

AFRICAN WATER FACILITY

INSTRUMENT

FOR THE ESTABLISHMENT

OF THE

AFRICAN WATER FACILITY SPECIAL FUND

(ADMINISTERED BY THE AFRICAN DEVELOPMENT BANK)

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**INSTRUMENT FOR THE ESTABLISHMENT
OF THE AFRICAN WATER FACILITY SPECIAL FUND
(ADMINISTERED BY THE AFRICAN DEVELOPMENT BANK)**

PREAMBLE

WHEREAS:

1. On March 18, 2000, during the Second World Water Forum, at The Hague, in the Netherlands, African Ministers of Water Resources and stakeholders endorsed the African Water Vision and a Framework for Action for an "Africa where there is an equitable and sustainable use and management of water resources for poverty alleviation, socio-economic development, regional cooperation and the environment";
2. The main components of the Framework for Action include:
 - Strengthening the governance or management of water resources
 - Improving relevant knowledge base
 - Meeting urgent water needs
 - Strengthening the financial base for sustainable and effective water distribution and governance;
3. In September 2001, at the meeting of African Water Stakeholders in Abidjan, Côte d'Ivoire, the participants established the Africa Water Taskforce (the "AWTF") for the purpose of prioritising African Water issues at the global and regional levels. The AWTF, in April 2002, organized a Conference of African Water Stakeholders, in Accra, Ghana, and proposed at the meeting the establishment of the African Water Facility (the "Water Facility") to mobilize resources to finance water infrastructure and investment facilitating activities in Africa;
4. Furthermore, in April 2002, at a conference in Abuja, Nigeria, the African Ministers for Water Resources established the African Ministers' Council on Water (AMCOW) to provide political leadership, policy direction, and advocacy in the use and management of water resources and for the achievement of the African Water Vision as well as the implementation of the related Framework for Action;
5. AMCOW, as one of its initial programmes resolved to set in motion the establishment of the Water Facility, as an essential financial requirement for achieving the African Water Vision and for the implementation of the Framework for Action;

6. The African Development Bank (the "Bank") is a significant and committed contributor to the development of Africa's water resources through the provision of funds, policy coordination, and development initiatives, and in this regard, the Bank has accepted the request of AMCOW to establish the African Water Facility Special Fund and administer its resources;
7. In accordance with Article 8 of the Agreement establishing the Bank, the Bank may establish or be entrusted with the administration of Special Funds which are designed to serve the purpose of the Bank and come within its functions;
8. The Board of Directors of the Bank (the "Board of Directors") has approved this Instrument, subject to the approval of the Board of Governors of the Bank (the "Board of Governors");¹

In light of the foregoing, it is hereby resolved as follows:

CHAPTER 1 PURPOSE AND OBJECTIVE

Section 1.1 Establishment. There is hereby established a Special Fund under Article 8 of the Agreement Establishing the Bank to be known as the African Water Facility Special Fund (hereinafter called the "Water Fund" or the "Fund"), which shall be constituted with resources mobilized from donors, to be administered in accordance with the provisions of this Instrument and, when applicable, the Agreement establishing the Bank.

Section 1.2 Purpose. The purpose of the Water Fund shall be to pool the resources mobilized from donors to finance water infrastructure and water investment facilitating activities in Africa.

Section 1.3 Areas of Intervention. The resources of the Water Fund shall be devoted primarily to water resources focused projects and programmes on:

- (a) Integrated Water Resources Management (IWRM)
- (b) Capacity Building
- (c) Policy, legal and Institutional Reform
- (d) Knowledge and Information building or dissemination
- (e) Developing and Implementing a Regulatory Framework
- (f) Effective Management of Shared Waters
- (g) Monitoring and Evaluation
- (h) Environmental Management
- (i) Strategic capital investment programmes and projects implementation

¹ The Board of Governors approved this Instrument by Resolution B/BG/2004/05, adopted on May 25, 2004.

Furthermore, given the important role of women in the African water sector, gender issues and dimensions shall be mainstreamed into the programs and activities financed by the Water Fund.

Section 1.4 Priorities and Cost Effectiveness of Activities. Priority will be given to those projects which are based on identifiable national priorities, taking into account water resources management and development plans of the recipient countries as well as integrated river basin management plans.

