



Global Environment Facility

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GEF Council Meeting
June 22-24, 2009

Agenda Item 13

NOTE ON THE MEMORANDUM OF UNDERSTANDING BETWEEN THE CONFERENCE OF THE PARTIES SERVING AS THE MEETING OF THE PARTIES TO THE KYOTO PROTOCOL AND THE COUNCIL OF THE GLOBAL ENVIRONMENT FACILITY REGARDING SECRETARIAT SERVICES TO THE ADAPTATION FUND BOARD

Recommended Council Decision

The Council, having considered document GEF/C.35/6, *Note on the Memorandum of Understanding between the Conference of the Parties Serving as the Meeting of the Parties to the Kyoto Protocol and the Council of the Global Environment Facility Regarding Secretariat Services to the Adaptation Fund Board*, welcomes the opportunity to provide secretariat services to support the Adaptation Fund Board and approves the *Memorandum of Understanding between the Conference of the Parties Serving as the Meeting of the Parties to the Kyoto Protocol and the Council of the Global Environment Facility Regarding Secretariat Services to the Adaptation Fund Board*, as contained in Annex 1 to document GEF/C.35/6, and authorizes the GEF Secretariat to provide all secretariat services to the Adaptation Fund and its Board, as reflected in the MoU, the *Rules of Procedure of the Adaptation Fund Board*, the *Roles and Responsibilities of the Adaptation Fund Secretariat*, and the *Operational Policies and Guidelines for Parties to Access Resources of the Adaptation Fund*.

BACKGROUND

1. The Adaptation Fund was established by the Parties to the Kyoto Protocol of the United Nations Framework Convention on Climate Change (UNFCCC) to finance concrete adaptation projects and programmes in developing countries that are Parties to the Kyoto Protocol. Initially, no decision was taken as to institutional arrangements for providing secretariat services to the Fund.
2. At its 32nd meeting, the GEF Council “authorize[d] the GEF CEO and Chair to communicate to the Conference of the Parties, serving as the meeting of the Parties of the Kyoto Protocol at its third session to be held in Bali in December 2007 ... GEF’s willingness to support a COP/MOP decision, should one be made, requesting the GEF Secretariat to function as the Secretariat of the Adaptation Fund.”¹
3. At the Conference of the Parties serving as the third meeting of the Parties to the Kyoto Protocol (CMP 3), held in Bali, Indonesia from December 3 to 14, 2007, Parties decided (1/CMP.3) that the Adaptation Fund Board (the Board), as the operating entity of the Fund, would be serviced by a Secretariat. Parties invited the GEF to provide secretariat services to the Board on an interim basis.
4. The CMP further requested the Board “to develop the necessary legal arrangements, to be concluded between the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol and [...] the secretariat [...] servicing the Adaptation Fund, for the purpose of regulating the provisions of the required services, the terms and conditions thereof and the performance standards required from the secretariat [...] servicing the Adaptation Fund, and present these legal arrangements for adoption by Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol at its fourth session.”
5. In accordance with the provisions above, the Board at its third meeting, approved a draft Memorandum of Understanding (MoU) between the CMP and the GEF Council regarding secretariat services to be provided to the Board on an interim basis. This MoU was transmitted to the fourth CMP for its adoption. In paragraph 3 of decision 1/CMP.4, the CMP adopted the *Memorandum of Understanding between the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol and the Council of the Global Environment Facility Regarding Secretariat Services to the Adaptation Fund Board*, which is hereby submitted to the Council for approval and attached to this document as Annex 1.
6. The nature of the secretariat services that the GEF shall provide to the Board is outlined in the MoU and also reflected in:
 - (a) the *Rules of Procedure of the Adaptation Fund Board*, as adopted by decision 1/CMP.4, paragraph 1 (Annex 2);

¹ Joint Summary of the Chairs of the 32nd GEF Council Meeting, November 14-16, 2007.

- (b) the *Roles and Responsibilities of the Adaptation Fund Secretariat* (Annex 3), which was approved by the Board at its first meeting and forwarded to the fourth meeting of the CMP; and
- (c) the *Operational Policies and Guidelines for Parties to Access Resources of the Adaptation Fund* (Annex 4), which was adopted in relevant part by the Board at its fifth meeting.

7. The CMP also decided in decision 1/CMP.4 that the Board be conferred with such legal capacity as necessary for the discharge of its functions with regard to direct access by eligible Parties and implementing and executing entities, in particular legal capacity to enter into contractual agreements and to receive and process project, activity and programme proposals directly.

8. This legal capacity refers only to the Board and neither to the Fund nor the secretariat; nevertheless the legal opinion contained in Annex 5 of the present document, which was prepared by a consultant upon request of the GEF Secretariat, is presented to the Council to provide legal background to the CMP decision.

RECOMMENDATIONS

9. The GEF Council is invited to approve the *Memorandum of Understanding between the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol and the Council of the Global Environment Facility Regarding Secretariat Services to the Adaptation Fund Board*, as contained in Annex 1 of the present document.

