diversity.
2. "Habitat country" shall mean a country with tropical forests, wetlands, estuaries, lakes, highlands, savannah ecosystems, temperate woodlands or other habitat of large-scale biological diversity, and a country recognized as such a habitat on the basis of an international environmental agreement, and on that account treated as a potential beneficiary of the fund. Where such a habitat extends over the boundaries of one or more countries, the countries concerned may create an intergovernmental authority for the express purpose of managing a biological diversity conservation programme for the habitat concerned. The intergovernmental authority shall be treated like a habitat country.
3. "The Board" shall mean the Executive Board of the Fund.
4. "Implementing agency" shall mean specialized international agencies upon which the Board shall rely for the full implementation of the measures for conservation of biological diversity in the habitat countries. Such agencies include in particular the following: the United Nations Environment Programme; the Food and Agricultural Organization of the United Nations; the International Union for the Conservation of Nature and Natural Resources; and the World Bank.

Establishment of the Fund

5. A Multilateral Trust Fund for enhancing the conservation of biological diversity, to be named "The Multilateral Trust Fund for the Conservation of Biological Diversity" and hereinafter referred to as "the Fund", is hereby established with the following aims :
 - (a) to make money grants to habitat countries to enable these countries to undertake in situ or ex situ conservation of ecosystems and species;
 - (b) to provide fair compensation to habitat countries for the use of their genetic resources;
 - (c) to provide financial assistance to habitat countries to enable them to reach a technological, educational and training level that will facilitate national programmes for the conservation of biological diversity;
 - (d) to provide financial assistance to habitat countries to enable them to conduct ecological surveys and to monitor technical assistance and strengthen relevant legal instruments for the conservation of biological diversity;

- (e) to accord habitat countries financial assistance to enable them to establish and operate management programmes for the conservation of biological diversity;
- (f) to make money grants to habitat countries to enable them to run effective programmes for the preservation of the ecological balance, and in particular to attain the following objectives: (i) protection of topsoil and croplands; (ii) reforestation of the earth; (iii) population control; (iv) energy efficiency; (v) renewable energy development.

6. The operations of the fund shall commence with an initial amount of 500 million US Dollars, contributed by States Parties in accordance with the United Nations scale of assessment; and this amount may be increased during the first three years of operation and will, in any case, be subject to annual review thereafter.

7. The Fund shall in each State Party be recognized as a legal person capable, under the laws of that State, of assuming rights and obligations and of being party in legal proceedings before the courts of that State. Each State Party shall recognize the Director of the Fund (hereinafter referred to as "the Director") as the legal representative of the Fund.

B. Monetary grants and compensation

Assistance and compensation

8. For the purpose of fulfilling its functions under paragraph 5, above, the Fund shall:

- (a) make an annual monetary grant to each habitat country, commensurate with that country's level of endowment in biological diversity and with that country's state of preparedness to employ the financial grant in effective programmes of conservation of biological diversity;
- (b) take action to assess or monitor the implementation of measures of conservation of biological diversity in the habitat country, as a basis for making a financial grant;
- (c) take any appropriate measures to assist the habitat country in acquiring and employing the capability for conservation of biological diversity.

9. The Fund shall, at the request of a habitat country, use its good offices as necessary to assist that country to secure personnel, material or services as may be necessary to enable that country to strengthen its machinery for the conservation of biological diversity, and the Fund may thereafter treat the value of such assistance as a commutation of a financial grant.

10. It shall be the responsibility of the habitat country to facilitate the due operation of the Fund's measures of assistance, and the Fund shall be under no obligation to make a financial grant or to accord any other assistance to the habitat country where the habitat country shall fail in any material respect to incorporate the Fund's assistance within its public programmes and to give them effect, with the object of conserving biological diversity.

11. The Board shall consider any claim for compensation, in respect of use of genetic resources, by a habitat country, and shall thereafter take a decision on any compensation payable by the Fund.

