



Miscellaneous No. 5 (2012)

Agreement

for the Establishment of the African Legal Support Facility

Adopted Tunis, 29 June 2009

[The Agreement is not in force for the United Kingdom]

*Presented to Parliament
by the Secretary of State for Foreign and Commonwealth Affairs
by Command of Her Majesty
August 2012*

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AGREEMENT FOR THE ESTABLISHMENT OF THE AFRICAN LEGAL SUPPORT FACILITY

THE STATES AND INTERNATIONAL ORGANIZATIONS, PARTIES TO THE PRESENT AGREEMENT

RECALLING the declaration of the African Finance Ministers of 2 June 2003 on Aid, Trade, Debt, IMF, HIV/AIDS in which they called for the rapid establishment of a legal technical assistance Facility to help Heavily Indebted Poor Countries (“HIPCs”) in Africa address the problems of creditor litigation;

MINDFUL of the findings of the Commission for Africa that the debt of HIPCs had become a target of lawsuits by the original creditors and disreputable speculators, and its call for the establishment of a rapid response legal technical assistance Facility, independent of the Bretton Woods Institutions, to assist African countries preempt, avoid or successfully prosecute such lawsuits;

RECALLING the resolution of the African Ministerial Conference of February 2007, jointly organized by the African Development Bank and the United Nations Economic Commission for Africa, on the management of Africa’s natural resources for growth and poverty reduction, which acknowledged the skills disparity between African and industrialized countries in negotiating contracts for extractive natural resources, and called specifically for the creation of a facility to assist African countries develop expertise and capacity to negotiate and conclude fair and equitable arrangements for the management of Africa’s natural resources and extractive industries;

RECOGNISING that African countries lack expertise and capacity in creditor litigation and in negotiations of complex commercial transactions, and that their ability to acquire such expertise and capacity is constrained by financial and institutional limitations;

CONVINCED that beneficial commercial relationships and proper balance of rights and obligations in complex commercial transactions, investment agreements, natural resource contracts and creditor litigations can only be maintained if the parties thereto have full knowledge of their respective rights and obligations as well as equal opportunity and access to competent legal services;

NOTING the commendable efforts of the African Development Bank in promoting the establishment of an African legal support facility;

HAVE HEREBY AGREED AS FOLLOWS:

ARTICLE I

Establishment

There is hereby established an international legal institution to be known as the “African Legal Support Facility” (hereafter called the “Facility”), which shall operate in accordance with the provisions of this Agreement.

ARTICLE II

Purposes and Functions

1. The purposes for which the Facility is established are:
 - (i) To provide legal advice and services to African countries in creditor litigation;
 - (ii) To provide technical legal assistance to African countries to strengthen their legal expertise and negotiating capacity in matters pertaining to debt management and litigation; natural resources and extractive industries management and contracting; investment agreements; and related commercial and business transactions, as the case may be;
 - (iii) To strengthen process in African countries.
2. To serve its purposes, the Facility shall carry out the following functions and activities:
 - (i) identification of legal expertise on creditor litigation; debt management; as well as the case may be in extractive industries and other natural resources management and contracting; investment agreements;
 - (ii) provision of financing to African member states of the Facility to assist them with actual creditor litigation and negotiations of complex commercial transactions where should states shall be willing and able to reimburse the Facility for the latter services;
 - (iii) investing in and organizing the training of legal counsel from African member states of the Facility to equip them with legal expertise necessary to address creditor/vulture fund litigation;
 - (iv) provision of technical legal assistance, other than actual litigation services, to African member states of the Facility;

- (v) establishing and maintaining a list of specialized law firms and legal experts to represent African member states of the Facility in creditor litigation and, as the case may be, negotiations of complex commercial transactions;
- (vi) developing a database and systems for making available and retrieving precedents in creditor litigation cases involving sovereign debtors;
- (vii) promoting an understanding, among African countries, of issues concerning identification and resolution of creditor litigation involving sovereign debtors against vulture funds, and, as the case may be, negotiations of complex commercial transactions, especially natural resource contracts; and
- (viii) conducting such other related functions or activities as may advance the purpose of the Facility.

ARTICLE III

Legal Status

The Facility shall be an international institution with full juridical personality under the laws of the states parties to this Agreement (hereinafter called the “Participating States”), and shall, in particular, have the legal capacity to:

- (i) enter into contracts and conclude agreements;
- (ii) acquire and dispose of movable and immovable property;
- (iii) be a party to judicial and other legal or administrative proceedings.

