

GEF Council Meeting
June 5 – 7, 2012
Washington, D.C.

Agenda Item 11

Clarifying the Responsibilities of the GEF's Key Actors with respect to the Use of GEF Resources

(Prepared by the Trustee and Legal Department of the World Bank)

Recommended Council Decision

The Council takes note of the paper GEF/C.42/04, *Clarifying the Responsibilities of the GEF's Key Actors with respect to the Use of GEF Resources*, approves the approach presented in the paper to strengthen Financial Procedures Agreements (FPAs) and requests the Trustee and the Implementing and Executing Agencies to prepare amendments to the existing FPAs to include appropriate provisions and requests the Trustee to include similar provisions in any new FPAs with GEF Partner Agencies.

Global Environment Facility:
Clarifying the Responsibilities of the GEF's Key Actors
With respect to the Use of GEF Resources

I. Introduction

As part of the GEF-5 reforms, the GEF Council agreed in November 2010 to launch a pilot to broaden the GEF partnership beyond the existing ten agencies, to include new agencies that may access GEF resources to carry out GEF-financed activities. Under this pilot, up to ten new agencies may be accredited, with priority given to national institutions.¹ In May 2011, the GEF Council approved the principles and criteria for implementation of the GEF-5 pilot initiative.² To be eligible, the new agencies (the “GEF Project Agencies”) will need to be accredited by an independent Accreditation Panel, to be established by the GEF Secretariat. These agencies will need to meet the GEF Minimum Fiduciary Standards³ and comply with the GEF Policy on Agency Minimum Environmental and Social Safeguard Standards.⁴ They will follow the same procedures as the existing GEF agencies⁵, including signing financial procedure agreements (FPAs) with the Trustee, and memoranda of understanding (MOUs) with the GEF Secretariat.

Against the backdrop of this pilot to broaden the GEF partnership, at the November 2011 Council meeting, a Council member “*expressed concern over the institutional responsibilities and course for legal actions, where there is direct access to funds, particularly for those new agencies that do not have*

¹ See paragraphs 21 to 27 of the Joint Summary of the Chairs, 39th GEF Council Meeting, November 16-18, 2010, and Document GEF/C.39/7/Rev.1, *Broadening of the GEF Partnership under Paragraph 28 of the Instrument: Key Policy Issues*.

² See paragraphs 26 to 34 of the Joint Summary of the Chairs, 40th GEF Council Meeting, May 24-26, 2011, Document GEF/C.40/09, April 26, 2011, *Broadening the GEF Partnership under Paragraph 28 of the GEF Instrument*.

³ See paragraph 21 of Joint Summary of the Chairs, GEF Council Meeting, June 12-15, 2007; Document, Recommended Minimum Fiduciary Standards for GEF Implementing and Executing Agencies; paragraph 14, Joint Summary of the Chairs, 41st GEF Council Meeting, November 8-11, 2011; and GEF/C.41/06/Rev.01, GEF Minimum Fiduciary Standards: Separation of Implementation and Execution Functions in GEF Partner Agencies.

⁴ See paragraphs 25 to 28 of the Joint Summary of the Chairs, 41st GEF Council Meeting, November 10, 2011.

⁵ See paragraph 9 of the document GEF/C.40/09-*Broadening the GEF Partnership under Paragraph 28 of the Instrument*. The Implementing Agencies do not have MOUs with the Secretariat as their responsibilities are established in the GEF Instrument.

international governing bodies.”⁶ The Trustee and the Legal Department of the World Bank were “asked to draft an information document of the responsibilities of the Trustee, the Secretariat and the new agencies in terms of resources provided for projects.”⁷

Under the existing arrangements, three Implementing Agencies⁸ and seven Executing Agencies⁹ (collectively, the existing GEF Agencies) have access to GEF resources, all of which are either United Nations (UN) agencies or multilateral development banks (MDBs). The Trustee transfers resources to the ten GEF Agencies for implementation/execution of project activities. Implementation generally involves project identification, preparation of project concept, appraisal, preparation of detailed project document, project approval and start-up, project supervision, and project completion and evaluation, in accordance with the respective policies and procedures of the relevant Agency, which is accountable to the Council for use of GEF resources made available to them; this is further detailed in relevant Council documents.¹⁰ Execution generally includes the management and administration of the day-to-day activities of projects in accordance with specific project requirements in an agreement with the agency responsible for implementation. Execution implies accountability for intended and appropriate use of funds, procurement and contracting of goods and services, as further detailed in relevant Council documents.¹¹ The Secretariat and the Evaluation Office undertake their respective responsibilities assigned to them under the Instrument for the Establishment of the Restructured Global Environmental Facility (GEF Instrument) and/or GEF Council decisions, including GEF Monitoring and Evaluation (M&E) Policy, in connection with monitoring and evaluation of the implementation of project activities by the GEF Agencies.

