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Twelfth Intergovernmental Meeting on the Action Plan for the Caribbean Environment Programme and Ninth 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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RESULTS OF THE OPEN INTERSESSIONAL DRAFTING GROUP ON THE RULES OF PROCEDURE FOR THE CARIBBEAN ENVIRONMENT PROGRAMME AND PROPOSED FINANCIAL RULES FOR THE CARTAGENA CONVENTION, AND THE CARIBBEAN ENVIRONMENT PROGRAMME, AND TERMS OF REFERENCE FOR THE CARIBBEAN TRUST FUND

Introduction

Decision III of the Eleventh Intergovernmental Meeting and the Eighth Meeting of the Contracting Parties to the Cartagena Convention requested the Open Intersessional Drafting Group to continue its work on the Rules of Procedure, and to concentrate, in particular, on four issues: (1) the participation of territories; (2) the participation of non-party states; (3) the interaction between the Action Plan and the Convention; and (4) the decision-making process under the Convention and Action Plan.

In response to this Decision, the Drafting Group held several intersessional meetings via conference call to address the issues and questions posed by Decision III. The meetings were productive in moving the discussion on Rules of Procedure forward, and have led to this paper. But a number of issues remain unresolved.

Background

In accordance with Decision III(5), the group was to examine three options for restructuring the relationship between the Action Plan and the Convention laid out in Discussion Paper UNEP(DEC)/CAR IG.24/INF.6 (the "Discussion Paper"). The three options were as follows: (1) to maintain the status quo, in which the respective responsibilities and activities of the Action Plan and Convention remain undefined; (2) to articulate the precise roles and responsibilities of the Action Plan and Convention, respectively; and (3) to consolidate the Action Plan and Convention by placing the Action Plan within the framework of the Convention.

Each of these options would affect participation differently and, relatedly, the development of Rules of Procedure. As the first option envisions the continuation of the status quo, participation would remain as it exists now and Rules of Procedure likely would remain undeveloped, given the current lack of clarity between the structures of the Convention and Action Plan. The second option requires formal delineation of the Action Plan and Convention and, as a result, would require different participation rules under the Action Plan and Convention, respectively. Similarly, formal separation likely would require the development of separate Rules of Procedure for the Convention and Action Plan. The third option, in which the Action Plan would be folded into the Convention, also would have an effect on participation and the development of the Rules of Procedure. If the Action Plan were to be subsumed by the Convention, it could affect the participation rights of non-Party States to the Convention as well as territories, though the extent to which is still unclear. It also would permit the development of one set of procedural rules for the Convention.

In light of the effect each option would have on these two areas, Decision III requested that the Drafting Group focus primarily on issues relating to participation and the Rules of Procedure. In responding to this direction, the drafting groups conducted a series of conference calls. While every party did not participate in every call, there was significant participation overall. The call participants included Barbados, British Virgin Islands, Columbia, Dominica, Mexico, the Netherlands Antilles, the United States, and the Secretariat.

Discussion

As directed by Decision III, the call participants (hereinafter “participants”) spent considerable time debating the advantages and disadvantages of the three options with a particular focus on how these options would affect participation in the Action Plan and Convention, respectively, and to a lesser extent, decision-making within the context of the third option.

First, the participants agreed that the three options presented by the Discussion Paper captured the range of options available. Second, it rapidly became clear that each option had at least one supporter. Moreover, the participants tended to group Options 1 and 2 together and contrast these two options to Option 3. The primary reason for this dichotomy was that it was only the third option that necessarily impacted the participation rights of the territories and non-Party States to the Convention. While the second option also would require distinguishing between Convention Parties and others, until it is decided which functions and programs would be the responsibility of the Convention and which would be the focus of the Action Plan, the effect of option two on participation is not well understood.

Rather than describe all advantages and disadvantages of each option here, many of which already are described in the 2004 Discussion Paper, the call participants favored the creation of a table that compared and contrasted such advantages and disadvantages of each option. That table is attached hereto as an annex. This section of the paper, in turn, highlights only some views with regard to participation and decision-making.

With regard to participation, the views of the call participants diverged. Some participants recognized the importance of the participation of territories and non-Party States to the Caribbean Environment Programme. However, citing legal necessity and the advantages to the Programme, those participants preferred the third option despite any impact on participation rights that territories or non-Party States may suffer. The particular advantages they cited included (1) increased legal clarity in the operation of the Programme, including clarification of procedural rules by which the Programme operated thereby preventing paralysis in the event that consensus is not attainable; (2) the ability to draft financial rules and thereby facilitate the solicitation of funding contributions; and (3) the creation of an incentive for non-Party States to accede to the Convention. To address the impact on participation rights of territories, moreover, these participants cited examples in other regional seas environment programs that facilitated the participation of territories despite the fact that such entities would be unable to vote. Two examples cited were the procedures discussed in SPREP and the MHLIC. Many of these participants found the continuation of the status quo objectionable on legal grounds because it would allow the confusion between the Action Plan and Convention to continue, thereby prohibiting the development of Rules of Procedure and Financial Rules, which would create a firmer procedural and financial foundation for activities under the Programme.

Other participants raised serious concerns about option three, in particular the effect it would have on the participation of territories. These participants emphasized that some territories have robust participation in, and contribute financially to, to the program. As a result,

these participants viewed the third option as counter-productive to the extent it could reduce meaningful territorial participation. They noted further that, unlike non-Party States, territories could not accede to the Convention to regain full participation rights. For these reasons, such participants preferred options one or two. At least one other participant raised concerns about option three's effect on non-Party States, as the option could impact the current participation of such non-Party States in the overall Programme. All of the participants, however, recognized the importance of encouraging non-Party States to accede to the Convention.