ARTICLE IV

Membership

1. Membership of the Facility shall be open to:
 - (a) all member states of the African Development Bank;
 - (b) other states;
 - (c) the African Development Bank;
 - (d) other international organisations or institutions.

2. The conditions governing eligibility to membership shall be determined by the Governing Council of the Facility.

3. Any state or international organisation which has not signed this Agreement before the date on which this Agreement enters into force shall, as a condition precedent to membership in the Facility, adhere to this Agreement by depositing an instrument of accession with the Provisional Depositary for the Depositors.

ARTICLE V

Headquarters of the Facility

1. The headquarters of the Facility shall be situated in the territory of a Participating State selected by the Governing Council of the Facility.

2. The Participating State in whose territory the headquarters of the Facility is to be located shall sign with the Facility, and take all necessary measures to make effective in its territory, an agreement regarding the headquarters of the Facility (the "Headquarters Agreement").

3. The Headquarters Agreement shall be concluded by the parties thereto not later than ninety (90) days from the date of the first meeting of the Governing Council of the Facility and shall immediately upon signature become binding and effective.

ARTICLE VI

Financial Resources

1. The financial resources of the Facility shall consist of the following:

- (i) Voluntary contributions by:
 - (a) participating States,
 - (b) international organisations other than the African Development Bank, signatories to this Agreement,
 - (c) non participating states,
 - (d) private entities [approved by the Governing Council];
- (ii) Allocations from the net income of the African Development Bank; and
- (iii) Income accruing to the Facility from its endowment fund, including income in the form of interest, fees, and proceeds from sales of assets and publications.

2. The parties to the present Agreement and other contributors to the financial resources of the Facility specified in paragraph 1 of this Article shall deposit with the Facility instruments of commitment stating the specific amounts to be contributed. Payment of contributions shall be made in a freely convertible currency.

3. The parties to this Agreement shall be under no obligation whatsoever to provide financial support to the Facility beyond voluntary contributions. In addition, they shall not be responsible, individually or collectively, for any debts, liabilities or obligations of the Facility.

ARTICLE VII

Governance and Management Structure

The Facility shall have a Governing Council, a Management Board, a Director and such other staff as are necessary to perform the functions and carry out the activities of the Facility.

ARTICLE VIII

Governing Council: Powers

1. All the powers of the Facility shall be vested in the Governing Council.
2. The Governing Council may delegate to the Management Board all its powers, except the power to:
 - (i) appoint members of the Management Board;
 - (ii) appoint external auditors to audit the accounts of the Facility and certify the balance sheet and statement of the income and expenditures of the Facility;
 - (iii) authorise replenishments of the resources of the Facility;
 - (iv) expand the scope of the purposes and functions of the Facility;
 - (v) approve the policies of the Facility;
 - (vi) amend this agreement;
 - (vii) extend or reduce the duration/sunset date for the Facility; and
 - (viii) decide to terminate the operations of the Facility and distribute its assets.

ARTICLE IX

Governing Council: Composition and Representation

1. The Governing Council shall be composed of twelve members, who shall be appointed by the Participating States; the African Development Bank; and international organizations, other than the African Development Bank, parties to this Agreement.
2. Five members shall represent Participating States which are regional member states of the African Development Bank representing the five regions of Africa to be appointed on a rotational basis between the Participating States from each region; four members shall represent Participating States which are also member states of the Organisation for Economic Cooperation and Development (OECD); one member shall represent non-OECD Participating States; one member shall represent the African Development Bank; and one member shall represent the other international organisations parties to this Agreement.

ARTICLE X

Governing Council: Procedure

1. The Governing Council shall meet at the headquarters of the Facility, or at such other places as the Management Board may decide. It shall meet once a year, unless the business of the Facility requires otherwise.
2. Meetings of the Governing Council shall be convened by the Director of the Facility or at the request of two-thirds of the members of the Governing Council.
3. Two-thirds of the members present at any meeting of the Governing Council shall constitute a quorum.
4. The Governing Council shall adopt its own rules of procedure.

ARTICLE XI

Management Board: Powers and Functions

1. The Management Board shall exercise the powers and functions of the Facility delegated to it by the Governing Council or set forth in this Agreement. It shall be responsible for the direction of the general operations of the Facility. The Management Board shall, in particular:

- (i) appoint the Director of the Facility;

- (ii) approve the annual budgets and annual work programmes of the Facility;
- (iii) issue the By-laws, regulations and rules of the Facility;
- (iv) submit proposals to the Governing Council on the replenishment of the Facility's resources.