Similarly, once new agencies, including national institutions, are accredited under the GEF-5 pilot on broadening the GEF partnership, the procedures and policies that are applicable to the existing GEF Agencies will apply to the new GEF Project Agencies, and they will be responsible to the GEF Council for use of GEF resources and activities carried out therewith, using their own operational policies and

⁶ See paragraph 27 of the Highlights of the Council’s Discussions, GEF Council Meeting, November 8-11, 2011, dated November 18, 2011 (Revised).

⁷ *Ibid.*

⁸ The initial three agencies are defined as “Implementing Agencies” in the GEF Instrument and include the United Nations Development Programme, United Nations Environment Programme, and the World Bank.

⁹ Executing Agencies include: African Development Bank/ African Development Fund, Asian Development Bank, European Bank for Reconstruction and Development, Food and Agriculture Organization of the United Nations, Inter-American Development Bank, International Fund for Agricultural Development, and United Nations Industrial Development Organization. These seven additional agencies, like the original Implementing Agencies, are responsible for project implementation and oversight.

¹⁰ For further details, see the following Council documents: GEF/C.41/06/Rev.01, *GEF Minimum Fiduciary Standards: Separation of Implementation and Execution Functions in GEF Partner Agencies* (reviewed by Council in November 3, 2011); GEF/C.39/9.

¹¹ For further details, see Council document GEF/C.39/9.

procedures. For the rest of the paper, GEF Project Agencies, together with the Implementing and Executing Agencies, are collectively referred to as “GEF Partner Agencies”.¹²

One gap in the existing GEF arrangements relates to clarity around who is responsible for enforcing the return of funds that have not been used by a GEF Partner Agency or recipient for the purposes provided in accordance with the Instrument and decisions of the Council, and how such enforcement is to be implemented. The expansion of the GEF partnership to include new agencies with different attributes serves to highlight this gap in fiduciary accountability.

A key objective of this paper is to address the responsibility of GEF Partner Agencies to return funds that have not been used for the purposes provided, including the return of such funds to the Trustee. The paper recommends that the FPAs between the Trustee and GEF Partner Agencies make explicit the responsibility of GEF Partner Agencies to return funds that have not been used for the purposes provided. This would be reflected in FPAs with the new GEF Project Agencies; in order to maintain a level playing field, existing FPAs with the GEF Agencies would also need to be amended.¹³ If the Council approves this recommendation, the details would need to be worked out jointly by the Trustee and the GEF Partner Agencies.

It should be noted that, while the approach put forward in this paper can help strengthen the FPAs through the inclusion of explicit provisions in the FPA on the return of funds not used for the purposes provided, it does not cover issues concerning enforcement. Similarly, it does not address the question of how any disputes regarding whether funds were used for the purposes provided would be handled.

The rest of this paper is organized as follows: Section II describes the responsibilities of the GEF’s key actors with respect to the use of GEF resources under the existing GEF partnership arrangements; these actors include the Implementing Agencies, the Executing Agencies, Trustee, Secretariat and Evaluation Office. Section III discusses the responsibilities of the GEF Project Agencies under the GEF-5 pilot initiative. Section IV offers certain additional measures for Council’s consideration in order to address the return of funds to the Trustee in cases where funds are not used by GEF Partner Agencies for the purposes provided in accordance with the GEF Instrument and GEF Council decisions.

This paper has benefitted from input provided by the GEF Secretariat, Evaluation Office and the existing GEF Agencies.

¹² With the expansion of the GEF over time, GEF agencies have become increasingly diverse. In Document GEF/39.8/2, *Accreditation Procedure for GEF Project Agencies* (approved by Council in November 2010), the term “GEF Partner Agency” was defined to encompass the three original Implementing Agencies, the seven Executing Agencies, and GEF Project Agencies to be accredited under the GEF-5 Pilot on broadening the GEF partnership under paragraph 28 of the GEF Instrument. GEF Partner Agencies are all accountable to the Council for their GEF-financed activities, including the preparation and cost-effectiveness of GEF projects, and for the implementation of the applicable operational policies, strategies and decisions of the Council.

¹³ See Document GEF/C.39/7/Rev.1, *Broadening of the GEF Partnership under Paragraph 28 of the Instrument: Key Policy Issues*, approved by the GEF Council in November 2010, states that “if new rules are developed and applied to accredited GEF Project Agencies, then they shall also be applied to the existing GEF Agencies, as appropriate, in order to maintain a level playing field.”

