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Eleventh Intergovernmental Meeting on the Action Plan for the Caribbean Environment Programme and the Eighth Meeting of the Contracting Parties to the Convention for the Protection and Development of the Marine Environment of the Wider Caribbean Region

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**DISCUSSION PAPER FOR THE OPEN INTERSESSIONAL DRAFTING GROUP ON  
THE RULES OF PROCEDURE FOR THE CARIBBEAN ENVIRONMENT  
PROGRAMME, FINANCIAL RULES FOR THE CARTAGENA CONVENTION AND  
THE CARIBBEAN ENVIRONMENT PROGRAMME, AND TERMS OF REFERENCE  
FOR THE CARIBBEAN TRUST FUND**



**Discussion Paper for the Open Intersessional Drafting Group on the Rules Of Procedure for the Caribbean Environment Programme, Financial Rules for the Cartagena Convention and the Caribbean Environment Programme, and Terms of Reference for the Caribbean Trust Fund**

**I. Introduction.**

1. This paper responds to Decision VIII of the 10<sup>th</sup> Intergovernmental Meeting on the Action Plan for the Caribbean Environment Programme and the 7<sup>th</sup> Meeting of the Contracting Parties to the Convention for the Protection and Development of the Marine Environment of the Wider Caribbean Region. Decision VIII requested the Open Intersessional Working Group to provide it with a report “elaborating the three options” outlined in document UNEP(DEC)/CAR IG.22/3, taking into account relevant international decisions and precedents.
2. Decision VIII specifically requested the Working Group to clarify:
  - “Whether and how participation and voting rights should be differentiated in the Action Plan, the Convention and the Protocols,” as well as whether consensus decisionmaking should be required in the interim;
  - “Whether the financial arrangements governing the status quo should be improved and/or clarified,” including whether to clarify that budgets and workplans adopted by the Protocol Parties are only in the nature of a recommendation to the joint meeting of the IGM and the COP and whether the Terms of Reference for the Caribbean Trust Fund can be improved to assure more stable funding; and
  - Whether the experience of other regional seas programmes can provide insight into these questions.
3. In order to address the above questions, this paper: (A) provides general background on the relationship between the Action Plan and the Convention and the legal status of the Rules of Procedure and Financial Rules; (B) outlines the three options proposed in document UNEP(DEC)/CAR IG.22/3; (C) examines relevant precedents in other international fora in order to elaborate the three options; and (D) proposes options and questions for continued discussion.

**II. The Action Plan and the Convention.**

4. Document UNEP(DEC)/CAR IG.22/3 described the relationship between the Action Plan and the Convention. While the Action Plan was designed to “establish a framework for activities requiring regional cooperation,”<sup>1</sup> the Convention is a legally binding agreement that sets out obligations among its parties and establishes an institutional framework to manage the legal agreement. Currently, 36 states and territories participate in the

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<sup>1</sup> UNEP/CEPAL/IG.27/3, at Annex IV, para. 3.

intergovernmental meetings on the Action Plan, while only 21 states are parties to the Convention.<sup>2</sup>

5. Despite the differences between the Action Plan and the Convention, the activities of both have been historically intertwined. UNEP acts as Secretariat for both bodies; the intergovernmental meetings on the Action Plan have been conducted in conjunction with the meetings of the Parties to the Convention; the Monitoring Committee for the Action Plan meets in joint session with the Bureau to the Convention; and funding for both the Action Plan and the Convention has come from the same sources, that is, the Caribbean Trust Fund, the UNEP Environmental Fund, and contributions to the Action Plan.
6. This linkage has been recognized by the Parties to the Convention and the Intergovernmental Meeting on the Action Plan. In 1987, the governments took a decision “to recognize that the Cartagena Convention is the legal framework of the Caribbean Action Plan and that the Action Plan is the operational instrument for the implementation of the Convention’s provisions through regional cooperative programs”<sup>3</sup> and “to convene, until all States are Parties to the Convention,” joint meetings on the understanding that Convention matters would be dealt with by the Contracting Parties and that the UNEP Governing Council’s Rules of Procedure would be used until future rules were adopted.<sup>4</sup>
7. The current arrangements have likely succeeded in practice because the two decision-making bodies have agreed to work together, and because decisions in the joint meetings have always been taken by consensus. But underlying issues remain because the governments have never clarified which body needed to decide which issue, which body would fund particular activities, and which delegations would be able to vote if consensus on an issue could not be achieved.
8. Additionally, there has been a desire to ensure that the Action Plan is placed on a firmer legal and financial foundation. In particular, it has been suggested that Financial Rules are needed to clarify the legal status of invoices and ensure a steady stream of contributions into the Caribbean Trust Fund, and that Rules of Procedure are needed in order to resolve future potential disputes in a fair and equitable manner.
9. Nonetheless, the distinctions between the Action Plan and the Convention – namely, the differing participants, the differing governing bodies, and the potential for differing activities and accounting – have made adoption of permanent Financial Rules and Rules of Procedure a difficult process.