C. Implementing agencies

Roles of implementing agencies

12. Implementing agencies, under the guidance and supervision of the Board:
 - (a) shall be requested by the Board to co-operate with and assist the States Parties by assisting the habitat countries to achieve greater effectiveness in the conservation of biological diversity, and
 - (b) shall be invited by the Board to make an inter-agency agreement and specific agreements with the Board, acting on behalf of the Parties.

D. Administration

Conduct of administration

13. The Director shall be the head of the Fund's Secretariat, which shall be co-located with the United Nations Environment Programme, and which shall assist the Board in the discharge of its functions.
14. The Board shall consist of fourteen members representing developed and developing countries in equal numbers, and shall have a Chairman and a Vice Chairman, with the two positions rotating between the two groups of countries every two years.
15. The Board shall formulate rules to regulate its operations both in relation to internal management and in relation to funding modalities.
16. The Board shall approve the nature, scope and design of projects or programmes to be financed by the Fund; it shall determine the criteria for allocation of funds to habitat countries, and shall formulate eligibility criteria for funding by the Fund, on the basis of principles incorporated in the various international agreements on environmental law.
17. The Board shall encourage the involvement of other agencies in carrying out its functions.
18. The Fund Secretariat and the implementing agencies shall co-operate with the States Parties to provide information on funding available for habitat countries, to secure the necessary contacts and co-ordinate, when requested by the interested Party, projects financed from other sources with activities financed under the present Article.
19. At the end of each calendar year, the Director shall submit to the Parties accounts for the year. The Director shall also, as soon as practicable, submit the audited accounts for each period to coincide with the accounting procedures of the implementing agencies.

E. Contributions and budgeting

Contributions by States Parties: budgeting by the Secretariat

20. All contributions by States Parties, and any contributions by non-Parties to the Fund shall be in convertible currency or, in certain circumstances, in kind and/or in national currency.
21. Contributions from States that become Parties after the beginning of the financial period of the mechanism provided for in the present Article, shall be calculated on a pro rata basis for the balance of the financial period.
22. Contributions not immediately required for the purpose of the Fund shall be invested under the authority of the Board and any interest so earned shall be credited to the Fund.
23. The Board shall prepare and submit to the regular meetings of the States Parties budget estimates, setting out, in US Dollars, the income and expenditure of the Fund.
24. The proposed budget estimates shall be dispatched by the Fund Secretariat to all States Parties at least sixty days before the date fixed for the opening of the regular meeting of the Parties at which they are to be considered.
25. The Fund shall cover Secretariat costs, based on regular budgets to be submitted for decision by the Board.
26. In the event that the Director anticipates a shortfall in resources over the financial period as a whole, he shall have authority to adjust the budget as approved by the States Parties, so that expenditures are at all times fully covered by contributions received.
27. No commitments shall be made in advance of the receipt of contributions, but income not spent in a budget year and unimplemented activities may be carried forward from one year to the next within the financial period.

II. ALTERNATIVE TWO: PROPOSED INTERNATIONAL CORPORATION
FOR FINANCING THE CONSERVATION OF BIOLOGICAL DIVERSITY

A. General provisions

Establishment of the Corporation

28. The Biological Diversity Finance Corporation (hereinafter called the Corporation) is hereby established, and shall function in accordance with these Articles of Agreement.

Legal status

29. The Corporation shall possess an international legal personality and shall enjoy administrative and financial independence.

Headquarters

30. The Headquarters of the Corporation shall be located in even though representative offices, agencies or branches of the Corporation may be located in such countries as the Board of Directors may determine.

Objectives and functions

31. It shall be the objective of the Corporation to provide finances for the implementation of measures of conservation of biological diversity, in the interest of present and future generations.
32. In pursuit of this objective the Corporation shall have authority:
- (a) to raise funds, whether as loans or grants, from its members and from willing donors ;
 - (b) to raise funds through the issue of bonds and securities;
 - (c) to issue and recover loans to and from member countries or institutions and agencies identified by member countries, with regard to the conservation of biological diversity, whether this is conducted by individual countries, institutions or agencies, or jointly with other institutions or agencies;
 - (d) to provide technical assistance and services in connection with the conservation of biological diversity.