II. Existing Arrangements

Responsibilities of the key actors in the GEF with respect to the use of GEF funds are specified in the GEF's governance documents. The GEF Instrument specifies the responsibilities of the Trustee and the original GEF Agencies (the three Implementing Agencies). Under the GEF Instrument, the Implementing Agencies are accountable to the GEF Council for their GEF-financed activities.¹⁴ The role and fiduciary responsibilities of the Trustee are set forth in Annex B to the GEF Instrument. The responsibilities of the seven additional Executing Agencies are addressed through various GEF Council decisions. Pursuant to authority provided under Annex B to the GEF Instrument (as discussed further below), the Trustee entered into FPAs with the Implementing and Executing Agencies.¹⁵ In the case of the Executing Agencies, because their responsibilities are not specifically addressed in the GEF Instrument and because they, unlike the Implementing Agencies, did not adopt the GEF Instrument, the GEF Secretariat also entered into the MOUs with them. The responsibilities of the Executing Agencies are detailed accordingly in those FPAs and the MOUs. The responsibilities of the GEF Evaluation Office and the GEF's key actors on monitoring and evaluation are described in the GEF Monitoring and Evaluation Policy, the most recent version of which was adopted by the GEF Council in November 2010.¹⁶ The responsibilities of each of the GEF's key actors are described below.

Responsibilities of the Trustee: The role and fiduciary responsibilities of the Trustee are set forth in Annex B in the GEF Instrument. Those responsibilities include “the disbursement of funds to the implementing and other executing agencies.”¹⁷ With respect to use of GEF funds, the GEF Instrument in particular provides that the responsibilities of the Trustee include “*the monitoring of the application of budgetary and project funds [. . .] so as to ensure that the resources of the Fund are being used in accordance with the Instrument and the decisions taken by the Council, including the regular reporting to the Council on the status of the Fund's resources.*”¹⁸ The three Implementing Agencies were selected as the original GEF partners under the Instrument on the basis of having successfully carried out the work of the pilot phase and on the presumption of having sound monitoring systems in place. Therefore, the key GEF actors have implemented the above-mentioned provision under the Instrument, as follows: receipt

¹⁴ See paragraph 22 of the GEF Instrument and paragraph 12 of Annex D of the GEF Instrument.

¹⁵ Annex B provides that the “Trustee shall administer the Fund in accordance with the applicable provisions of the Instrument and such decisions as the Council may take under the Instrument....” (Paragraph 3 of Annex B to the GEF Instrument). It also provides that one of the responsibilities of the Trustee is “*the financial management of the Fund; including the investment of its liquid assets, the disbursement of funds to the implementing and other executing agencies as well as the preparation of the financial reports regarding the investment and use of the Fund's resources.*” (Paragraph 4(b) of Annex B to the GEF Instrument). Annex B states: “*All amounts in respect of which the Trustee is authorized to make transfers to the Implementing Agencies and any executing agency shall be transferred as agreed between the Trustee and the transferee.*” (Paragraph 6 of Annex B to the GEF Instrument). On the basis of the foregoing provisions, the Trustee has entered into FPAs with each GEF Implementing Agency and each of the additional seven Executing Agencies, reflecting the provisions of the relevant Council decisions.

¹⁶ See paragraph 12 of Joint Summary of the Chairs, 39th GEF Council Meeting, November 16-18, 2010.

¹⁷ See Paragraph 4(b) of Annex B to the GEF Instrument.

¹⁸ See Paragraph 4(d) of Annex B to the GEF Instrument.

by the Trustee from the Implementing Agencies of annual financial reports, audited by their independent auditors, along with certain other financial reports, fulfills the Trustee's responsibility under this provision.

The GEF Council at its meeting in May 2004 specifically confirmed the above practice, and agreed to extend its application to the measures to be taken to provide GEF direct access to Executing Agencies under the GEF Expanded Opportunities policy.¹⁹ The Trustee Report submitted for that GEF Council meeting states:

“Under the Instrument, the Trustee has a responsibility to monitor the application of budgetary and project funds so as to ensure that the resources of the Trust Fund are being used in accordance with the Instrument and the decisions of the Council. Upon the establishment of the GEF, the Trustee consulted with the Implementing Agencies on the appropriate approach for the Trustee to discharge this responsibility. In light of the fact that the Implementing Agencies are UN agencies and the Bank itself, and that they too share a responsibility under the Instrument to ensure that the resources of the Trust Fund are being used in accordance with the Instrument and the decisions of the Council, it was agreed that an appropriate approach for the Trustee to discharge this responsibility would be for it to require and accept from the Implementing Agencies an annual financial report, audited by the agency's independent auditors, and certain periodic unaudited financial reports, as evidence that the resources of the Trust Fund had been so used. The Trustee has continued to operate on this basis and does not, therefore undertake additional monitoring measures, such as, for example, requiring that the Implementing Agencies submit to spot audits or make their books available to the Bank.

“Subject to the Council's confirming that this practice is satisfactory, the Trustee intends to operate on the same basis with respect to the monitoring of GEF resources made available to the Executing Agencies. Accordingly, the FPAs require each Implementing Agency and Executing Agency to provide the Trustee with an annual audited financial report, audited by the agency's independent auditors, and certain other financial reports, as agreed with the agencies in the FPAs, but do not require the agencies to submit to additional monitoring measures undertaken by the Trustee.