**MEMORANDUM OF UNDERSTANDING BETWEEN THE CONFERENCE OF
THE PARTIES SERVING AS THE MEETING OF THE PARTIES TO THE
KYOTO PROTOCOL AND THE COUNCIL OF THE GLOBAL
ENVIRONMENT FACILITY REGARDING SECRETARIAT SERVICES TO
THE ADAPTATION FUND BOARD**

I. Preamble

The Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol (hereinafter the CMP) having decided (decision 5/CMP.2) to establish the Adaptation Fund of the Kyoto Protocol (hereinafter the Fund) and having further decided (decision 1/CMP.3) that the operating entity of the Fund shall be the Adaptation Fund Board (hereinafter the Board) established to supervise and manage the Fund, and that the Board should develop and approve draft legal and administrative arrangements for secretariat services and the trustee for approval by the CMP (decision 1/CMP.3, paragraph 5 (j)), and having invited the Global Environment Facility (hereinafter the GEF) to provide secretariat services to the Board, on an interim basis,

Recognizing the willingness of the GEF to provide secretariat services to the Board (hereinafter the secretariat) on an interim basis,

Having consulted with each other and taking into account the relevant aspects of their governance structures, as reflected in their constituent instruments,

The CMP and the Council of the GEF (hereinafter the Council) have reached the following understanding in accordance with the recommendation of the Board:

II. Purpose

1. The purpose of the present Memorandum of Understanding (hereinafter the MOU) is to make provisions for the relationship between the CMP and the Council and to fulfil Article 12 of the Kyoto Protocol and decision 1/CMP.3 in connection with the provision of secretariat services as the secretariat.

III. Secretariat services

2. The secretariat shall, under the guidance and instructions of the Board, provide the following services to the Board to support and facilitate the work of the Board:

- (a) As a dedicated team of officials, provide secretariat services to the Board in a functionally independent and effective manner;
- (b) Manage the daily operations of the Fund and report to the Board;
- (c) Assist the Board in developing strategies, policies and guidelines for the Fund;
- (d) Ensure timely implementation of the decisions of the Board;
- (e) With respect to the day to day functioning of the Fund, act as liaison between the Board and Parties and implementing and executing entities;
- (f) Make arrangements for the meetings of the Board, including issuance of invitations and preparation of documents and reports of meetings, and provide a secretary of the Board meeting;

- (g) Develop the work programme and annual administrative budget of the Fund and submit them for approval by the Board;
 - (h) Ensure the implementation of the operational policies and guidelines of the Fund developed by the Board through, inter alia, the development of a project cycle based on criteria to be adopted by the Board;
 - (i) Operationalize the project cycle by:
 - (i) Undertaking initial review and screening of project proposals to assess conformity with guidelines approved by the Board;
 - (ii) Presenting project proposals for Board approval;
 - (iii) Monitoring implementation of progress;
 - (iv) Periodically reporting to the Board on portfolio performance;
 - (j) Coordinate the formulation and monitor the implementation of projects, ensuring liaison with other bodies as required;
 - (k) Liaise, as appropriate, with the secretariats of other relevant international bodies;
 - (l) Provide the trustee with all relevant information to enable it to carry out its responsibilities, consistent with decision 1/CMP.3 and the decisions of the Board;
 - (m) Provide services to ensure and facilitate proper communication with Parties;
 - (n) Perform any other functions assigned to it by the Board.
3. The head of the secretariat responsible for rendering the services shall be accountable to the Board.

IV. Amendments

4. Any amendments to the present MOU will be mutually agreed upon by the CMP and the Council. The Board may recommend to the CMP any amendments to the MOU.

V. Interpretation

5. If differences arise in the interpretation of the present MOU, the Council and the CMP or the Board, as appropriate, will consult each other and reach a mutually agreed solution.

VI. Entry into effect

6. The present MOU will come into effect upon adoption by the CMP and the Council. Either party may withdraw this MOU at any time by notification addressed to the other party. The withdrawal will take effect six months after the notification.

VII. Review

7. Decision 1/CMP.3, paragraph 32, provides for a review of the interim institutional arrangements after three years at the sixth session of the CMP. The present MOU will be reviewed in accordance with that decision. Following that review, this MOU may be modified to reflect any decisions mutually agreed by the CMP and by the Council.

Rules of procedure of the Adaptation Fund Board

I. Scope

1. These rules of procedure shall apply to the conduct of the business of the Adaptation Fund Board, in accordance with decision 1/CMP.3 of the third session of the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol (CMP). These rules become effective on their adoption by the CMP.

II. Definitions

2. For the purpose of these rules:

- (a) “Fund” means the Adaptation Fund pursuant to decision 10/CP.7 of the seventh session of the Conference of the Parties;
- (b) “Board” means the Adaptation Fund Board, established by decision 1/CMP.3 of the third session of the CMP as the operating entity of the Adaptation Fund with the mandate to supervise and manage the Adaptation Fund under the authority and guidance of the CMP;
- (c) “Member” means a representative elected by the CMP as a member of the Adaptation Fund Board, accorded the right to vote;
- (d) “Alternate” means a representative elected by the CMP as an alternate for each member;
- (e) “Meeting” means any meeting of the Adaptation Fund Board;
- (f) “Chair” means the Board member elected as Chair of the Adaptation Fund Board, according to paragraph 10 of these rules;
- (g) “Vice-Chair” means the Board member elected as Vice-Chair of the Adaptation Fund Board, according to paragraph 10 of these rules;
- (h) “Secretariat” is a body appointed by the CMP to provide secretariat services to the Board and to the Fund, consistent with decision 1/CMP.3, paragraphs 3, 18, 19 and 31;
- (i) “Trustee” means the trustee for the Adaptation Fund;
- (j) “Implementing entities” means the organizations that have been identified ex ante by the Board as meeting the criteria adopted by the Board, in accordance with decision 1/CMP.3, paragraph 5 (c), to access funding to implement concrete adaptation projects and programmes supported by the Fund;
- (k) “Executing entities” are organizations that meet the criteria set by the Board to access funding to implement concrete adaptation projects and programmes supported by the Fund, subject to such audit mechanisms and due diligence criteria as established by the Board;
- (l) “UNFCCC” means the United Nations Framework Convention on Climate Change;
- (m) “Protocol” means the Kyoto Protocol to the United Nations Framework Convention on Climate Change;
- (n) “Parties” means Parties to the Kyoto Protocol;
- (o) “Annex I Parties” means Parties included in Annex I to the Convention, as may be amended, or Parties which have made a notification under Article 4, paragraph 2(g), of the Convention;
- (p) “Non-Annex I Parties” means Parties not included in Annex I to the Convention;