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<sup>2</sup> Currently, 21 states are parties to the Oil Spills Protocol, and 12 states are parties to the Specially Protected Areas and Wildlife Protocol. The Pollution from Land-Based Sources and Activities Protocol has not yet entered into force because an insufficient number of states have ratified it.

<sup>3</sup> UNEP(OCA)/CAR IG.2/4, at para. 15. The U.S. delegation expressed their reservation on this decision.

<sup>4</sup> *Id.* at para. 9.

### III. Options Previously Identified.

10. Document UNEP(DEC)/CAR IG.22/3 identified three options to address the rules issues discussed above: (A) maintain the status quo; (B) formalize the current close relationship between the Action Plan and Convention while recognizing the underlying legal differences; and (C) restructure the current arrangement by bringing the Action Plan under the framework of the Convention.
11. Option 1: Continue the Current Interim Ad Hoc Arrangements. This option is simply to retain the current structure without clarifying the underlying legal issues. Although it would not provide resolution of the key issues, some of those issues might be resolved on an ad hoc basis, or through revisions to the Terms of Reference to the Caribbean Trust Fund.
12. Option 2: Formalize the Current Arrangements. This option is to prepare new Rules of Procedure and Financial Rules that would formalize the parallel operation of the Action Plan and the Convention while clarifying the legal distinctions between the two entities. Under this option, separate Rules of Procedure would be crafted for the Action Plan and the Convention that would differ, where necessary, in addressing such matters as participation and voting. Additionally, it might be necessary as a practical matter to determine whether particular issues were being addressed by the Parties to the Convention or the Intergovernmental Meeting of the Action Plan. Financial Rules would also need to be crafted in order to clarify authorities for financial decisionmaking and the operations and accounting of the Caribbean Trust Fund.
13. Option 3: Restructure the Current Arrangements. This option is to unify the Convention and Action Plan by bringing the Action Plan under the umbrella of the Convention. Under this option, the two bodies would no longer operate in parallel; rather, the Action Plan would become the implementing mechanism for the Convention. Such a restructuring would need to address the participation of those states and territories that currently participate in the Action Plan but are not Parties to the Convention.

### IV. Precedents from Other International Fora.

14. The Working Group examined a number of other international fora in order to understand how similar international bodies have addressed the issues at stake. In particular, Decision VIII requested the Working Group to examine the “decisions on UNEP funding adopted as part of the International Environmental Governance process” and “the relationship among the Action Plan, Convention, and Protocols in other regional seas programmes, including the Barcelona Convention,” particularly with regard to the participation of non-party states and territories. The following paragraphs summarize the Working Group’s findings.
15. UNEP Funding. In the Report of the UNEP Governing Council on the Work of Its Seventh Special Session (UNEP/GCSS.VII/6) (2002), the Governing Council addressed the funding of UNEP, and suggested a number of steps to ameliorate UNEP’s financial situation. These steps included:

- “More predictable funding from all Member States” (para. 15(a)).
  - “More efficient and effective use of available resources, including the possibility of utilizing external management review mechanisms” (para. 15(b)).
  - “Strong focus on agreed priorities of UNEP and ongoing review of previous priorities” (para. 15(c)).
  - “Greater mobilization of resources from the private sector and other major groups” (para. 15(d)).
  - “All Member States . . . taking into account their economic and social circumstances should contribute financially to UNEP” (para. 16).
  - All member states “will be encouraged to contribute to the Environment Fund either on the basis of the indicative scale of contributions, or on the basis of” biennial pledges, the U.N. Scale of Assessment, historic levels of contributions, or any other basis identified by a member. States will inform the Executive Director of their basis or level of contribution (paras. 17-20).
  - Resources will also come from additional voluntary contributions (para. 21).
  - “All Member States are encouraged to make prompt payment of their contributions to the Environment Fund” (para. 22).
  - “UNEP should continue efforts to attract additional resources and support from partnerships with civil society and the private sector” and continue partnerships and complementarity with other international institutions (paras. 24-25).
16. Relationship Between the Action Plan and the Convention. An examination of the other regional seas programmes revealed that no other programme operates in a manner identical to the Caribbean Environment Programme. Although the regional seas programmes operate under an array of different procedures, those that share an Action Plan and a Convention tend to view the Action Plan as a subsidiary, implementing mechanism for the Convention, not a parallel structure. For example, the Conventions related to the Kuwait Region Action Plan (the Kuwait Convention), the South-East Pacific Action Plan (the Lima Convention), the West and Central Africa Action Plan (the Abidjan Convention), the Red Sea and Gulf of Aden Action Plan (the Jeddah Convention) and the South Pacific Region Action Plan (the SPREP Convention) all operate as the legal frameworks for their associated Action Plans. Additionally, some Action Plans – such as the East Asian Seas Action Plan, the Caspian Sea programme, and the North-West Pacific Action Plan – operate without a formal Convention. And others – such as the Baltic Sea Programme and the Black Sea Programme – lack an Action Plan and operate strictly under a Convention.
17. The closest analogy to the Caribbean Environment Programme is perhaps the Mediterranean Action Plan and its associated Barcelona Convention for the Protection of the Mediterranean Sea Against Pollution. Like the Action Plan for the Caribbean Environment Programme, the Mediterranean Action Plan preceded the existence of its Convention, and the participants to the Action Plan made the negotiation of a regional

Convention a priority. The Mediterranean Action Plan, however, adopted the Barcelona Convention as its legal framework, and all members of the Action Plan are Contracting Parties to the Barcelona Convention. This identical membership is facilitated by the fact that all Mediterranean States are parties to the Barcelona Convention, and no territories are members of the Action Plan.

18. In short, the relationship between the Action Plan for the Caribbean Environment Programme and the Cartagena Convention appears to be unique among the regional seas programmes. Despite this fact, other regional seas programmes have addressed issues of participation relevant to the relationship between the Action Plan and the Convention.
19. Participation of Non-State Parties and Territories. The Working Group examined a number of regional seas programmes and similar entities to gain insight into how they addressed the participation of non-party states and territories.
20. *SPREP Agreement.* The South Pacific Regional Environmental Programme directly addressed participation of territories in the Agreement that created the organization. The Agreement creates two classes of participants: Members and Parties. The Agreement provides that:
  - “The SPREP Meeting shall be open to the Membership of the Parties to this Agreement and, with the appropriate authorisation of the Party having responsibility for its international affairs, of [certain listed territories].” (Art. 3).
  - Officers are elected from participating Members. (Art. 4(1)).
  - “The Parties shall ensure the full involvement of all Members in the work of the SPREP meeting. The work of the SPREP meeting shall be conducted on the basis of consensus of all members. . . .” (Art. 4(3)(a)).
  - Decisions, however, are “taken by a consensus of the Parties. The consensus of the Parties shall ensure that the views of all Members of the SPREP Meeting have been properly considered and taken into account in reaching that consensus.” (Art. 4(3)(b)).
21. *Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean.* The WCPFC (commonly referred to as the MHL) follows a similar plan:
  - “The Commission and its subsidiary bodies shall be open to participation [by listed territories] with the appropriate authorization of the Contracting Party having responsibility for its international affairs.” (Art. 43(1)).
  - “The nature and extent of such participation shall be provided for by the Contracting Parties in separate rules of procedure of the Commission, taking into account international law, the distribution of competence on matters covered by this Convention and the evolution in the capacity of such territory to exercise rights and responsibilities under this Convention.” (Art. 43(2)).

- “Notwithstanding [the previous paragraph], all such participants shall be entitled to participate fully in the work of the Commission, including the right to be present and to speak at the meetings of the Commission and its subsidiary bodies. In the performance of its functions, and in taking decisions, the Commission shall take into account the interests of all the participants.” (Art. 43(3)).