“The Trustee seeks confirmation from the Council that: (a) the Council supports the current practice that the Trustee discharges its responsibility under the Instrument to monitor the application of budgetary and project funds so as to ensure that the resources are being used in

¹⁹ See paragraphs 30 and 31 of Joint Summary of the Chairs, GEF Council meeting, May 19-21, 2004. Paragraph 30 in particular provides as follows:

“The Council confirms that the practices of the Trustee with regard to monitoring the GEF resources made available to the Implementing Agencies, as described in paragraphs 11 to 15 of document GEF/C.23/Inf. 3, are satisfactory to meet the Trustee's obligations under the Instrument to monitor the application of budgetary and project funds so as to ensure that the resources of the Trust Fund are being used in accordance with the Instrument and the decisions taken by the Council. The Council agrees that the Trustee should follow similar arrangements with respect to monitoring of GEF resources made available to the Executing Agencies. The Trustee is requested to continue to monitor the GEF resources and, in consultation with the GEF Secretariat, to inform the Council of any additional measures that may be needed to strengthen the financial procedures.”

accordance with the Instrument and the decisions taken by the Council solely by requiring, and accepting from the Implementing and Executing Agencies an annual audited financial report, audited by the agency's independent auditors, and certain periodic unaudited financial reports, as evidence that the resources of the GEF Trust Fund have been so used; and (b), given the importance of the agencies' financial reports to the Trustee's ability to discharge its responsibilities under the Instrument, agrees that the Trustee may suspend commitment and disbursement of GEF funds that have been allocated by the Council and/or the CEO, as appropriate, to any agency that is out of compliance with reporting obligations to the Trustee under the FPA it has entered into with the Trustee, and such non-compliance has continued for a period of not less than thirty (30) days after written notification thereof shall have been given to the agency by the Trustee, pending any such non-compliance being resolved to the satisfaction of the Trustee.”²⁰

In sum, the Trustee's responsibility for monitoring the use of GEF funds is fulfilled by, and limited to, receiving required financial reports from the agencies, and suspending commitment and disbursement to agencies in protracted non-compliance with the reporting requirements under the FPAs.

Responsibilities of GEF Secretariat: According to the GEF Instrument, the GEF Secretariat's responsibilities include, *inter alia*, coordinating the formulation and overseeing the implementation of program activities pursuant to the joint work program, preparation of common guidelines on the project cycle to ensure the implementation of the operational policies adopted by the Council.²¹ The GEF Instrument also provides that the GEF Secretariat review and report to the Council on the adequacy of arrangements made by the Implementing Agencies in accordance with the guidelines referred above, and provide the Trustee with all relevant information to enable it to carry out its responsibilities.²² The GEF Secretariat may perform any other functions assigned to the Secretariat by the Council.²³ Under the GEF Instrument, the Secretariat also prepares an annual report on the activities of the GEF and circulates to the Council for its approval. Such annual report is required to include “*all the information necessary to meet the principles of accountability and transparency that shall characterize the [GEF] as well as the requirements arising from the reporting arrangements agreed with each Conference of the Parties*”.²⁴

In order to facilitate the implementation of GEF Council decisions relating to Executing Agencies, the GEF Secretariat entered into MOUs with the Executing Agencies, which enumerate the general understandings concerning the Executing Agencies' responsibilities in connection with allocation of GEF resources to them under the direct access modality.²⁵

²⁰ See Paragraphs 13-15 of GEF Council Document, GEF/C.23/Inf.3, Trustee Report.

²¹ See Paragraph 21(b) of the GEF Instrument.

²² See Paragraph 21(h) of the GEF Instrument.

²³ *Ibid.*

²⁴ See Paragraph 31 of the GEF Instrument.

²⁵ Following a request by the GEF Council at its May 1999 GEF Council meeting (paragraph 7 of Joint Summary of the Chairs, GEF Council Meeting, May 5-7, 1999) to provide a report on progress made in relation to the proposal made

Under those provisions of the GEF Instrument and relevant GEF Council decisions, the Secretariat has undertaken various activities to oversee the implementation of program activities, including requiring certain reporting from the GEF Agencies. The Council approved the Results Based Management (RBM)²⁶ framework for the GEF to monitor performance and achievement of outputs, outcomes and impacts of GEF-financed activities. The Secretariat²⁷ prepares the Annual Monitoring Report (AMR) based upon reporting by the GEF Agencies and reports to the Council annually on the various indicators and targets including progress towards project outcomes and reasons for delay in implementation and completion of projects. In addition, the Secretariat, through providing relevant information and inputs requested by the Evaluation Office, participates in all evaluation reviews and studies; and ensures that findings and recommendations emanating from evaluation and monitoring activities are followed up with regard to GEF policies, programs and procedures and that the Council decisions are implemented, noting that ensuring the quality of monitoring and evaluation is a shared responsibility under the GEF partnership. In sum, the Secretariat is responsible for overseeing, and reporting to the Council, on the overall status and health of the portfolio under implementation.

