



UNITED
NATIONS



**Convention to Combat
Desertification**

Distr.
GENERAL

ICCD/COP(9)/9/Add.1
27 September 2009

Original: ENGLISH

Conference of the Parties
Ninth session
Buenos Aires, 21 September–2 October 2009

Agenda item 10
Assessment of the Global Mechanism by the Joint Inspection Unit

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Addendum

Legal opinion on the scenario proposed to the Conference of the Parties of the United Nations Convention to Combat Desertification by the Joint Inspection Unit on the institutional merging of the permanent secretariat of the Convention and the Global Mechanism

1. In decision 3/COP.8, the Conference of the Parties (COP) requested the Joint Inspection Unit (JIU) to conduct an assessment of the Global Mechanism (GM) and to submit its recommendations to COP 9 for consideration.¹ At COP 9 Parties are considering the report of the JIU entitled “Assessment of the Global Mechanism of the United Nations Convention to Combat Desertification”.² During consideration of the report by the Committee of the Whole (COW) on 22 September 2009, the COW requested the secretariat to provide a legal opinion on the second scenario for enhancing coordination and effectiveness of the implementation of the Convention put forward in the JIU report, entitled “institutional merging of the permanent secretariat and the Global Mechanism”.

2. This legal opinion has been prepared by the secretariat in consultation with the United Nations Office of Legal Affairs. It is provided to Parties at the request of the Chair of the COW. The secretariat would like to note that it is the prerogative of the Parties to the Convention to interpret and reach an understanding on the provisions of the Convention and the report of the JIU to COP 9.

¹ ICCD/COP(8)/16/Add.1, decision 3/COP.8, para. 27.

² JIU/REP/2009/4.

I. Analysis of the institutional merging of the permanent secretariat and the Global Mechanism as in the second scenario proposed by the Joint Inspection Unit

3. In accordance with decision 3/COP.8, the JIU conducted an assessment of the Global Mechanism in 2009 and submitted its report to COP 9. In its report, the JIU made six recommendations to the COP, including one to consider the institutional arrangements of the Global Mechanism and to take a lasting solution on this issue during COP 9. The JIU proposed three scenarios concerning the institutional arrangements:

- (a) Scenario 1: improvement in the status quo;
- (b) Scenario 2: institutional merging of the permanent secretariat and the Global Mechanism;
- (c) Scenario 3: the Global Mechanism to be converted into a desertification and land degradation fund.

4. With regard to its proposal to merge the secretariat and the Global Mechanism (scenario 2), the JIU report stated that: "This merger is proposed as part of an overall institutional design where the functions currently assigned to the GM and the UNCCD secretariat would be preserved and mutual support between the different divisions of such a single secretariat would be clearly defined and delimited to avoid ambiguities". The proposal provides that:

- (a) Three new divisions would be established within the secretariat, to which staff of the secretariat and the Global Mechanism would be transferred;
- (b) The divisions would report to the COP through the Executive Secretary;
- (c) The Global Mechanism would be "transposed and renamed as the Division of Resource Mobilization", and this "division would assume the core mandate of the GM as defined by the Convention, in identifying, mobilizing and channelling resources to assist affected eligible Parties".

5. According to the Convention the COP is not prohibited from taking a decision to implement the proposal of the JIU to change the institutional arrangements for the secretariat and the Global Mechanism. Nor is it required in the Convention that the secretariat and the Global Mechanism maintain two separate existences - institutionally or physically.

6. In the Convention the COP was mandated, at its first session, to (a) identify an organization to house the Global Mechanism and (b) make arrangements for the functioning of the secretariat (article 21, paragraph 5 and article 23, paragraph 3). It is clear that these mandates were to ensure that the two bodies would be operational as soon as possible after the entry into force of the Convention. These provisions, however, do not limit the authority of the COP to take another decision concerning the organization to house the Global Mechanism or the arrangements for the secretariat, as the COP has broad powers to take decisions necessary to promote the effective implementation of the Convention (see article 22, paragraph 2).

7. These two legally distinct treaty bodies could be unified and the Global Mechanism included in the structure of the secretariat, with the mandated functions of the Global Mechanism and the secretariat “clearly defined and delimited to avoid ambiguities”.³ The Executive Secretary could be mandated by the COP to take over responsibility for the functioning of the Global Mechanism and to report to the COP on the work of the secretariat and the Global Mechanism.⁴

8. However, it is unclear what is intended by the JIU recommendation to “merge” these two entities, and that the Global Mechanism be “transposed and renamed” into a new division established in the secretariat. The term “merge” is defined in the Oxford English Dictionary as “to combine to form a single entity; to amalgamate, fuse”.⁵ For example, when two companies are merged they cease to exist as two separate and distinct legal entities. In some instances, one company is absorbed by the other and loses its legal identity and ceases to exist. In other instances, a totally new company is established, and the two original companies cease to exist.