- (q) “Secretary” means the person in charge of providing support services and logistics to the Adaptation Fund Board meetings;
- (r) “Head of secretariat” means the head of the entity responsible for rendering secretariat services to the Adaptation Fund Board.

III. Board

3. The Board shall comprise 16 members representing Parties, formally elected at a session of the CMP on the Adaptation Fund as follows:
 - (a) Two representatives from each of the five United Nations regional groups;
 - (b) One representative of the small island developing States;
 - (c) One representative of the least developed country Parties;
 - (d) Two other representatives from Annex I Parties;
 - (e) Two other representatives from non-Annex I Parties.
4. The election of each member is to be accompanied by the election of an alternate following the same principles as set out in paragraph 3 above.
5. The member and alternate shall each serve for a term of two calendar years and shall be eligible to serve a maximum of two consecutive terms.
6. In the absence of a member, or when requested by a member in writing, his or her alternate will act for the member, including by voting in the member’s stead.
7. If a member or an alternate resigns or is otherwise unable to complete the assigned term of office or to perform the functions of that office, a new member or alternate shall be elected in accordance with decision 1/CMP.3, paragraph 8.
8. Notwithstanding paragraph 7, if a member or an alternate resigns or is otherwise unable to complete the assigned term of office or to perform the functions of that office, the Adaptation Fund Board may decide, bearing in mind the proximity of the next session of the CMP, to appoint another member, or an alternate member, from the same constituency to replace the said member for the remainder of that member’s mandate. The Adaptation Fund Board shall request the relevant constituency to nominate the new member, or the new alternate.
9. Except as may be expressly provided otherwise in these rules, any reference in these rules to a member shall be deemed to include his or her alternate, when such alternate acts for such member.

IV. Officers

10. The Board shall elect the Chair and Vice-Chair from among its members, with one being from an Annex I Party and the other being from a non-Annex I Party. The term of office of the Chair and Vice-Chair shall be one calendar year. The office of Chair and Vice-Chair shall alternate annually between a member from an Annex I Party and a member from a non-Annex I Party.
11. If the Chair is temporarily unable to fulfil the obligations of the office, the Vice-Chair shall in the interim assume the obligations and authorities of the Chair. In the absence of the Chair and the Vice-Chair at a particular meeting, any other member designated by the Board shall temporarily serve as the Chair of that meeting.
12. If the Chair or Vice-Chair is unable to complete the term of office, the Board shall elect a replacement to complete the term of office.

13. The Chair shall, *inter alia*, declare the opening and closing of the meeting, ensure the observance of these rules, accord the right to speak, put questions to the vote and announce decisions. The Chair shall rule on points of order and, subject to these rules, shall have complete control of the proceedings and over the maintenance of order, including adjournment or suspension.

14. The Chair shall propose to the Board chairs and vice-chairs from among the members and alternates for specific working groups and committees, as necessary.

15. The Chair, or any member designated by the Chair, shall report to the CMP on behalf of the Board.

16. The Chair shall advocate and seek support for the Fund and the work of the Board. The Chair shall represent the Board at external meetings and shall report back to the Board on those meetings.

V. Secretariat

17. The secretariat, being a dedicated team of officials to render secretariat services to the Adaptation Fund Board, shall:

- (a) Make the necessary arrangements for the meetings of the Board, including ensuring that announcements of the meetings are posted on the Adaptation Fund and UNFCCC websites, issuing invitations, preparing meeting documents and the final report, which will include decisions of the meeting, and shall post all documents on the website of the Adaptation Fund;
- (b) Designate a member of the dedicated team of officials to serve as Secretary of the Adaptation Fund Board meetings to provide support services and logistics;
- (c) Keep meeting records and arrange for the custody and preservation of documents of the meetings in the archives of the entity designated as the secretariat to the Adaptation Fund Board;
- (d) Generally perform all other functions that the Board may request.

VI. Meetings

18. The Board shall meet at least twice every year or as frequently as necessary to enable it to discharge its responsibilities. The meetings of the Board shall take place in the country of the seat of the UNFCCC secretariat, except when meeting in conjunction with sessions of the CMP or with the sessions of subsidiary bodies under the UNFCCC, in which case the Board meeting may take place in the country or at the venue of the relevant UNFCCC meeting.

19. Unless the Board decides otherwise in accordance with paragraph 20, meetings shall be open to members, alternates and observers as referred to in paragraphs 31–32. Observers shall inform the secretariat of the composition of their delegation four weeks prior to the first day of any scheduled meeting.