Membership

33. The countries which have signed this Agreement shall be the original founding members of the Corporation.
34. Any other Member State of the United Nations Organization or international financial institution or inter-governmental agency may accede to membership of the Corporation if its request is approved by a simple majority vote of the Board of Directors.
35. The liability of members of the Corporation, as shareholders, shall be limited to the amount, if any, which may remain unpaid on the portion of capital subscribed.

B. Capital base

Capital resources

36. The resources of the Corporation shall consist of:

- (a) the equity capital subscribed by its members;
- (b) voluntary subscriptions to its capital by members and non-members;
- (c) interest-free loans to the Corporation, amounts recovered through the repayment of loans and interest received on loans;
- (d) other amounts raised by borrowing;
- (e) funds derived from operations or otherwise accruing to the Corporation.

Equity capital

37. The initial capital of the Corporation shall be 200 million US Dollars, in shares of 1 million US Dollars each. Each member of the Corporation shall be required to subscribe to one share; and shares subscribed shall not be transferable, except in accordance with the provisions of these Articles of Agreement.

Alteration of capital

- 38. The Corporation may increase or decrease its initial share capital, or may cancel, consolidate or divide shares, or otherwise alter its capital by a resolution of a general meeting.
- 39. No member shall be obliged to subscribe to additional amounts in the case of general or individual increases in the capital of the Corporation.

Further subscriptions

- 40. The Board of Directors shall lay down appropriate terms and procedures for additional subscriptions to be provided by members on a voluntary basis.
- 41. Such further contributions by members may include contributions to a Research Fund.

Loan Capital

- 42. The Corporation may accept interest-free loans from members or non-members, and may repay such loans from its resources.
- 43. The Corporation may raise funds through the issue of bonds or other securities, or by obtaining credit in national or international capital markets.

44. Members making interest-free loans to the Corporation shall make such loans annually for such periods as the Board of Directors may determine, or such periods as may be agreed upon between the members and the Board.

Review of the Corporation's resources

45. The Board of Directors shall, between the fifth and the seventh year, and at intervals of not more than seven years thereafter, review the resources of the Corporation in relation to its requirements, and may submit recommendations thereon to a meeting of members.

C. The Corporation's operations

Principles of operation

46. The Corporation shall provide assistance in the form of grants or loans for conservation measures for biological diversity, in countries and areas recognized by the Board of Directors as the habitat of biological diversity.
47. The Corporation may complement its available financial resources in the best interest of its members, but shall not provide exceptionally concessional loans for any project or undertaking which, in the opinion of the Board of Directors, can obtain adequate financing elsewhere on terms which the Corporation considers reasonable.

Eligibility for loans

48. Subject to the conditions stipulated in these Articles of Agreement, the recipients eligible for assistance from the Corporation shall be:
- (a) Governments of member countries as well as agencies, departments or subdivisions thereof;
 - (b) public or private institutions or enterprises operating in the territory of member countries; provided that government guarantees shall be obtained in respect of such loans;
 - (c) inter-regional or sub-regional organizations established by member countries for the promotion of conservation of biological diversity, provided that guarantees by the relevant Governments shall be obtained, in respect of such loans.

Types of loans

49. The Corporation may provide, as may be directed by the Board of Directors:
- (a) highly concessional loans, being loans for periods exceeding 30 years with low interest and a grace period of not less than 5 years;
 - (b) less-concessional loans, being loans for a period not exceeding 30 years, with a higher rate of interest and a grace period shorter than 5 years.

Terms and conditions of loans

50. The Board of Directors shall issue guidelines for each type of loan.

Limitations of financial operations

51. When the Corporation proposes to raise funds by the issue of bonds or other securities or by obtaining credit in capital markets, the Board of Directors shall ensure that the total amount of outstanding loans, credits and guarantees issued by the Corporation (other than interest-free loans) shall not at any time exceed twice the amount of its subscribed capital, its reserves and free income.

D. Structure and governance

Structure of the Corporation

52. The Corporation shall have a general meeting, a Board of Directors, a President, a Vice-President and such other officers and staff as may be required for the performance of its duties.