GEF Evaluation Office: The Evaluation Office was formed by the Council decision of July 2003 as an independent monitoring and evaluation unit.²⁸ The role and responsibilities of the Evaluation Office and of the evaluation function in the GEF were further defined in the 2006 GEF M&E Policy, which was updated and amended in 2010. Under the terms of the Council decision, it reports directly to the Council and is independent of GEF Agency and GEF Secretariat management. The Evaluation Office has the central role of ensuring the independent evaluation function within the GEF, setting minimum requirements for M&E, ensuring oversight of the quality of M&E systems on the project and program levels, and sharing evaluative evidence within the GEF. The Evaluation Office pursues the goals of improved accountability and learning through an Evaluative, Normative and Oversight function. The Evaluation Office is currently focused on four main streams of evaluation, which are: Country Portfolio, Performance, Impact and Thematic. The 2010 GEF M&E Policy in paragraph 81 indicates that the evaluation function in the GEF explores five main evaluation criteria, not all of which have to be systematically assessed in all cases. These five criteria are relevance, effectiveness, efficiency, results and sustainability. While addressing efficiency, when appropriate, evaluations are expected to assess “the extent to which GEF results have been derived with the least costly resources possible”. The Evaluation Office has also included as part of its assessments on a project’s financial performance and sustainability quality of supervision functions of GEF Agencies. Furthermore, the Evaluation Office collaborates with the independent evaluation units of the GEF Agencies to enhance collective capacity to fulfill evaluation needs effectively and efficiently. While information provided by the GEF Agencies to the Evaluation

under the document GEF/C.13/3, *Expanded Opportunities for Executing Agencies*, legal arrangement by the GEF Secretariat to enter into MOUs with the GEF Executing Agencies was reported to the Council in paragraph 10 of the document, GEF/C/15/4, April 7, 2000, *Review of Process in Expanded Opportunities for Executing Agencies*.

²⁶ A framework for the GEF Results-based Management Framework (RBM) was approved by the Council in 2007. At its November 2010 meeting, Council approved the Results-based Management and Knowledge Management Workplan for GEF-5.

²⁷ Noting that the Secretariat’s roles and responsibilities are described in various Council documents and decisions, this paper reflects the salient responsibilities of Secretariat.

²⁸ See the document July 29, 2001, *Terms of Reference for an Independent Monitoring and Evaluation Unit*, and the letter dated July 29, 2003 from the CEO and Chairman of the GEF to Council Members.

Office may reveal certain aspects related to a project's efficiency of resource use, financial management, or supervision responsibility of the agencies, the Evaluation Office does not have any responsibility in auditing or monitoring use of funds for an individual project. Should it emerge from any evaluation that funds may not have been used for the purposes provided under the GEF Instrument and GEF Council decisions, the Evaluation Office would bring this to the attention of the relevant authority and report on this to the Council, as necessary.

Accountability of Existing GEF Agencies: The Instrument provides that the Implementing Agencies are accountable to the GEF Council for their GEF-financed activities.²⁹ The GEF Council confirmed in February 1995 that, in accordance with paragraph 22 of the GEF Instrument, each Implementing Agency should assume full accountability for all GEF projects executed under its sponsorship, including for the activities of executing agencies working with them.³⁰ The GEF Council decided over time to expand direct access to GEF resources by seven additional Executing Agencies under the Expanded Opportunities policy. Agencies acting under the direct access modality are directly accountable to the GEF Council for their GEF-financed activities.

As indicated above, the responsibilities of the Implementing Agencies and Executing Agencies are reflected in the FPAs between the Trustee and the Implementing Agencies and Executing Agencies and, in the case of the Executing Agencies, also in MOUs between them and the GEF Secretariat.

While the FPAs are negotiated individually, they generally include the following obligations on the part of the Implementing Agencies and Executing Agencies:

- Maintaining separate records and ledger accounts in respect of the funds received from the Trustee and disbursements thereof.
- Using the funds received from the Trustee for the purpose for which they were provided.
- Reporting funds received from the Trustee for projects for which no further disbursement is due to be made by the Agency and either returning such funds to the Trustee or taking them into account in amounts requested to be transferred subsequently.
- Disbursing funds to recipients in accordance with the Agency's rules and policies and its applicable disbursement procedures.
- Exercising the same degree of care and diligence in the discharge of the GEF Agency's functions under the FPA as it exercises with respect to the administration and management of its own affairs.
- Taking such actions as are necessary for the proper administration of the funds received from the Trustee and being accountable to the GEF Council for the Agency's GEF-financed activities.

The FPAs also require the Agencies to provide periodic financial reports to the Trustee on the use of the funds it has received under the FPA, including an annual financial statement, audited by the Agency's external auditors. In addition, the Trustee reserves its right to require the Agencies to provide a special

²⁹ See Paragraph 22, and Annex D, paragraph 12, of the GEF Instrument.