20. The Board may declare any of its meetings, or segments thereof, closed; these shall then be open to members, alternates and the representatives of the secretariat and the trustee. The Board may invite any of the representatives referred to in paragraphs 31–32 to attend such meetings.

21. At each meeting, the Board shall set the date and duration for the next meeting.

22. The secretariat shall notify all members, alternates and observers of the dates and venue of the meetings and circulate a formal invitation and provisional agenda for any meeting at least six weeks before the first day of the meeting.

23. A simple majority of the members of the Board must be present at a meeting to constitute a quorum. A quorum shall be verified by the Chair at the beginning of the meeting and at the time of the adoption of the decision.

24. Before the end of each meeting, the Chair shall present a draft report of the meeting, containing draft conclusions and decisions of the meeting, for consideration and approval by the Board. The Chair shall ascertain the existence of a quorum before adopting the draft report of the meeting on the understanding that the Chair will finalize the text, taking into account the amendments proposed during the meeting.

25. Any written records of the Board or recordings of proceedings shall be kept by the secretariat on behalf of the Board in accordance with paragraph 17 (c) and applicable rules and regulations. The secretariat shall make available to any Board member or alternate, at his or her request, copies of any records or recordings kept by the secretariat on behalf of the Board.

VII. Confidentiality and conflict of interest

26. Information obtained from Adaptation Fund project participants marked as proprietary and/or confidential shall not be disclosed without the written consent of the provider of the information, except as required by national law.

27. Members and alternates have a duty not to disclose such confidential and/or proprietary information, unless required by applicable national law. This duty remains an obligation after the member's term expires.

28. Each member and alternate member shall take, and agree to respect, a written oath of service before assuming his or her service. The oath of service shall be witnessed by the Chair of the Adaptation Fund Board, and in the case of the Chair, by the Vice Chair of the Adaptation Fund Board. It shall read as follows:

"I solemnly declare that I will perform my duties and exercise my authority as member or alternate of the Adaptation Fund Board honourably, faithfully, impartially and conscientiously.

"I further solemnly declare that, subject to my responsibilities within the Adaptation Fund Board, I shall not disclose, even after the termination of my functions, any information marked confidential coming to my knowledge by reason of my duties in the Adaptation Fund Board.

"I shall disclose immediately to the Adaptation Fund Board any interest in any matter under discussion before the Adaptation Fund Board which may constitute a conflict of interest or which might be incompatible with the requirements of independence and impartiality expected of a member or alternate of the Adaptation Fund Board and I shall refrain from participating in the work of the Adaptation Fund Board in relation to such matter."

29. At each meeting, members and alternates must declare any conflicts of interest they may have in relation to any items on the agenda.

30. Members and alternates shall be bound by the rules of procedure of the Adaptation Fund Board, and shall recuse themselves from all related deliberations and decision-making should any personal and/or financial interest arise in any aspect of a project activity or a body representing a project for approval to the Board. Members and alternates have an obligation to promptly disclose any such situation.

VIII. Observers

31. Except where otherwise decided by the Board, meetings shall be open for attendance, as observers, to representatives of UNFCCC Parties, the UNFCCC secretariat and UNFCCC accredited observers. Such observers may attend without the right to vote.

32. The secretariat shall, upon the request of the Board, notify any individual or entity, whether national or international, governmental or non-governmental, qualified in a field related to the work of the Fund, of any meeting so that it may be represented by an observer.

33. Observers may, upon the invitation of the Chair and if there is no objection from any of the members present, participate without the right to vote in the proceedings of any meeting in matters of direct concern to the body or agency, which they represent.

34. Observers may, upon invitation of the Chair and if there is no objection from the members present, make presentations relating to matters under consideration by the Board.

IX. Procedures for public communication

35. The secretariat shall acknowledge receipt of unsolicited communications addressed to the Chair and make them available to the Chair and the Board via e-mail or fax. The Chair, with the support of the secretary of the Board, shall initiate action, including consultation with the Board, as needed, and answer unsolicited communications on behalf of the Board, as appropriate.

36. Unsolicited communications may be taken into consideration at the Board's next meeting if received before the document submission deadline (four weeks prior to the meeting). Any unsolicited communication received after this deadline would normally be considered at a subsequent meeting. At the discretion of the Chair, a communication may be brought forward to the Board.

37. If a member or alternate of the Board, in that capacity, receives an unsolicited communication, he or she shall forward it to the secretariat, copying the sender of the unsolicited communication, for processing as per the above. The same shall apply for submissions received by members of panels, committees or working groups.

X. Agenda

38. The Chair, assisted by the secretariat, shall draft the provisional agenda for each regular meeting. The secretariat shall indicate the administrative and financial implications of all substantive agenda items submitted to the meeting. The provisional agenda, together with the notice of the meeting and other relevant documents, shall be transmitted to all those invited to the meeting in accordance with paragraphs 22 and 43 of these rules.

39. The Board shall, at the beginning of each meeting, adopt the agenda for the meeting.

40. Any item on the agenda of any meeting, consideration of which has not been completed at the meeting, shall automatically be included in the agenda of the next meeting unless otherwise decided by the Board.

XI. Travel

41. As soon as the Trust Fund for the Adaptation Fund is established, eligible members and alternates of the Board shall have their full costs of travel and daily subsistence allowance (DSA), including full transit costs, at the standard United Nations DSA rate, provided under the budget of the Board and secretariat.