CHAPTER II ADMINISTRATION

Section 2.1 Administration. The Bank shall be the Trustee for the Water Fund, and in this capacity shall, as legal owner, hold in trust the funds, assets and receipts which constitute the resources of the Water Fund, and manage and apply them for the purpose of, and in accordance with, the provisions of this Instrument. The Bank shall keep the resources of the Water Fund separate and apart from all other accounts and assets of, or administered by, the Bank.

Section 2.2 Use of the Bank's Facilities. Except as otherwise provided herein, the Bank shall administer the Water Fund through its own organisation, services, facilities, officers, staff and such other experts and consultants as may be necessary. The Bank shall in no event delegate responsibility for the administration of the Water Fund.

Section 2.3 Expenses of Administering the Water Fund. The Bank shall keep an account of the expenses incurred in the administration of the Water Fund, as follows:

- (i) Direct costs incurred by the Bank for the Water Fund;
- (ii) Indirect costs incurred by the Bank in the administration of the Water Fund.

Section 2.4 Payment of Administrative Costs. The Bank shall bear the reasonable costs of the establishment of the Water Fund and, until it notifies the Governing Council otherwise, shall administer the Water Fund free of charge as its contribution to the Fund. Such notification shall be given in writing to the Governing Council at least six (6) months prior to the effective date thereof.

Section 2.5 Commitments. The Bank shall adopt measures to avoid commitments in excess of the available resources of the Water Fund, and shall seek to keep administrative costs of the Water Fund at a minimum.

Section 2.6 Privileges and Immunities. The privileges and immunities accorded to the Bank under its Articles of Agreement shall apply to the property, assets, archives, income, operations and transactions of the Water Fund.

Section 2.7 Reporting. (a) The Bank shall present to the Governing Council an Annual Report on the activities of the Water Fund. The Annual Report shall contain a brief description of the activities of the Water Fund during the preceding financial year, including all the operations financed with the resources of the Water Fund, and the status and outcomes of such operations. The Annual Report shall also include a statement of assets and liabilities of the Water Fund, a statement of cumulative receipts and expenditure, and a statement of the use of resources of the Water Fund, with such explanatory notes as may be pertinent.

(b) The comments which the members of the Governing Council may consider appropriate to make in respect of the statements and information referred to in paragraph (a) of this Section, shall be presented as soon as possible and in any case within thirty (30) days following the receipt of the respective reports. Thereafter, the Annual Report will be submitted for the consideration of the Board of Directors. Following the approval of the Board of Directors, the Bank shall distribute the Annual Report to all of the Donors and participants in the Water Fund.

Section 2.8 Audit. The Water Fund shall be subject to the internal and external audit procedures of the Bank, including an annual audit to be conducted by the external auditors of the Bank. Upon the written request of the Governing Council, the Bank shall cause the accounts and records of any specific activity financed with the resources of the Water Fund to be audited by the Bank's external auditors. Notwithstanding Section 2.4 of this Agreement, the costs of such special audit shall be charged to the resources of the Water Fund.

CHAPTER III STRUCTURE AND GOVERNANCE

Section 3.1 Structure. The Water Fund shall have a Governing Council, a Director and other staff considered necessary to carry out the objectives of the Fund. The Board of Directors of the Bank also shall take certain decisions, as provided in this Instrument, concerning the Water Fund.

Section 3.2 Participation. Any member country of the Bank, any country which is eligible to become a member of the Bank, and any organization acceptable to the Bank, may become a participant in the Water Fund. Participation in the Water Fund shall be effected by submitting an Instrument of Participation and by acceding to the terms of this Instrument. Participation in the Water Fund shall be a prerequisite for representation on the Governing Council of the Fund.

Section 3.3 Governing Council: Composition. The Governing Council shall have thirteen (13) members comprising five (5) persons appointed by AMCOW on a sub-regional basis, one (1) member appointed by the Bank, one (1) member appointed by the African Union under the New Partnership for Africa's Development (NEPAD), one (1) member appointed by U.N.–Water Africa, five (5) members appointed by Donors to the Water Fund who are not otherwise represented in the membership of the Governing Council, and the Director of the Water Fund who shall be an *ex-officio* member. Membership of the Governing Council should reflect regional and geographical groupings, and due weight to funding efforts of all Donors.