9. Should the COP proceed to unify these two treaty bodies in a manner that results in either of them losing its separate and distinct legal identity or ceasing to exist, this may cause legal uncertainty with regard to the legal status of these two treaty bodies, and may require amendments to the Convention in accordance with article 30, which would take time to negotiate and enter into force. It is unclear whether the JIU intended that chain of events.

10. Alternatively, the COP may decide that the secretariat serve as the organization to house the Global Mechanism, with the Global Mechanism established as a distinct division in the structure of the secretariat and with its head reporting to the Executive Secretary. Such an approach would safeguard and preserve the separate identities and mandates, as proposed by the JIU, and would not require any amendments to the Convention.

11. In considering the modalities of unifying the two bodies, the COP may wish to evaluate whether the secretariat has the necessary legal capacity and administrative infrastructure to undertake the administrative operations of the Global Mechanism, including the necessary budgetary and human resources, as required under article 21, paragraph 6 of the Convention. The budget for the operation of the Global Mechanism and the secretariat is provided by the COP. The legal capacity and privileges and immunities of the secretariat are provided by its Headquarters Agreement. It can enter into administrative and contractual arrangements for the operations of the Global Mechanism.

12. On the issue of the relocation of either body, to ensure legal certainty and protection concerning the operations of the Global Mechanism and the secretariat, the COP may wish to consider:

(a) Whether the Global Mechanism should be relocated to Germany, the host country of the secretariat, where it would benefit from the legal arrangements in the Headquarters Agreement of the secretariat;

³ Ibid., para. 169.

⁴ Ibid., para. 178.

⁵ Oxford English Dictionary Online available at <http://dictionary.oed.com>.

(b) Whether the secretariat should be relocated to Rome, in which case a Headquarters Agreement would need to be concluded with the host country to provide *inter alia* legal status and privileges and immunities for the secretariat and the Global Mechanism and its officials;

(c) Whether to maintain separate locations for the Global Mechanism and the secretariat, in which case arrangements for administrative support and privileges and immunities would need to be secured for the operations of the Global Mechanism. The JIU stated in its report that “IFAD is open to discussion of the current hosting arrangements, assuming that even in the case of an institutional merging the relocation of the GM is not necessary”.⁶ The COP could request the Executive Secretary to: (a) discuss and, as appropriate, conclude an agreement with the International Fund for Agricultural Development (IFAD) for administrative services and privileges and immunities for the Global Mechanism, and/or (b) negotiate a Headquarters Agreement with the host country to regulate the legal status and privileges and immunities of the Global Mechanism and its officials.

13. Should the COP choose to unify the secretariat and the Global Mechanism, the memorandum of understanding between the COP and IFAD for the operations of the Global Mechanism would need to be terminated.

II. Conclusion

14. According to the Convention the COP is not prohibited from taking a decision to implement the proposal of the JIU to change the institutional arrangements of the secretariat and the Global Mechanism. Nor is it required in the Convention that the secretariat and the Global Mechanism maintain separate existences – institutionally or physically. In the Convention broad powers are provided to the COP to take a decision to unify these two distinct treaty bodies in order to ensure the effective implementation of the Convention.

15. The Global Mechanism could be included in the structure of the secretariat, with the mandated functions of the Global Mechanism and the secretariat preserved and delimited to avoid ambiguities.⁷ The Executive Secretary could be mandated by the COP to take over responsibility for the Global Mechanism.⁸ As stated by the JIU, significant savings and institutional coherence could thus be achieved.⁹

16. Should the COP decide to follow the proposal to merge the secretariat and the Global Mechanism, and to transpose and rename the Global Mechanism, with the result that the Global Mechanism lose its separate and distinct legal identity under the Convention, this may require amendments to the Convention in accordance with article 30, which would take time to negotiate and enter into force.

⁶ JIU/REP/2009/4, para. 158.

⁷ *Ibid.*, para. 169.

⁸ *Ibid.*, para. 178.

⁹ *Ibid.*, para. 181.

17. Alternatively, the COP could decide that the secretariat serve as the organization to house the Global Mechanism, with the Global Mechanism established as a distinct division within the structure of the secretariat. Such an approach would safeguard and preserve the separate identities and mandates of the secretariat and the Global Mechanism, as proposed by the JIU, and would not require any amendment to the Convention.

18. In considering the modalities of unifying the two treaty bodies, including relocation, the COP may wish to ensure and secure the legal certainty and necessary privileges and immunities for the operations of the unified secretariat and Global Mechanism.