42. As soon as the Trust Fund for the Adaptation Fund is established, travel for Board members and alternates shall be arranged according to United Nations rules.

XII. Transmittal of documents

43. The secretariat shall transmit the documentation related to items on the provisional agenda to all those invited to the meeting at least four weeks before the first day of the meeting scheduled. In exceptional circumstances, the Chair may instruct the secretariat to transmit a document after the deadline.

XIII. Decision-making and voting

44. Decisions of the Board shall be taken by consensus whenever possible.

45. If all efforts to reach a consensus have been exhausted and no agreement has been reached, decisions shall be taken by a two-thirds majority of the members present at the meeting on the basis of one member, one vote.

46. An alternate may cast a vote only if acting for the member in accordance with paragraph 6.

47. The Chair shall ascertain whether consensus has been reached. The Chair shall declare that a consensus does not exist if there is a stated objection to the proposed decision under consideration by a member or alternate acting for a member.
48. After ascertaining the existence of a quorum, the Chair shall announce the start of voting, after which no one shall be permitted to intervene until the results of the vote have been announced, unless an issue is raised in connection with the process of voting.
49. Voting shall be by roll-call, which shall be taken in alphabetical order of the names of the members, beginning with the member whose name is drawn by lot by the Chair.
50. The name of each member shall be called in all roll-calls, and he or she shall indicate the vote ('yes' or 'no') or abstention.
51. Votes cast by each member participating in a roll-call shall be recorded in the report of the meeting.

XIV. Termination of Board membership

52. The Board may propose to the CMP the termination of the membership of any member or alternate for cause including, inter alia, breach of the conflict of interest provision, breach of the confidentiality provisions, or failure to attend two consecutive meetings of the Board without proper justification.
53. The Board shall recommend to the CMP the termination of the membership of a member or an alternate only after the member or alternate has been given the opportunity of a hearing by the Board in a meeting.
54. Any motion calling for the termination of the membership of a member or alternate shall be decided in accordance with the voting rules in section XIII above. When the motion concerns the termination of the office of a Chair, the Vice-Chair shall act as Chair until the voting has been conducted and its result announced.

XV. Committees and working groups

55. The Board may establish committees, panels and working groups, if required, to provide, inter alia, expert advice, to assist the Adaptation Fund Board in the performance of its functions.

XVI. Intersessional decisions

56. Decisions without meetings may occur on an extraordinary basis when, in the judgement of the Chair and the Vice-Chair, a decision must be taken by the Board that should not be postponed until the next meeting of the Board. The secretariat, with the approval of the Chair, shall transmit to each member and alternate a proposed decision with an invitation to approve the decision on a no-objection basis.
57. Each member's comments on the proposed decision shall be sent to the secretariat during such period as the secretariat may prescribe, provided that such period is no less than two weeks.
58. At the expiration of the period prescribed for comments, the decision shall be approved unless there is an objection. If a proposed decision has financial implications, approval of the decision will require replies from at least two-thirds of the members. If there is an objection raised by any member to any proposed decision that cannot be resolved, the Chair shall include consideration of the proposed decision as an item on the agenda for the next meeting.
59. Any intersessional decision shall be deemed to have been taken at the headquarters of the UNFCCC secretariat. The secretariat shall inform members and alternates about the decision and post all intersessional decisions on the Adaptation Fund website.

XVII. Languages

60. The working language for the Board shall be English. Simultaneous interpretation shall be provided during its meetings in all of the official United Nations languages that correspond to the actual language requirements of the members and alternates present at that meeting.
61. Late meetings, committees and working groups will be held in English when interpretation is not available.
62. Documents for the meetings will be provided in English only.
63. The full text of all reports including decisions taken by the Board shall be made publicly available via the Adaptation Fund website in all six official languages of the United Nations.

XVIII. Amendments to rules of procedure

64. These rules of procedure may be amended according to paragraphs 44–51 above and, to be effective, must be formally approved by the CMP.

XIX. Overriding authority of the Kyoto Protocol

65. In the event of any conflict between any provisions of these rules and any provisions of the Kyoto Protocol, the Kyoto Protocol shall prevail.

ROLE AND RESPONSIBILITIES OF THE ADAPTATION FUND SECRETARIAT

1. Secretariat services shall be provided to the Adaptation Fund Board in order to support and facilitate its activities.
2. Decision 1/CMP.3 invited the GEF Secretariat to provide secretariat services to the Adaptation Fund Board on an interim basis.
3. The Secretariat shall:
 - (a) As a dedicated team of officials, provide secretariat services to the Adaptation Fund Board in a functionally independent and effective manner;
 - (b) Manage the daily operations of the Fund and report to the Adaptation Fund Board;
 - (c) Assist the Board in developing strategies, policies and guidelines for the Fund;
 - (d) Ensure timely implementation of the decisions of the Board;
 - (e) With respect to the day to day functioning of the Fund, act as liaison between the Board and Parties and implementing and executing entities;
 - (f) Make arrangements for the meetings of the Board, including issuance of invitations and preparation of documents and reports of meetings and provide a Secretary of the Board meeting;
 - (g) Develop the work programme and annual administrative budget of the Fund and submit them for approval by the Board;
 - (h) Ensure the implementation of Adaptation Fund operational policies and guidelines developed by the Board through, inter alia, the development of a project cycle based on criteria to be adopted by the Board;
 - (i) Operationalize the project cycle by:
 - undertaking initial review and screening of project proposals to assess conformity with guidelines approved by the Board,
 - presenting project proposals for Board approval,
 - monitoring implementation of progress, and
 - periodically reporting to the Board on portfolio performance;
 - (j) Coordinate the formulation and monitor the implementation of projects, ensuring liaison with other bodies as required;

- (k) Liaise as appropriate, with the secretariats of other relevant international bodies;
- (l) Provide the Trustee with all relevant information to enable it to carry out its responsibilities, consistent with the decision 1/CMP.3 and the decisions of the Board;
- (m) Provide services to ensure and facilitate proper communication with parties;
- (n) Perform any other functions assigned to it by the Board.