Section 3.4 Governing Council: Functions. The Governing Council shall be responsible for determining the general policy direction of the Water Fund. In this regard, the Governing Council shall approve the operational focus of the Fund and the proposed areas of intervention, and review the annual report of activities financed from the resources of the Water Fund. The Bank shall consult regularly with the Governing Council.

Section 3.5 Governing Council: Chairperson. The Governing Council shall appoint a Chairperson who shall serve for a term of one (1) year. The Chairperson shall be a national of a member country of the Bank. The Chairperson shall be a person of international repute and of the highest competence. The Governing Council shall appoint the first Chairperson at its inaugural meeting.

Section 3.6 Governing Council: Procedure. The Governing Council shall adopt its Rules of Procedure at its inaugural meeting. The Bank shall also appoint a Secretary for the Governing Council.

Section 3.7 Governing Council: Meetings. The Chairperson of the Governing Council, in close consultation with the members of the Council, and the Bank, may convene meetings at such places and at such times as may be required.

Section 3.8 Decision-Making. Subject to the provisions of this Instrument, all matters before the Governing Council shall be determined at meetings or by correspondence in accordance with the Rules of Procedure to be adopted by the Governing Council under Section 3.6 above, and unless otherwise agreed by the Governing Council, each member of the Governing Council shall have one (1) vote.

Section 3.9 The Director. The Bank shall assign/appoint a person to serve as Director of the Water Fund, as well as an operational and administrative team to assist the Director. The Bank shall also provide adequate office facilities for the Director and the team.

Section 3.10 The Director: Appointment and Functions. The Director of the Water Fund shall be a person with considerable senior management experience in

water resource development and management. The Director shall be appointed by the President of the Bank and shall be accountable to the President or other officer of the Bank designated by the President. The Director shall serve as the administrative head of the Water Fund within the organisational structure of the Bank and shall perform such related functions as may be assigned by the Bank.

CHAPTER IV FINANCIAL ARRANGEMENTS

Section 4.1 Resources (a) The resources of the Water Fund shall consist of contributions obtained from donor countries or organizations (the "Donor(s)"). Contributions may be made in kind, to the extent acceptable by the Bank, taking into consideration the relevance and ease of valuation of the contribution.

(b) All sums received: (i) in the form of additional resources from Donors, (ii) in connection with the operations financed out of the resources of the Water Fund, or (iii) which accrue to the Water Fund by way of interest, dividends, fees, sale of assets or from other sources, shall be added to the *corpus* of the Water Fund for use by the Bank as part of the Water Fund.

Section 4.2 Contributions. A member country of the Bank, or any country eligible to be a member country, as well as an organization acceptable to the Bank, may make contributions to the Water Fund to be utilized for achieving its purpose. The Bank will receive contributions for use in accordance with the terms of this Instrument. Contributions will be effected by a deposit of an Instrument of Commitment, stating the specific amount of the contribution, and the payment schedule agreed with the Bank. Payment of the first instalment of the amount of the commitment made by each participant in the Water Fund shall, however, not be later than a date which is three (3) months from the date of submission of its Instrument of Participation.

Section 4.3 Denomination and Payment. (a) Contributions shall be paid in any one of the lending currencies of the Bank.

(b) The financial statements and accounts of the Water Fund shall be denominated in one of the lending currencies of the Bank, as determined by the Governing Council.

Section 4.4 Separation of Resources. (a) The Bank shall at all times hold, utilise, commit, invest or in any other manner dispose of the resources of the Water Fund, independently of the resources of the Bank itself, or of any other resources entrusted to the Bank for administration.

(b) The Bank shall keep separate accounts and records of the resources and operations of the Water Fund in such a way as to permit the identification of the assets, liabilities, income, costs and expenses pertaining to the Water Fund.

Section 4.5 Replenishment. The resources of the Water Fund may be replenished from time to time. The Bank, after having considered the commitment capacity and rate of utilization of the resources of the Fund, shall advise the Governing Council, accordingly, to initiate discussions for a general replenishment of the resources of the Water Fund.

CHAPTER V OPERATIONS

Section 5.1 Recipients. Regional member countries of the Bank, political subdivisions or agencies thereof as well as regional agencies or institutions concerned with water resource development or development in general in Africa or a region thereof shall be eligible to receive financing or other assistance from the resources of the Water Fund.