The MHLIC is still considering its Rules of Procedure. One proposal has been put forth on the issue of territorial participation. According to Annex II of the Revised Draft Rules of Procedure under consideration by Fifth Session of the WCPFC Preparatory Conference (WCPFC/PrepCon/WP.1/Rev.4) (2003):

- A territory would be “Participating” once it has received authorization “in the form of a declaration” from the relevant Contracting Party describing the territory’s competencies and responsibilities.
  - Territories would have the right to attend, speak, and receive communications
  - Territories “would not have rights inconsistent with their territorial status (such as being elected Chair or being counted towards a quorum).”
  - For matters within a territory’s competence, the territory may make proposals and offer amendments.
  - For matters outside a territory’s competence, the territory may only make proposals and offer amendments “with the specific authorization of the Contracting Party.”
  - The Commission would make “all efforts to reach decision by consensus. Consistent with their full participation in the work of the Commission, all Participating Territories would participate in the Commission’s deliberation to reach consensus. Participating Territories’ views would be properly considered and taken into account in reaching any decision.” Consensus would be “especially important” where the decision would economically impact the territory.
  - If the Commission could reach consensus but for a Participating Territory on allocation (if the Territory is responsible for resources in its waters), or on assessments (if the Territory independently contributes to the budget), then the Participating Territory may request up to 12 hours for consultations.
  - “Notwithstanding this, a Participating Territory could not block consensus on a proposal.”
  - Questions related to territories eventually acquiring the right to vote are left for further discussion.
22. *Antarctic Treaty.* The Antarctic Treaty has two classes of Parties: consultative and non-consultative. Those parties which are non-consultative may be present at Antarctic Treaty Consultative Meetings only if invited and if not objected to by any consultative party, and may only speak subject to the priority of consultative parties and under any restrictions imposed by the Chair. They may also submit documents. But they are “not entitled to

participate in the taking of decisions.” Observers are subject to similar rules. (Rules 26-34).

23. *Nairobi Convention (Eastern Africa)*. Rule of Procedure 47 allows participation of non-states, “upon invitation of the President and without the right to vote.”
24. *Istanbul Convention (Black Sea)*. Article 19 of the Istanbul Convention states that “A non-Black Sea State which accedes to this Convention may attend the meetings of the Contracting Parties in an advisory capacity.”
25. *Arctic Council*. The Arctic Council allows non-Arctic States to be observers if all Arctic States agree, and if they are not acting “at odds with the Council’s Declaration.” These observers may only speak at the discretion of the Chair. (Rules 36-38).
26. *OSPAR Commission (Northeast Atlantic)*. OSPAR allows non-States to be represented as observers on unanimous agreement of the Commission. Observers’ participation may be restricted by the Commission. On the same basis, they may participate in working groups. (Rules 9, 23).
27. *Barcelona Convention (Mediterranean)*. Finally, as noted in Document UNEP(DEC)/CAR IG.22/3, only Parties to the Barcelona Convention may formally participate in decision-making on the associated Action Plan, but other Mediterranean states may be invited to “participate without vote in the deliberations of the meeting.” (Rule 5).

## **V. Elaborating the Options.**

28. The above precedents suggest some concrete possibilities for consideration. Some of the precedents – such as those that do not address territorial participation and those that prevent participation by non-Contracting Parties – probably do not meet the needs of the Caribbean Environment Programme. But some of the precedents – particularly those that provide for non-party and territorial participation in certain circumstances and those that address financial matters – may provide fertile ground for discussion.
29. *Participation of Territories*. Both the SPREP Agreement and the MHLC provide detailed models of how territorial participation might be addressed in the context of the Cartagena Convention. Under these Conventions, territories with authorization have broad rights to participate in Convention meetings, but do not have rights inconsistent with their non-Party status, such as voting. Such a model would be similar to the approach of the Barcelona Convention to the participation of non-Party States; invited non-Parties may “participate without vote in the deliberations of the meeting.”
30. Unless the Caribbean Action Plan is subsumed under the Convention, however, following the SPREP model in the Caribbean context would require a separate examination of participation in the Action Plan. The Action Plan has historically afforded broad participation rights to territories and non-Parties to the Cartagena Convention, and any new

model for participation would need to address the distinction between deliberation over Convention matters and deliberation over Action Plan matters.