4. The head of the secretariat responsible for rendering the services shall be accountable to the Adaptation Fund Board.

The Adaptation Fund

AFB/B.6/5
May 13, 2009

Adaptation Fund Board
Sixth Meeting
Bonn, June 15-17, 2009

Agenda Item 7.b

PROVISIONAL OPERATIONAL POLICIES AND GUIDELINES FOR PARTIES TO ACCESS RESOURCES FROM THE ADAPTATION FUND

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Introduction

1. The Kyoto Protocol (KP), in its Article 12.8, states that “The Conference of the Parties serving as the meeting of the Parties to this Protocol shall ensure that a share of the proceeds from certified project activities is used to cover administrative expenses as well as to assist developing country Parties that are particularly vulnerable to the adverse effects of climate change to meet the costs of adaptation.”¹ This is the legal basis for the establishment of the Adaptation Fund.
2. At the seventh session of the Conference of the Parties to the United Nations Framework Convention on Climate Change (UNFCCC), held in Marrakech, Morocco, from October 29 to November 10, 2001 (COP7), the Parties agreed to the establishment of the Adaptation Fund (the Fund).²
3. In Montreal, Canada in November 2005³ and Nairobi, Kenya in December 2006,⁴ the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol (CMP), decided on specific approaches, principles and modalities to be applied for the operationalization of the Fund.
4. In Bali, Indonesia, in December 2007, the CMP decided that the operating entity of the Fund would be the Adaptation Fund Board (the Board), serviced by a Secretariat and a Trustee.⁵ Parties invited the Global Environment Facility to provide secretariat services to the Adaptation Fund Board (the Secretariat), and the World Bank to serve as the trustee (the Trustee) of the Fund, both on an interim basis.
5. In particular, Decision 1/CMP.3, paragraph 5(b), lists among the functions of the Board to develop and decide on specific operational policies and guidelines, including programming guidance and administrative and financial management guidelines, in accordance with decision 5/CMP.2, and to report to the CMP.
6. In Poznan, Poland, in December 2008, through Decision 1/CMP.4, the Parties adopted:
 - (i) the Rules of Procedures of the Adaptation Fund Board;
 - (ii) the Memorandum of Understanding between the CMP and Council of the Global Environmental Facility regarding secretariat services to the Adaptation Fund Board, on an interim basis;
 - (iii) the terms and conditions of services to be provided by the International Bank for Reconstruction and Development (the World Bank) as trustee for the Adaptation Fund, on an interim basis; and
 - (iv) the strategic priorities, policies and guidelines of the Adaptation Fund.

¹ See FCCC/KP/Kyoto Protocol.

² See Decision 10/CP.7, “Funding under the Kyoto Protocol”.

³ See Decision 28/CMP.1, “Initial guidance to an entity entrusted with the operation of the financial system of the Convention, for the operation of the Adaptation Fund” in Annex I to this document.

⁴ See Decision 5/CMP.2, “Adaptation Fund”, in Annex I to this document.

⁵ See Decision 1/CMP.3, “Adaptation Fund”, in Annex I to this document.

7. In Decision 1/CMP.4, paragraph 11, the CMP decided that the Adaptation Fund Board be conferred such legal capacity as necessary for the discharge of its functions with regard to direct access by eligible Parties. Relevant decisions of the CMP in this regard are attached at the Annex I.

8. This document, in response to these decisions of the CMP, proposes operational policies and guidelines for eligible developing country Parties to access resources from the Fund. *The Operational Policies and Guidelines* are expected to evolve further based on the experience acquired through the operationalization of the Fund and subsequent decisions of the Board and reflecting future guidance from the Parties.

Definitions of Adaptation Projects and Programmes

9. The Adaptation Fund established under decision 10/CP.7 shall finance concrete adaptation projects and programmes.

10. A concrete adaptation project is defined as a project aimed at addressing the adverse impacts of and risks posed by climate change. Adaptation projects can be implemented at the community, national and transboundary level. Projects concern discrete activities with concrete outcomes that are more narrowly defined in scope, space and time.

11. An adaptation programme is a process, a plan or an approach to be adopted when the impacts of climate change cannot be addressed within the scope and domain of an individual project. The Board will provide further guidance on the adaptation programmes, its aims and objectives in the future on the basis of lessons learned.

Operational and Financing Priorities

12. The overall goal of all adaptation projects and programmes financed under the Fund will be to support concrete adaptation activities that reduce adverse impacts of and risks posed by climate change facing communities, countries, and sectors. *The Fund will not finance business-as-usual projects that do not implement concrete actions to reduce the adverse impacts of climate change.*

13. Provision of funding under the Adaptation Fund will be based on, and in accordance with, the *Strategic Policies and Guidelines* adopted by the CMP, attached as Annex II.