³⁰ See paragraph 19 and 20 of the Joint Summary of the Chairs, GEF Council Meeting, February 22-24, 1995.

audit, if circumstance warrants it (as further described below). As agreed with the GEF Council, the FPAs provide that if the Agency fails to comply with its reporting requirements under the FPA and such non-compliance continues for period of not less than 30 days after written notice from the Trustee, the Trustee may suspend any further commitment and/or cash transfer to the Agency until such time as the non-compliance is resolved to the reasonable satisfaction of the Trustee.

Similar to FPAs, MOUs are individually negotiated and they generally include the following undertakings by the Executing Agencies:

- The Agency will be solely responsible for the administration of GEF funds made available to it and will carry out such administration in accordance with its regulations and rules, standard practices and procedures and with the same degree of care as it uses in the administration of its own funds.
- The Agency will take all appropriate measure to ensure that each allocation of GEF funds is used for the purposes for which it was provided, as set out in the pertinent GEF project document, and will be accountable to the GEF Council for all activities funded by the allocation.
- The Agency will be solely responsible for ensuring that the development, preparation, implementation, monitoring and evaluation of the activities financed by the allocations of GEF funding it receives are consistent with the GEF's operational policies and procedures, supervising the activities performed under approved GEF project documents and informing the GEF Secretariat of any condition it believes may interfere with its performance of its obligation under the MOU or the implementation of any activities due to be performed under any GEF project document.

In addition, under the MOU, the Executing Agency provides reports on the agency's GEF projects as may be reasonably requested by the Secretariat.

As well, the Implementing Agencies and Executing Agencies work closely with the Evaluation Office in accordance with relevant decisions of the GEF Council, and provide, as needed, inputs in the context of various evaluation reports prepared by the Evaluation Office.

Circumstances that warrant return of funds by Agencies: All Implementing Agencies and Executing Agencies are accountable to the GEF Council for their GEF-financed activities pursuant to the GEF Instrument, GEF Council decisions and other policy documents approved by the Council. The FPAs provide that the Agencies will use the funds transferred to them for the purpose for which they have been provided, exercising the same degree of care and diligence in the discharge of their functions under the FPA as they exercise with respect to the management and administration of their own resources. Similarly under the MOUs, the Agencies agree to use the GEF funding they receive for the purposes for which it is provided and to be accountable to the GEF Council for the activities to be undertaken with such funding. They also agree to provide the GEF Secretariat with reports on the use of the funding received. Although there is currently no explicit provision in the FPAs, GEF resources are expected to be returned by the Agencies in case of non-compliance with its obligations under the FPA, including funds that have not been used by the Agencies for the purposes provided under the GEF Instrument and decisions of the GEF Council.

Such situations could be evidenced in several ways, including through financial reports received by the Trustee under the FPAs or other reports received by the Secretariat or the Evaluation Office under the GEF Instrument, GEF Council decisions or the MOUs. In addition to periodical reporting requirements, the FPAs provide that if the Trustee has reason for concern that GEF resources provided to the Agency for a project may not have been used in accordance with the GEF Instrument and decisions taken by GEF Council, the Trustee will ask the Agency to provide it with information concerning the use of the resources. If, after reviewing any such information provided, the Trustee continues to have concerns as to the manner in which the resources have been used, the Trustee may request the Agency to get the accounts and reports of the Agency to be audited by the Agency's external auditors.

Dispute Resolution: The GEF Instrument provides partial guidance as to what mechanism is to be used in addressing concerns raised in connection with GEF-funded activities. The GEF Instrument provides that the Trustee will work with the Implementing Agencies and the CEO to address and resolve any concerns the Trustee may have about inconsistencies between the use of GEF resources, the GEF Instrument, and GEF Council decisions. The CEO will inform the GEF Council of any concerns that the Trustee or any Implementing Agency may have which are not satisfactorily resolved.³¹ However, the GEF Instrument does not address the actions that may be taken by the GEF Council following the receipt of such information from the CEO.

As for disputes with the Executing Agencies, the MOUs with the Secretariat³² provide that if there is a dispute under the MOU or any GEF project document submitted by the Executing Agency to the GEF Secretariat which cannot be settled by the agency and the GEF Secretariat, the CEO, in consultation with the Trustee, when appropriate, is to inform the GEF Council and seek the GEF Council's advice with respect to a resolution. The MOU provides that the CEO will invite the Executing Agency to participate in any Council meeting at which the resolution of any such dispute will be discussed.

The FPAs currently do not include any express provision for the exercise of legal recourse against an Agency that does not use GEF funding it has received in accordance with the GEF Instrument, decisions of the GEF Council, the FPA and the MOU, except for the provisions for suspension of commitment and cash transfer of GEF funds in the event of delinquency by the agencies in providing financial reports. While the Agencies undertake general obligations in respect of use of GEF resources, there is no provision in either the MOUs or the FPAs that explicitly addresses the return of funds when the funds have not been used by the Agencies for the purposes provided under the GEF Instrument and GEF Council decisions.