Section 5.2 Approval. Financing or other form of assistance provided from the resources of the Water Fund shall be subject to the approval of the Board of Directors of the Bank. Such approval shall be in accordance with the voting rules of the Board of Directors set forth in the Agreement establishing the Bank, and may be granted individually or as part of a group of projects. The Board of Directors of the Bank, in consultation with the Governing Council, shall adopt operational procedures, for operations financed with the resources of the Water Fund, which shall in particular be designed to ensure a fast-track process for the consideration, approval and implementation of operations financed with the resources of the Water Fund. In this connection, the Board of Directors may delegate to Management of the Bank, the approval of activities below a specified amount.

Section 5.3 Operational Principles. Except as otherwise provided herein, or in operational procedures adopted by the Board of Directors of the Bank for purposes of the Water Fund, the Bank, in its administration of the Water Fund, shall apply the same principles and criteria that are applicable to financing provided from its own ordinary resources, particularly those contained in Article 17 of the Agreement establishing the Bank.

Section 5.4 Recipient's Contribution. In considering applications for financing from the resources of the Water Fund, the Bank shall give due regard to the relevant self-help measures being taken by the recipient and, where the recipient is not a member country of the Bank, by both the recipient and the member or members intended to benefit from the proposed financing.

Section 5.5 Procurement. Procurement of goods, works and services using the resources of the Water Fund shall be carried out in accordance with the Rules of the Bank. Procurement shall be limited to member countries of the Bank as well as those Donor States that are non-members of the Bank.

Section 5.6 Supervision. Supervision of the operations carried out with the resources of the Water Fund shall be the exclusive responsibility of the Bank.

Section 5.7 Currencies. Financing out of the resources of the Water Fund shall be denominated and disbursed in the lending currency of the Bank in which the account(s) of the Water Fund is denominated. Any reimbursements or related charges, whenever applicable, shall be made in the currency of disbursement.

Section 5.8 Financing Agreements. Financing agreements concluded by the Bank obligating the resources of the Water Fund shall indicate clearly that the financing has been provided by the Water Fund.

Section 5.9 Non-obligation of the Bank. Financing approved by the Bank pursuant to this Instrument shall not involve any financial obligation on the part of the Bank, and except as otherwise provided for in this Instrument, the Bank shall not derive any financial benefits from the Water Fund. Co-financing of projects shall, however, not be interpreted as a financial benefit to the Bank under this Instrument.

CHAPTER VI GENERAL PROVISIONS

Section 6.1 Establishment and Effectiveness. (a) The Water Fund shall be established as of the date of adoption of this Instrument by the Board of Governors of the Bank, in accordance with Article 8 of the Agreement establishing the Bank.

(b) This Instrument shall become effective and the Water Fund operational on the date when the Bank shall have received Instruments of Commitment pledging contributions in an aggregate amount equivalent to at least Ten million Units of Account (UA 10,000,000) (the Unit of Account being defined in the Agreement establishing the Bank); provided, however, that such date shall not be later than September 30, 2004 or such later date as may be determined by the Bank.

Section 6.2 Consultation and Information. Participants in the Water Fund shall co-operate fully to assure that the purposes of the Water Fund are accomplished.

Section 6.3 Financial Year. The financial year of the Water Fund shall be the calendar year.

Section 6.4 Notices and Requests. (a) Notices or requests to the Water Fund shall be in writing and shall be delivered at the address below, or such other address as may be notified by the Bank:

The African Water Facility
*(a Special Fund Administered by the
African Development Bank)*
01 B.P. 1387
Abidjan 01
Ivory Coast
Telephone: (+225) 20 20 44 44
Telefax: (+225) 20 20 49 29
E-mail: africanwaterfacility@afdb.org
Telex AFDEV Abidjan
Attention: The Director

During the period of the Temporary
Relocation of Operations of the Bank:

The African Water Facility
*(a Special Fund Administered by the
African Development Bank)*
Agence Temporaire de Relocalisation
**15 Avenue du Ghana, Angle Rues Hedi Nouira
& Pierre de Coubertin**
B.P. 323 Tunis
1002 Tunis Belvedere, Tunisia
Telephone: (+216) 71 10 20 25
Telefax: (+216) 71 83 05 87
E-mail: africanwaterfacility@afdb.org
Attention: The Director

(b) Notices and requests to the Bank or any other participants in the Water Fund shall be in writing and shall be delivered to the address provided in the respective Instruments of Participation or any other address as shall be notified in writing by such participant.