In addition, and as a possible way to bridge divisions over participation, the participants discussed a consensus rule for decision-making under the Rules of Procedure developed pursuant to option two or three. Many call participants had positive views toward this possibility. Nevertheless, there was little detailed discussion as to how consensus would work, which parties would be permitted to break consensus, and what would happen were consensus on a particular issue not possible.

Recommendations/Conclusion

Though a number of issues remain to be resolved, the intersessional discussions resulted in progress, with the participants arriving at several conclusions and recommendations.

First, while all three Discussion Paper options found some support, the participants agreed that these three options were the only ones available and generally agreed that the two main options were either option three or option one or two.

Second, all of the participants agreed in the importance of encouraging non-Party States to accede to the Convention in order to have full participation in the Convention, and that designing procedures that facilitated non-party accession was desirable.

Third, all of the participants agreed that the main remaining issue concerned the participation of territories. A number of the participants supported option three and believed that other regional seas programs offered creative ways to enable territories to retain meaningful participation rights under the Convention. However, there was continued objection to option three for the potential impact it could have on territorial participation. These participants instead supported options one or two.

Fourth, technical difficulties related to meeting by conference call may have slowed progress in the drafting group. As a result, the participants recommend continuing discussions on the Rules of Procedure at the 12th IGM and 9th COP, and urge Parties to have the relevant expertise available at this meeting to conduct discussions. If the Parties are not able to resolve their differences at that meeting, the drafting group suggests that the Parties consider whether any resources would be available for a face-to-face meeting among legal experts to address the issues outlined in Decision III, to be held either separately or in conjunction with a future meeting.

Annex
Advantages and Disadvantages of Three Options

OPTION 1 (continuation of the status quo)		OPTION 2 (formal delineation between action plan and convention)		OPTION 3 (merging action plan into convention)	
Pros	Cons	Pros	Cons	PROS	CONS
Permits broad territorial and non-Party state participation encouraging wide-spread participation in the program	Leaves the legal relationship between the Action Plan and Convention undefined	Clarifies the legal relationship between the Action Plan and the Convention	Requires CEP participants to allocate CEP functions and activities between the Action Plan and Convention	Clarifies the legal relationship between the Action Plan and Convention	Formal participation of territories permanently reduced as compared to States-Party and formal participation of non-Party states reduced until such states accede.
Continues the cooperative approach that has characterized the CEP since its inception	Prevents the adoption of Rules of Procedure, thereby retaining ambiguity of process if consensus breaks down	Permits the adoption of separate rules of procedure for the Action Plan and Convention	Requires adoption of two sets of Rules of Procedure	Permits the adoption of one set of rules of procedure	If rules are designed poorly, could result in even further reduced participation by territories and non-Party states.
	Prevents the	Permits	Requires adoption	Permits the adoption of	Could result in

OPTION 1 (continuation of the status quo)		OPTION 2 (formal delineation between action plan and convention)		OPTION 3 (merging action plan into convention)	
Pros	Cons	Pros	Cons	PROS	CONS
	adoption of Financial Rules	adoption of financial rules for the Action Plan and Convention	of two sets of financial rules	one set of financial rules, thereby giving States-Party a clear set of rules on which to base their contributions.	reduced financial contributions from the territories and non-Party States that now contribute.
	Fails to provide incentive for non-State Parties to accede to the Convention	Depending on the allocation of functions, possibly gives incentive to non-Party States to accede to the Convention	Depending on allocation of functions, possibly fails to give non-Party States incentive to accede to the Convention	Having only one set of clearly stated finances for the Convention and Action Plan may facilitate more stable, adequate and predictable funding from State-Parties, multilateral institutions and other contributors, and provide a more stable foundation for the Caribbean Trust Fund (CTF) as the financing mechanism of the Convention.	Non-Party States would have to become Party to the Convention to be able to use the CTF or benefits from funding /programmes of CEP
	Creates tension with Convention's provisions and international law norms by allowing	Depending on the allocation of functions, possibly retains participation of	Depending on allocation of functions, possibly restricts participation of	Conforms structure with convention's provisions and international law norms regarding Convention participation	Territories are not able to accede to the Convention on their own.

OPTION 1 (continuation of the status quo)		OPTION 2 (formal delineation between action plan and convention)		OPTION 3 (merging action plan into convention)	
Pros	Cons	Pros	Cons	PROS	CONS
	non-Parties to participate in decisions that may be the prerogative of Convention parties.	territories on activities important to territories	territories on activities important to territories		
			Significant time and human resource commitment necessary to allocation of functions between Action Plan and Convention	Financial rules would enable faster and clearer authorizations of disbursements from the Caribbean Trust Fund	Territories will not be able to have voting rights on issues important to them or be able to break consensus, without sovereign party consent or coordination.
			Division of resources between the Convention and Action Plan, and expansion of administrative expenses/effort, is possible.	Enables easier prioritization of activities within CEP and the more efficient use of resources.	
				Encourages non-Party states to accede to the Convention	

OPTION 1 (continuation of the status quo)		OPTION 2 (formal delineation between action plan and convention)		OPTION 3 (merging action plan into convention)	
Pros	Cons	Pros	Cons	PROS	CONS
				Territorial participation may remain robust by allowing territories to receive information, make proposals, recommend amendments and be taken into consideration.	