14. Funding will be provided on full adaptation cost basis of projects and programmes to address the adverse effects of climate change.⁶ Full cost of adaptation means the costs of concrete adaptation activities to be implemented to address the adverse impacts of and risks posed by climate change.

15. In developing projects and programmes to be funded under the Fund, eligible Parties may wish to consider the guidance provided in 5/CP.7. Parties are also encouraged to consult information included in reports from the Intergovernmental Panel on Climate Change (IPCC)

⁶ Decision 5/CMP.2, paragraph 1 (d).

and information generated under the Nairobi Work Programme (NWP) on Impacts, Vulnerability and Adaptation to Climate Change.⁷

16. Decisions on the allocation of resources of the Board shall take into account the criteria outlined in the *Strategic Priorities and Guidelines of the Adaptation Fund*, adopted by the CMP, specifically:

- (i) level of vulnerability;
- (ii) level of urgency and risks arising from delay;
- (iii) ensuring access to the Fund in a balanced and equitable manner;
- (iv) lessons learned in project and programme design and implementation to be captured;
- (v) securing co-benefits to the extent possible, where applicable;
- (vi) maximizing multi-sectoral or cross-sectoral benefits; and
- (vii) adaptive capacity to adverse effects of climate change.

17. Resource allocation decisions will be guided by the paragraphs 8 and 10 of the *Strategic Priorities, Policies and Guidelines of the Adaptation Fund*.

18. The Board will review its procedures for allocating resources of the Adaptation Fund among eligible Parties at least every three years, and/or as instructed by the CMP, including an assessment of the amount of resources that can be allocated to regional activities.

Project/ Programme Proposal Requirements

19. To access Fund resources, a project will have to be in compliance with the eligibility criteria contained in paragraph 15 of the *Strategic Priorities, Policies and Guidelines of the Adaptation Fund Board* and using the relevant templates.

Financing Windows

20. Parties may undertake adaptation activities under the following categories:

- (i) Small-size projects and programmes (proposals requesting up to \$1 million); and
- (ii) Projects and programmes (proposals requesting over \$1 million).

Eligibility Criteria

Country Eligibility

21. The Fund shall finance concrete adaptation projects and programmes in developing country Parties to the Kyoto Protocol that are particularly vulnerable to the adverse effects of climate change.

⁷ IPCC Assessment Report 4, see <http://www.ipcc.ch/ipccreports/assessments-reports.htm> and NWP see http://unfccc.int/adaptation/sbsta_agenda_item_adaptation/items/3633.php.

22. Paragraph 10 of the Strategic Priorities and Guidelines of the Adaptation Fund provides the country eligibility criteria.

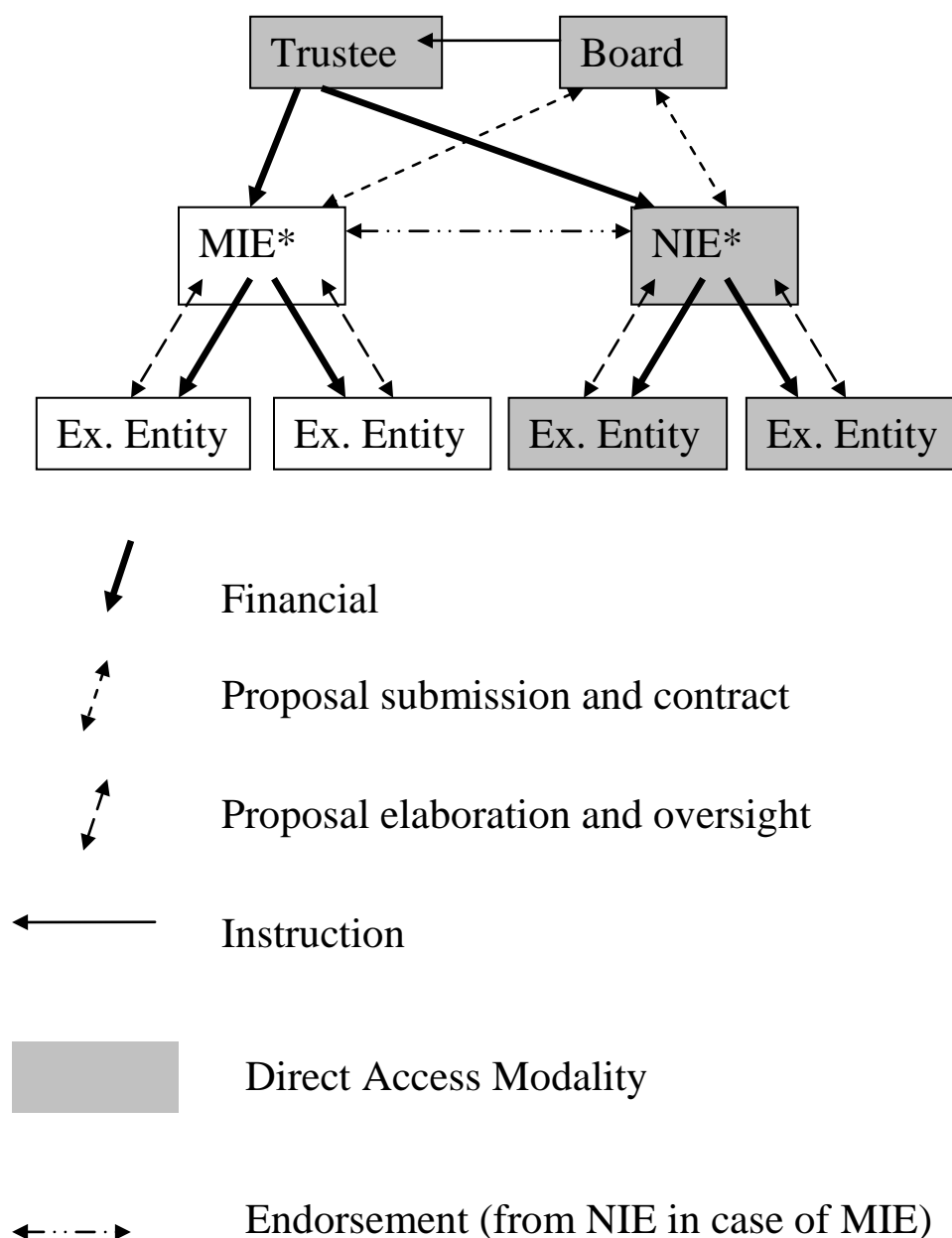
23. A cap in resource allocation per eligible host country, project and programme will be agreed by the Board based on a periodic assessment of the overall status of resources in the Adaptation Fund and with a view to ensuring equitable distribution.