Therefore, if an Agency does not use funds provided to it by the Trustee in accordance with the GEF Instrument, GEF Council decisions, the FPA or the MOU, it is expected that the GEF Secretariat and the Trustee would seek to resolve the issue consensually with the Agency. If the issue cannot be resolved in this manner, the CEO would bring the matter to the attention of the GEF Council, and the GEF Council would then decide on the course of further action. While the course of action that the GEF Council could take is not specified in the GEF Instrument, possible actions could include requiring the Agency to return the funds that have been determined to have not been used for the purposes provided, on the basis of non-

³¹ See Paragraph 21(c) of the GEF Instrument.

³² The MOUs are not legally binding.

compliance with the terms for which the GEF funds were provided. Further, the GEF Council could decide that the Agency would not be eligible to receive further GEF funding until the funds not used for the purposes provided have been returned. In the past where certain concerns or issues were raised by the Trustee or the GEF Secretariat, matters have been resolved consensually among the parties.

III. Responsibilities of the GEF Project Agencies under the GEF-5 pilot initiative

The GEF-5 pilot on broadening the GEF partnership does not change the existing allocation of responsibilities among the GEF key actors, and the GEF Project Agencies would therefore be directly accountable to the GEF Council for the use of GEF funds and activities carried out therewith. This direct accountability is premised on the fact that accredited agencies satisfy the Fiduciary, Environmental, and Social Safeguards Standards as approved by the GEF Council. While it would be the responsibility of the GEF Project Agency to ensure that the GEF funds made available to them would be used in accordance with the relevant GEF Council decisions, it would also be supported by shared responsibilities among the partners in monitoring and reporting the use of GEF resources and implementation of the activities, in the same manner as with the existing GEF Agencies as described above.³³

Although the governance and organizational structure of new agencies and the type of systems they employ could vary from agency to agency, the GEF Council has decided that, once any GEF Project Agencies are accredited under the GEF-5 pilot as meeting the Fiduciary, Environmental, and Social Safeguards Standards, they would be accountable to the GEF Council for their GEF-financed activities in the same manner as the existing GEF Agencies under the GEF Expanded Opportunities policy.³⁴ The GEF Project Agencies would follow the same procedures as the existing GEF Agencies, including entering into FPAs with the Trustee, and entering into MOUs with the Secretariat.³⁵ Once the GEF Project Agencies are accredited, they will carry out GEF-financed activities in accordance with their respective policies and procedures and in compliance with GEF Policies on M&E and separation of implementation and execution functions.

Based on these decisions of the GEF Council, the Trustee will transfer funds approved by the GEF Council (or as the case may be, by the CEO) to the GEF Project Agencies in accordance with the FPAs entered into with them. The Trustee would then require and receive certain periodic financial reports, including annual audited reports from the GEF Project Agencies as evidence that the resources of the Trust Fund had been so used, whereupon the Trustee discharges its responsibility to monitor the application of GEF resources. As is the case with the existing GEF Agencies, the Trustee is not expected to monitor each GEF Project Agencies' policies and procedures, and therefore the Trustee will not be responsible for use of GEF funds transferred to the GEF Project Agencies except as described above. The

³³ It should be noted that the Executing Agencies had several years of performance of managing GEF funds through indirect access to GEF funds via the Implementing Agencies before the Executing Agencies were granted direct access to GEF funding under the Expanded Opportunities policy.

³⁴ See Paragraph 26 of the Joint Summary of the Chairs, 40th GEF Council Meeting, May 24-26, 2011.

³⁵ See Paragraph 14 of Annex I (Draft Policy on the Accreditation of GEF Partner Agencies) to *Broadening the GEF Partnership Under Paragraph 28 of the GEF Instrument* (GEF/C/40/09) states: "The GEF Trustee will enter into a FPA with the GEF Project Agency that will enable the Trustee to commit and transfer funds." It should be noted that the Implementing Agencies do not have MOUs with the Secretariat as their responsibilities are established in the GEF Instrument.

GEF Secretariat and the Evaluation Office would require certain reporting from the GEF Project Agencies under the terms of the MOUs. Should there be any dispute or concern raised in connection with use of GEF resources or GEF-funded activities, it is expected that matters be referred to the GEF Council for resolution.

Overall assessment: While the GEF-5 pilot initiative does not introduce any changes to the responsibilities of the key actors involved, the preparation of this paper led the Trustee to conclude that it would be desirable to have greater clarity on the responsibilities of the GEF's key actors, particularly with respect to the use of GEF resources. The existing legal arrangements, including the FPA and the MOU, underpinning the relationship with, and the responsibilities of, the existing GEF Agencies, reflect the underlying spirit of shared responsibilities and collaboration among the key actors, which originally comprised international organizations.