ARTICLE XII

Management Board: Composition

1. The Management Board shall be composed of five members, appointed by the Governing Council. The Director of the Facility shall be an ex-officio member of the Management Board, but the Director shall have no vote.
2. Members of the Management Board shall be persons of high integrity and competence in law, finance and development. They shall serve in their personal capacities and not as representatives of Participating States or international organisations parties to this Agreement.

ARTICLE XIII

Management Board: Procedure

1. The Management Board shall meet at the Headquarters of the Facility, or at such other places as it may decide. It shall meet twice a year, unless the business of the Facility requires otherwise.
2. Meetings of the Management Board shall be convened by the Director of the Facility or at the request of at least three members.
3. Three members present at any meeting of the Management Board shall constitute a quorum.
4. The Management Board shall adopt its own rules of procedure.

ARTICLE XIV

Director and Staff

1. The Director shall serve as the Chief Executive Officer of the Facility and shall be responsible for the day-to-day administration of the Facility. The Director shall be appointed by the Management Board. The Director shall be a person of high integrity and competence in legal aspects of debt management, extractive resources

contracting, or commercial transactions, with considerable professional and managerial experience.

2. The Director shall be responsible to the Management Board for the management and operations of the Facility, in accordance with the provisions of this Agreement, and the decisions of the Governing Council and the Management Board.

3. The Director shall attend meetings of the Management Board in an ex-officio capacity and shall not have voting rights.

4. The Director shall serve for a term of five years and may be reappointed for another term of five years, which shall not be renewable.

5. The Director shall appoint such other staff as are necessary to perform the functions and carry out the activities of the Facility.

ARTICLE XV

Cooperation Arrangements

The Facility may conclude cooperation arrangements with other institutions. In this connection, it may receive experts and personnel of other institutions on a secondment or exchange basis.

ARTICLE XVI

Immunities, Exemptions, Privileges, Facilities and Concessions

Each Participating State shall take all legislative action under its national law and all administrative measures, as are necessary, to enable the Facility to effectively fulfil its purposes and carry out the functions entrusted to it. To this end, each Participating State shall accord to the Facility, in its territory, the status, immunities, exemptions, privileges, facilities and concessions set forth in this Agreement, and shall inform the Facility of the specific action it has taken for this purpose.

ARTICLE XVII

Judicial Proceedings

The Facility shall enjoy immunity from every form of legal process except in cases arising out of the exercise of its borrowing powers when it may be sued only in a court of competent jurisdiction in the territory of a Participating State in which the Facility has its principal office, or in the territory of a Participating State or non-member State where it has appointed an agent for the purpose of accepting service or

notice of process or has issued or guaranteed securities. No actions shall, however, be brought by members or persons acting for or deriving claims from members.

ARTICLE XVIII

Immunity of Property and Assets

1. The property and assets of the Facility wherever located and by whomsoever held shall be immune from:

- (a) search, requisition, expropriation, confiscation, nationalization and all other forms of seizure, taking or foreclosure by executive or legislative action; and
- (b) seizure, attachment or execution before the delivery of final judgment or award against the Facility.

2. For the purpose of this Article XVIII, the term “property and assets of the Facility” shall include property and assets owned or held by the Facility and deposits and funds entrusted to the Facility in the ordinary course of business.

ARTICLE XIX

Freedom of Property, Assets and Operations from Restriction

1. To the extent necessary to implement the purposes of the Facility and carry out its functions, each Participating State shall waive, and refrain from imposing, any administrative, financial or other regulatory restrictions that are likely to hinder in any manner the smooth functioning of the Facility or impair its operations.

2. To this end, the Facility, its property, assets, operations and activities shall be free from restrictions, regulations, supervision or controls, moratoria and other legislative, executive, administrative, fiscal and monetary restrictions of any nature.

ARTICLE XX

Immunity of Archives

1. The archives of the Facility and, in general, all documents belonging to, or held by the Facility shall be inviolable wherever located, except that the immunity provided for in this Article shall not extend to documents required to be produced in the course of judicial or arbitral proceedings to which the Facility is a party;

2. Without prejudice to the generality of the provisions of paragraph 1 of this Article, documents containing professional work products of or held by the Facility shall not be produced for judicial or arbitral proceedings.

ARTICLE XXI

Privilege for Communications

Official communications of the Facility shall be accorded by each Participating State the same treatment and preferential rates that the Participating State accords to the official communications of other international organizations.

