



Global Environment Facility

GEF/C.22/Inf.15/Rev.1
November 14, 2003

GEF Council
November 19-21, 2003

PARTICIPATION OF COUNCIL MEMBERS IN COUNCIL MEETINGS

1. Please find attached a memorandum from David Freestone, Chief Counsel, Environmentally and Socially Sustainable Development and International Law, World Bank, on the visa status of GEF Council Members and the requirements of the Instrument regarding the location of GEF Council meetings.

OFFICE MEMORANDUM

DATE: November 11, 2003

TO: Mr. Leonard Good, CEO and Chairman, Global Environment Facility (GEF)

FROM: David Freestone, Chief Counsel, Environmentally and Socially Sustainable Development (ESSD) and International Law

EXTENSION: 81743

SUBJECT: **Visa Status of Global Environment Facility (GEF) Council Members Attending GEF Council Meetings and the Location of GEF Council Meetings**

1. This memorandum is in response to your request for legal advice on (1) the visa status of GEF Council Members, and (2) the requirements of the Instrument establishing the Restructured GEF (the "GEF Instrument") regarding the location of GEF Council meetings.

Visa Status

2. There was a recent denial of a visa requested by a GEF Council Member in order to enter the United States (the "U.S.") and attend the November 19-21, 2003, GEF Council meeting. In connection with this denial, the question arises as to whether GEF Council Members are afforded any special visa status when attending GEF Council meetings in the U.S. The answer to this question is that, although some GEF Council Members may have diplomatic status granted by their respective governments, they have no special status derived from the GEF Instrument, the GEF Trustee's or Implementing Agencies' privileges and immunities, or under U.S. law, when attending GEF Council meetings.

3. Under the GEF Instrument, the International Bank for Reconstruction and Development (the "Bank") administratively supports the GEF, and "staff of the GEF Secretariat shall include staff members seconded from the Implementing Agencies as well as individuals hired competitively on an as-needed basis by one of the Implementing Agencies." (See para. 21 of the GEF Instrument.) In practice, all GEF staff hold appointments to the Bank, and non-U.S. staff are granted the U.S. G-4 (non-immigrant) visa status specially reserved for the staff of international organizations. By contrast, GEF Council Members are not GEF staff and, as a rule, do not hold appointments to the Bank.

4. There is no headquarters agreement between the Bank and the U.S. Government, nor are there any special arrangements with the U.S. regarding the GEF. The privileges and immunities of the Bank and its staff emanate directly from the Bank Articles of Agreement, which have been incorporated into U.S. law. (See 22 U.S.C. § 286h: "Article VII, sections 2 to 9, both inclusive, of the Articles of Agreement of the Bank, shall have full force and effect in the United States.")

5. As GEF Council Members are neither GEF staff nor, as a rule, do they hold appointments to the Bank, the privileges and immunities of the Bank and the U.S. G-4 visa status would be inapplicable. GEF Council Members attending GEF Council meetings are therefore treated in exactly the same way as delegates attending Bank meetings. GEF Council Members may be conferred with diplomatic and/or special status by their governments, but they derive no special status from the relationship between the GEF on the one hand, and the Bank and the other Implementing Agencies on the other, and are subject to U.S. visa requirements, depending on individual circumstances.

Location of GEF Council Meetings

6. The GEF Instrument provides in para. 17 that: "[t]he Council shall meet semi-annually or as frequently as necessary at the seat of the Secretariat to enable it to discharge its responsibilities." (Emphasis added.) Hence the GEF Council is expressly required to meet at the seat of the Secretariat, i.e. in Washington, D.C.

7. The GEF Instrument is not an international treaty, but a *sui generis* act. Nevertheless the rules of treaty interpretation, embodied in the 1969 Vienna Convention on the Law of Treaties and reflecting general international law, provide a helpful starting point when analyzing the provisions of the GEF Instrument. The general rule of interpretation, embodied in Article 31 of the Vienna Convention, requires that a treaty be interpreted in good faith "in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." In addition to the context, another element to be taken into account is "any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation" (Art. 31(3)(b)).

8. In this context, it should be noted that, on the occasion of the two Assembly meetings in New Delhi in 1998 and in Beijing in 2002, the GEF Council decided to meet outside Washington, D.C., in the place where the Assembly was being held, concomitantly with the Assembly meeting. It could therefore be argued that there is "subsequent practice" derogating from the clear letter of para. 17 of the GEF Instrument. The issue is whether this subsequent practice can be taken to mean that the express requirements of para. 17 are no longer applicable. In other words, has the subsequent practice of the GEF Council established a contrary agreement to that reflected in the provisions of the GEF Instrument, to the effect that the requirement that the GEF Council meet at the seat of the Secretariat would have fallen into disuse (or, to use international legal terminology, "desuetude")?

9. In this case, the subsequent practice superseding para. 17 does not necessarily lead to the conclusion that all GEF Council meetings may take place anywhere, but to the more limited conclusion that, when concomitant with Assembly meetings, GEF Council meetings can be held in the same place where the Assembly meetings are held. Therefore, with respect to GEF Council meetings unrelated to Assembly meetings, unless the GEF Instrument were to be amended, the rule remains that the GEF Council shall meet at the seat of the Secretariat.

Cc: Messrs./Mmes. R. Danino and S. White (LEGVP); D. Rivero and P. Beauregard (LEGAD); C. Di Leva and M. Ragazzi (LEGEN); K. King and P. Bliss-Guest (GEF); J.W. Evans and R. Khanna (ENV); and P. Crivelli (FRM).