With the expansion of the GEF partnership to include actors with different attributes, it would be desirable to clarify the responsibilities of each of the GEF key actors, and to consider strengthening arrangements, to help ensure that GEF resources are used for the purposes intended in accordance with the Instrument and the decisions of the Council. In line with the Council's decision on the Broadening of the GEF Partnership, the new, strengthened arrangements would need to be applied to existing and new agencies.³⁶

Currently there is no provision in the existing MOUs or the FPAs that explicitly addresses the aspect of return of funds that have not been used by a GEF Agency for the intended purposes. There is also no mechanism for any legal enforcement action against the Agencies. In view of the limited responsibility of the Trustee in monitoring the use of GEF resources by a GEF Partner Agency and the absence of any specific stipulation in the GEF Instrument on this point, as discussed above, the Trustee is not expected to take any legal action against an Agency to enforce the return of any funds from the relevant Agency that have not been used for the purposes provided under the GEF Instrument and GEF Council decisions.

While the existing arrangements and allocation of the responsibilities among the key actors, and any risks associated with such arrangements, are to a large extent inherent in the structure originally contemplated in the GEF Instrument, the following section suggests certain measures for the Council's consideration, which would clarify the processes to be followed in case funds have not been used by a GEF Partner Agency for the purposes provided under the GEF Instrument and GEF Council decisions.

IV. Proposed measures

As noted above, under the current arrangement of the FPAs, the Trustee receives certain periodic financial reports on the GEF funds received by the GEF Partner Agencies. While such reporting is made on an aggregate basis without reporting on individual, project-level activities, the FPAs provide that if the Trustee has reason for concern that GEF resources provided to an Agency for a project may not have been used in accordance with the GEF Instrument and decisions taken by GEF Council, the Trustee will ask the Agency to provide it with information concerning the use of the resources. If, after reviewing any such information provided, the Trustee continues to have concerns as to the manner in which the resources have been used, the Trustee may request the Agency to get the accounts and reports of the Agency to be

³⁶ See Document GEF/C.39/7/Rev.1, *Broadening of the GEF Partnership under Paragraph 28 of the Instrument: Key Policy Issues*.

audited by the Agency's external auditors. If the Agency fails to provide the information requested by the Trustee or such audits, the FPAs provide that the Trustee may suspend any further commitments or transfers under the FPA until such time as the non-compliance with such requirements is resolved to the reasonable satisfaction of the Trustee. There is, however, no provision in the FPA that explicitly requires an Agency to return funds that have not been used for the purposes provided in accordance with the GEF Instrument and GEF Council decisions or that provides for the Trustee to take action in case the Agency fails to do so.

To address this gap, it is proposed that the GEF Council decide that all FPAs between the Trustee and GEF Partner Agencies, including new agencies (the GEF Project Agencies), be strengthened to include provisions consistent with those described below to address the return to the Trustee of funds that have not been used for the purposes provided in accordance with the GEF Instrument and GEF Council decisions and that the Trustee and the existing GEF Agencies should amend their existing FPAs to incorporate appropriate provisions consistent with those described below as soon as feasible.

- (i) In addition to the current provisions in the FPA regarding suspension of commitments and disbursements to a GEF Partner Agency that is not in compliance with its reporting requirements under the FPA, the FPA should provide that, if any financial or auditor's report provided to the Trustee by a GEF Partner Agency under the FPA indicates that resources provided to the GEF Partner Agency under the FPA were not used for the purposes provided under the GEF Instrument and the decisions taken by the GEF Council, then the following measures would apply: the GEF Partner Agency will promptly refund such resources to the Trustee or otherwise take necessary actions within its control to address the matter, including notification of such actions by the GEF Partner Agency to the CEO, and where appropriate, after consultation with the CEO, to the GEF Council;
- (ii) in the event of a failure on the part of a GEF Partner Agency to take the above action, the Trustee will bring the matter to the attention of the CEO, and, after consultation with the concerned GEF Partner Agency, the CEO will inform the GEF Council;
- (iii) the GEF Council will consult with, and seek the views of, the concerned GEF Partner Agency; and
- (iv) the GEF Council may instruct the Trustee to suspend commitments and disbursements of GEF funds to the GEF Partner Agency.

The GEF Council could also decide to take other actions, such as deciding that the GEF Partner Agency will not be eligible to receive further GEF funding until the misused funds have been returned.

If the funds were not used for the purposes provided due to the action of third parties and not as a result of the Agency's gross negligence or willful misconduct, the GEF Partner Agency would be expected to follow its own rules and procedures and would be requested to use reasonable efforts to recover the amount from the third parties and return the GEF resources to the extent that they are recovered by the GEF Partner Agency, but the GEF Partner Agency would not be required to return any misused resources which are not so recovered.

It should be noted that while the above measures would help urge the relevant GEF Partner Agency to return any misused funds, the Trustee would not be expected to take any legal action against an Agency to enforce the return of any funds that have not been used for the purposes provided under the GEF Instrument and GEF Council decisions.