31. *Participation of Non-Party States.* Other regional seas programmes have addressed the participation of non-Party states in a variety of ways. The most common form of participation is, upon invite, the ability to participate without vote. This is the model adopted by the Nairobi Convention, the OSPAR Commission, and the Barcelona Convention. Greater limitations on participation are possible, however, and some Conventions, such as the Arctic Council, allow non-Parties to participate only as discretionary observers. In the Caribbean context, however, non-Party state participation in the Action Plan has historically been broader than mere observer status.
32. *Financial Matters.* Most of the steps proposed by the UNEP Governing Council address broad issues of financial stability. The core proposals that might be most relevant to the Action Plan and Convention are: 1) encouraging each government to contribute financially to the Caribbean Trust Fund in a prompt manner; 2) examining the possibility of additional funding sources from international institutions and the private sector; and 3) working towards the most efficient use of resources, including prioritizing activities of the Convention and Action Plan. Many of these issues can be addressed in the context of discussing the Proposed Financial Rules presented in Document UNEP(DEC)/CAR IG.22/4.
33. None of these proposals, however, would directly address the financial interaction between the Action Plan and the Convention. Unless it is made clear which activities funded by the Caribbean Trust Fund are associated with the Action Plan and which are associated with the Convention, no specific rules can be drafted. Instead, a decision would first need to be made regarding which model is most appropriate in defining the relationship between the Action Plan and the Convention.
34. *The Options.* Continuing the current ad hoc arrangements requires little elaboration. The primary question related to this option is whether the UNEP proposals suggested in paragraph 32 should be considered in the context of revisions to the Proposed Financial Rules and Terms of Reference to the Caribbean Trust Fund.
35. In contrast, the option of formalizing the current arrangements might be significantly informed by international precedents on participation. It is worth considering whether the models presented in paragraphs 20 through 27 might be useful starting points for elaborating the Rules of Procedure. In particular, the models used in the SPREP Agreement and the MHLC are particularly detailed, and might be grounds for discussion on how to address territorial participation in Convention issues.
36. Finally, it should be reiterated that other regional seas programmes that have both an Action Plan and a Convention have subsumed the Action Plan's activities under the legal framework of the Convention. This option could incorporate the models of participation discussed in the previous paragraphs.

## VI. Directions for Further Action.

37. A basic question is whether to pursue the status quo, a formalization of current arrangements, a restructuring of the relationship between the Action Plan and the Convention, or some other approach. Once this basic question is resolved, more detailed proposals can be addressed by the governments.
38. In this regard, it may be worthwhile to sever questions relating to the Rules of Procedure from those relating to the Financial Rules. Consensus might be more easily achieved by examining only one aspect of the issue, and most of the considerations involved in ensuring a stable financial base for the Caribbean Trust Fund are separate from the participatory issues that must be addressed in the Rules of Procedure context.
39. Decision VIII also requested the Working Group to consider two questions that have not otherwise been addressed in this paper: (A) whether the current interim rules should be altered to require consensus decision-making; and (B) whether to clarify that budgets approved by Protocol Parties are only guidance.
40. First, although the Intergovernmental Meeting of the Action Plan and the Contracting Parties to the Convention operate on a consensus basis as a de facto matter, there are certain legal and procedural difficulties in requiring consensus decision-making on Convention issues. This is because non-Parties to the Convention would be able to prevent the Parties to the Convention from taking decisions on Convention matters, despite the fact that they have not ratified the Convention and are not bound by its obligations. Moreover, the Convention specifically requires that certain decisions be taken by Contracting Parties. (E.g., Arts. 17-21.) Thus, the governments must address which activities are solely operating under the Action Plan before a consensus requirement could appropriately be considered.
41. Second, Article 20(2) of the Cartagena Convention states that “[t]he Contracting Parties shall unanimously adopt financial rules . . . to determine, in particular, their financial participation under this Convention and under protocols to which they are parties.” Thus, the Contracting Parties must decide, through the promulgation of Financial Rules, whether decisions under protocols operate as guidance. The Contracting Parties could apparently choose to treat such decisions as guidance on an interim basis, but until Financial Rules and updated Terms of Reference are promulgated, there will be no solid legal foundation for any such decision. Moreover, it is unclear whether the Contracting Parties could legally condition Protocol Party decisions on consensus approval of all Action Plan participants.
42. *Next Steps.* Like Document UNEP(DEC)/CAR IG.22/3, this paper has focused on broad questions of structure – questions that concern the overall architecture of the arrangements for the Action Plan and the Convention. Once the parties have given consideration to the issues discussed in this paper, it will be possible to undertake further review of individual rules and language. As an initial step, it might be most effective to focus on those issues relating solely to participation and the Rules of Procedure. The models utilized in other

international bodies such as SPREP and the MHLC might be starting points for this inquiry.

References:

UNEP(DEC)/CAR IG.22/3: Results of the Open Intersessional Drafting Group on the Rules of Procedure for the Caribbean Environment Programme

UNEP(DEC)/CAR IG.22/4: Proposed Financial Rules for the Cartagena Convention, and the Caribbean Environment Programme, and Terms of Reference for the Caribbean Trust Fund