The membership

53. Each member of the Corporation shall appoint a representative and an alternate representative to attend meetings of the general membership.
54. Each representative shall have one vote in the general meetings of the Corporation. An alternate may vote only in the absence of the representative.
55. General meetings shall be held at least once every two years.
56. The general meeting is the supreme authority of the Corporation and shall have the power to:
- (a) issue or amend policy guidelines for the management of the Corporation's business;
 - (b) consider and approve the annual report of the Board of Directors or the President on the Corporation's activities;
 - (c) elect the Board of Directors;
 - (d) appoint auditors and set their remuneration;
 - (e) transact any other business not within the competence of any other organ.
57. Unless otherwise stipulated, resolutions put to the vote in a general meeting shall be decided by a simple majority of members.
58. Resolutions adopted in a general meeting shall be binding on all members.

Board of Directors

59. The Board of Directors shall be composed of no fewer than seven nor more than eleven directors. ~~Each director should have an alternate.~~ Each director and alternate director should serve for three years. An alternate director shall not vote in a meeting of the Board of Directors, except in the absence of the director.
60. Directors and alternate directors shall be selected according to groups, as follows:

Developing countries

- | | | |
|--|---|------------------------------|
| . The Mediterranean Group | - | 2 directors and 2 alternates |
| . The Latin American and Caribbean Group | - | 1 director and 1 alternate |
| . Tropical African Group | - | 2 directors and 2 alternates |
| . Asian and Pacific Group | - | 2 directors and 2 alternates |

Developed countries

- | | | |
|------------------------|---|------------------------------|
| . Western States Group | - | 3 directors and 3 alternates |
| . East European Group | - | 1 director and 1 alternate |
61. Countries shall be assigned to one or other of the groups specified in paragraph 60 above upon applying for membership of the Corporation.
62. Each director and alternate shall serve until a successor has been appointed.

Powers of the Board of Directors

63. All the executive powers of the Corporation shall be vested in the Board, except such powers as are reserved for the general meeting. These powers shall include the following;
- (a) formulating policies, in accordance with the provisions of these Articles of Agreement and such guidelines as the general meeting may issue from time to time;
 - (b) adopting regulations and other measures to facilitate the efficient operation of the Corporation;
 - (c) taking decisions on borrowing, and the issuing of bonds and securities or guarantees;
 - (d) causing the undertaking of country studies, as a basis for determining eligibility for loans by the Corporation;
 - (e) providing technical, planning or research assistance to member countries that may be in need, as part of the effort to conserve biological diversity;
 - (f) undertaking necessary negotiations and re-negotiations with member countries requesting financial assistance to support efforts for the conservation of biological diversity;

- (g) preparing for meetings of the membership;
- (h) appointing the President, Vice-President and senior staff of the Corporation;
- ~~(i) approving the Corporation's budget;~~
- (j) interpreting the provisions of these Articles of Agreement.

Resolutions of the Board of Directors

64. Resolutions at meetings of the Board of Directors shall be decided by a majority of the directors, each director having the right to cast one vote only; but the President, or the Vice-President when sitting in an acting capacity, shall have a casting vote in the event of an equality of votes.

The President and Vice-President

65. The President and Vice-President of the Corporation shall be appointed by the Secretary-General of the United Nations, upon the recommendations of the Executive Director of the United Nations Environment Programme, for terms of five years, provided that the two positions shall rotate between the group of developing countries and the group of developed countries.
66. The President and the Vice-President shall remain in office at the end of their terms of office, until their successors assume office.

Other staff

67. The Corporation, in selecting its staff, shall pay due regard to the importance of recruiting personnel on as broad a geographical basis as possible, whilst observing the paramount importance of securing a high standard of efficiency and technical competence.

Status of staff

68. In the discharge of their duties, members of staff owe their obligations entirely to the Corporation and to no other authority. They shall refrain from any act which is incompatible with the international character of their functions and independence.
69. Each member of the Corporation shall respect the international status of the staff and shall refrain from all attempts to influence any member of staff in the discharge of his duties.

E. Financial provisions

The Financial Year

70. The Corporation's financial year shall commence on January 1 and end on December 31 of each year.
71. The term of the first financial year shall be fixed by the Board of Directors.