Section 6.5 Settlement of Disputes. (a) Disputes related to the interpretation and implementation of this Instrument shall be settled amicably by the parties.

(b) In the event that a dispute, which is not settled amicably, relates solely to a matter of interpretation of the Instrument, a request for interpretation shall be submitted for the consideration of the Board of Directors of the Bank. Such interpretation shall be final.

(c) In all other cases, and upon the failure of earnest attempts for an amicable settlement, such dispute shall be submitted by notification in writing to arbitration by a tribunal of three arbitrators. One of the arbitrators shall be appointed by the Bank, another by the other disputing party, and the two (2) parties shall appoint the third arbitrator, who shall be the Chairperson. If, within forty-five (45) days of receipt of the request for arbitration, either party has not appointed an arbitrator, or if, within thirty (30) days of the appointment of the two (2) arbitrators, the third arbitrator has not been appointed either party may request the Chairperson of the African Union Commission to appoint the arbitrator not yet appointed. The procedure of arbitration shall be fixed by the arbitrators, but the third arbitrator shall have full power to settle all questions of procedure in any case of disagreement with respect thereto.

(d) The arbitral tribunal shall afford to all parties a fair hearing and shall render its award in writing. Such award may be rendered by default. An award signed by a majority of the arbitral tribunal shall constitute the award of such tribunal. A signed counterpart of the award shall be transmitted to each of the disputing parties. Any such award rendered in accordance with the provisions of this Section shall be final and binding upon such parties, and the participants, Donors and recipients. Each of the disputing parties shall abide by and comply with any such award rendered by the tribunal in accordance with the provisions of this Section.

(e) The parties shall fix the amount of the remuneration of the arbitrators and such other persons as shall be required for the conduct of the arbitration proceedings. If the parties shall not agree on such amount before the tribunal shall convene, the tribunal shall fix such amount as shall be reasonable under the circumstances. Each of the disputing parties shall defray its own expenses in the arbitration proceedings. The cost of the tribunal shall be divided between, and borne equally by the parties. Any question concerning the division of the expenses of the tribunal or the procedure for payment of such expenses shall be determined by the tribunal.

Section 6.6 Withdrawal from Participation. Any participant may, however, withdraw from participation in the Water Fund by written notice to the Bank. The withdrawal shall become effective six (6) months after the communicated date of receipt of the notice. The participant shall, however, remain liable for the payment of any portion of the amount of its commitment, on the basis of which the Water Fund has made commitments to recipients.

Section 6.7 Amendments and Termination. (a) Amendments or additions may be made to this Instrument by a decision of the Board of Directors and the Governing Council. Such amendments or additions shall however be reported to the Board of Governors at its Annual Meeting.

(b) This Instrument shall be in effect until the anniversary date of its adoption by the Board of Governors, in the year 2025; provided however that this period may be extended or shortened by a decision of the Board of Governors of the Bank, upon the recommendation of the Board of Directors acting in consultation with the Governing Council. The effectiveness of this Instrument will also terminate upon the occurrence of the event contemplated in Article 47, Section 1 of the Agreement establishing the Bank.

(c) On the date of expiration or the date of termination (each hereinafter referred to as the "Termination Date"), the Bank shall cease all activities relating to the resources of the Water Fund, except those incidental to the orderly realisation, conservation and preservation and settlement of the direct or contingent obligations to which the Water Fund or the Bank, on behalf of the Water Fund, may be subject.

(d) The Bank shall also present to the Governing Council a list of all operations in progress and outstanding obligations, as of the Termination Date, and such operations shall continue to be processed until the respective processing is concluded.

(e) The Bank shall within a reasonable period after the termination of the Water Fund transfer to the Donors such of the resources of the Water Fund as are in possession of the Bank and are not required for the purpose of settlement of any outstanding obligations, and shall thereafter, transfer the balance of such resources as and when received by the Bank.

(f) In the event of termination, the Bank shall, prior to transferring funds in its control to the relevant Donors, withhold such portion of the funds as shall correspond to the administrative fee, if any, and an amount to cover contingent liabilities, as agreed by the Governing Council to be paid to the Bank.