ARTICLE XXII

Personal Immunities, Privileges and Exemptions

1. All members of the Governing Council, members of the Management Board, the Director and other employees of the Facility, personnel seconded to the Facility, and consultants and experts performing missions for the Facility:

- (i) shall be immune from legal process with respect to acts performed by such persons in their official capacity;
- (ii) shall be accorded the same immunities from immigration restrictions and alien registration requirements, and, not being local nationals, shall be accorded the same immunities from national service obligations and the same facilities as regards exchange regulations, as are accorded by each Participating State to representatives, officials and employees of comparable rank of other states or international organizations; and
- (iii) Where such persons are not resident nationals or permanent residents, shall be granted the same treatment in respect of travelling facilities as is accorded by Participating States to representatives, officials and employees of comparable rank of other states or international organizations.

2. The Director and other employees of the Facility:

- (i) shall be immune from personal arrest or detentions, except that this immunity shall not apply to civil liability arising from a road traffic accident or to a traffic offence; and
- (ii) shall be exempt from any form of direct or indirect taxation on salaries and emoluments, paid by the Facility

3. A Participating State may, when depositing its instrument of ratification, acceptance or accession, reserve for itself and its political subdivisions the right to tax salaries and emoluments paid by the Facility to its nationals or residents.

ARTICLE XXIII

Waiver of Immunities and Privileges

The immunities and privileges provided in this Agreement are granted in the interests of the Facility and may only be waived, to such extent and upon such conditions as the Management Board of the Facility shall determine in cases where such a waiver would not, in its opinion, prejudice the interests of the Facility. The Director of the Facility shall have the right and the duty to waive the immunity of any employee, secondee, consultant or expert of the Facility in case where, in the Director's opinion, the immunity would impede the course of justice and can be waived without prejudice to the interests of the Facility. In similar circumstances and under the same conditions, the Management Board shall have the right and duty to waive the immunity of the Director of the Facility

ARTICLE XXIV

Exemption from Taxation

1. The Facility, its property, assets, income, operations and transactions shall be exempt from all taxation and custom duties.

2. Without prejudice to the generality of the provision of paragraph 1 of this Article, each Participating State shall take all necessary action to ensure that the property and assets of the Facility, and other instruments and transactions, interest, commissions, fees, and other income, return and moneys of any kind, accruing, appertaining or payable to the Facility from any source shall be exempt from all forms of taxes, duties, charges, levies, and imposts of any kind whatsoever, including stamp duty and other documentary taxes, heretofore levied or hereafter imposed in its territory.

3. The Facility shall also be exempt from any obligation relating to the payment, withholding, or collection of any tax or duty.

ARTICLE XXV

**Fiscal Exemptions, Financial Facilities,
Privileges and Concessions**

The Facility shall be accorded by each Participating State a status not less favourable than that of other international organizations, and shall enjoy all fiscal exemptions financial facilities, privileges and concessions granted to international organizations and other institutions by the Participating States.

ARTICLE XXVI

Interpretation and Settlement of Disputes

1. This Agreement shall be interpreted in the light of its primary purposes of enabling the Facility to fully and efficiently discharge its functions and fulfill its purposes.
2. The English and French texts of this Agreement shall be equally authentic.
3. Any dispute among the parties to this Agreement or between the Facility and a party to this Agreement regarding the interpretation or application of any provision of this Agreement shall be submitted to the Governing Council of the Facility, whose decision shall be final and binding.

ARTICLE XXVII

Entry into Force

1. This Agreement shall be open for signature by or on behalf of the contracting parties and shall be subject to ratification, acceptance or approval
2. The present Agreement shall enter into force on the day when:
 - (i) ten (10) Participating States and international organizations shall have signed the Agreement; and
 - (ii) seven (7) instruments of ratification, acceptance or approval shall have been deposited.
3. This Agreement shall take effect for each contracting party on the date of deposit of its instrument of ratification, acceptance, approval or accession in accordance with its constitutional or other applicable statutory procedures.

ARTICLE XXVIII

Duration

The Facility shall be in force and effect for fourteen years from the date of entry into force of this Agreement; provided, however, that this period may be extended or reduced by a decision of the Governing Council.

ARTICLE XXIX

Depositary

1. Instruments of ratification acceptance, approval or accession shall be deposited with the Secretary General of the African Development Bank, who shall act as the provisional depositary of this Agreement (herein called the “Provisional Depositary”).
2. The Provisional Depositary shall register this Agreement with the Secretariat of the United Nations in accordance with Article 102 of the Charter of the United Nations and the regulations thereunder adopted by the General Assembly of the United Nations. The Provisional Depositary shall transmit certified copies of this Agreement to all contracting parties.
3. Upon commencement of operations of the Facility, the Provisional Depositary shall transmit the text of this Agreement and all relevant instruments and documents in the possession of the Provisional Depositary to the Director of the Facility, who shall then act as the Depositary.



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