Budget

72. The President shall submit to the Board of Directors, on a date not later than October 15 of each year, an estimate of the expenses and current income of the Corporation for the following financial year.

Accounts and auditors

73. The President shall ensure that proper books of account are kept which will give a true and fair view of the state of the Corporation's affairs and will explain its transactions.
74. The Board of Directors shall submit to the general meeting of the Corporation a report containing an audited statement of the accounts, including a balance sheet and an income and expenditure account. The form of such a statement shall be determined by the Board of Directors.
75. The accounts of the Corporation shall be certified by a firm of auditors of recognized international standing, appointed by the general meeting.

Profits and reserves

76. The general meeting of the Corporation shall determine, upon the recommendation of the Board of Directors, the allocation which should be made of the net income of the corporation.

F. Immunities and privileges

Immunities of assets, correspondence, records

77. The property and other assets of the Corporation in the territories of member countries shall enjoy immunity from nationalization, confiscation or any form of seizure by executive or legislative action. Such immunities shall not extend to judicial action or to assets purchased by proceeds of loans extended by the Corporation to its beneficiaries.
78. The official correspondence and records of the Corporation shall be accorded in each member country the same privileges enjoyed by the official communications and records of other member countries.

Exchange restrictions

79. The assets and transactions of the Corporation shall not be subject to the exchange control regulations prevailing in any member country.

Immunity from taxation

80. The Corporation, its assets, property, income and its operations and transactions authorized by this Agreement, as well as the shares of its capital shall be immune from all taxation and all customs duties in member countries.

Personal privileges and immunities

81. All directors, alternates, officers and employees of the Corporation, including experts on missions for the Corporation, shall be immune from legal process with respect to acts performed by them in their official capacity.

G. Suspension of operations and liquidation

Temporary suspension

82. In an emergency, the Board of Directors may temporarily suspend its activities in respect of new operations, pending an opportunity for further consideration and action by the general meeting.

Liquidation

83. The general meeting may by a two-thirds majority and after giving member countries not less than three month's notice, decide to terminate operations and liquidate the Corporation.
84. The Corporation shall undertake the liquidation proceedings either by itself or through a committee of liquidators to be appointed by the general meeting.
85. No distribution of assets shall be made to members on account of their subscriptions to the capital of the Corporation until all liabilities to creditors shall have been discharged or provided for.

H. Miscellaneous provisions

Arbitration and interpretation

86. In the event of a disagreement occurring between the Corporation and a country which has ceased to be a member, or between the Corporation and a member, after a decision has been taken to terminate operations of the Corporation, such disagreement shall be submitted to arbitration by a tribunal of three arbitrators. One arbitrator shall be appointed by the party instituting proceedings, another by the adverse party, and the third, within thirty days of the appointment of the second arbitrator, by the President of the International Court of Justice.
87. A majority vote of the arbitrators shall be sufficient to reach a decision which shall be final and binding upon the parties.
88. Questions of interpretation or application of these Articles of Agreement shall be submitted to the Board of Directors for decision.

Amendments to Articles of Agreement

89. These Articles of Agreement may be amended by a resolution passed by a three-fourths majority at a general meeting of the Corporation. Only member countries of the Corporation, or the Board Directors, shall have authority to propose amendments to these Articles of Agreement. Amendments shall enter into force for all members three months after the date of approval.

Prohibition of political activity

90. Neither the Corporation nor any personnel working in any of its organizations shall in any manner interfere in the political affairs of ~~any member country or in other international political issues.~~

Relations with other organizations

91. The Board of Directors may conclude with organizations of national, regional or international character, agreements conducive to the expansion of co-operation with the Corporation.

I. Final provision

Entry into force

92. These Articles of Agreement shall enter into force when approved by a resolution of the General Assembly of the United Nations Organization.

First meeting of the Board of Directors

93. The Governing Council of the United Nations Environment Programme or the Executive Director of the Programme shall convene the first general meeting of the Corporation within a period of six months following the entry into force of these Articles of Agreement.

Commencement of operations

94. The Board of Directors shall inform all member countries of the date of commencement of operations.