Implementing and Executing Entities

24. Parties can submit proposals for concrete adaptation projects and programmes directly to the Board for funding.

25. Eligible Parties who seek financial resources from the Adaptation Fund may submit proposals *either* directly through their nominated National Implementing Entity (NIE)⁸ *or* using the services of Multilateral Implementing Entities (MIE), according to the figure below.

⁸ May include Ministries.



* A Party nominates either a Multilateral or National Implementing Entity.

26. National Implementing Entities (NIE) are those legal entities nominated by Parties that are recognized by the Board as meeting the fiduciary standards established by the Board. The NIEs will bear the full responsibility for the overall management of the projects and programmes financed by the Adaptation Fund, and will bear all financial, monitoring and reporting responsibilities.

27. Parties may also nominate regional and subregional entities as implementing entities, and thereby provisions of paragraph 26 will apply.

28. Multilateral Implementing Entities (MIE) are those Multilateral Institutions and Regional Banks that meet the fiduciary standards provided by the Board. The MIEs, chosen by Eligible Parties to submit proposals to the Board, will bear the full responsibility for the overall management of the projects and programmes financed by the Adaptation Fund, and will bear all financial, monitoring and reporting responsibilities.

29. In the case of regional (ie: multi-country) projects and programmes, the proposal submitted to the Board should be endorsed by all participating Parties.

30. Executing Entities are organizations that execute adaptation projects and programmes supported by the Fund under the oversight of Implementing Entities.

Accreditation for Implementing Entities

31. The Board will invite Parties to nominate a NIE. National Implementing Entities will need to meet criteria of fiduciary standards established by the Board.

32. In case the nominated NIE does not meet the criteria, an eligible Party may nominate another entity to access funding from the Fund, provided that it meets the criteria established by the Board, or it can review the capacity of the same entity for receiving funding at a later stage.

33. The Board will invite potential MIEs to express interest in serving the Adaptation Fund as a MIE, as defined in paragraph 28. MIEs will need to meet the criteria established by the Board.

(The remainder of this section will need redrafting following the report on the fiduciary standards commissioned from the Secretariat. This report will need to include consideration of capacity building to NIEs that do not meet the management standards of the AFB.)

Project Cycle

34. The project cycle of the Adaptation Fund for any size of projects and programmes starts by project submission to the Secretariat by the NIE/MIE chosen by the government of the recipient country/ies, initial screening, project review and approval.

35. The Board will invite each Party to designate an Adaptation Fund focal point, and the Secretariat will maintain an updated list of them at the website of the Fund. Proposals need to be endorsed by the Party's AF focal point.

Review and Approval of Small-size Projects and Programmes

36. In order to expedite the process of approving projects and reduce unnecessary bureaucracy, it is proposed that small-size projects and programmes undergo a single approval process by the Board. The proposed project cycle steps are as follows:

(a) The project or programme proponent submits a proposal document based on a template to be approved by the Board. Proposals will be submitted to the Board through the Secretariat four times per year.

(b) The Secretariat will screen all proposals for consistency and provide a technical summary. It will then forward them to the Projects and Programmes Review Committee for review, based on the criteria approved by the Board. Screening will be conducted as soon as possible, and within fifteen (15) working days.

(c) The Project and Programmes Review Committee will review the proposals and give its recommendation to the Board for a decision four weeks before the next Meeting. The Board can approve or reject a proposal with a clear explanation.

(d) All proposals approved by the Board will be posted on the Adaptation Fund website.

Review and Approval of Regular Projects and Programmes

37. Regular adaptation projects and programmes are those that request project funding exceeding \$1 million from the Fund. It is proposed that these proposals undergo either a single or double⁹ approval process. To reduce the time needed to get a project or programme funded, if a proponent prefers to submit a full-fledged project or programme proposal at once, a proponent is allowed to do so. The proposed project cycle steps are as follows:

(a) The project or programme proponent submits a concept or a full-fledged project or programme proposal document based on a template approved by the Board. Proposals can be submitted to the Board through the Secretariat four times per year.

(b) The Secretariat will screen all proposals for consistency and forward them to the Projects and Programmes Review Committee for review based on the criteria approved by the Board. Screening will be conducted within fifteen (15) working days by the Secretariat. Reviewing will be conducted by the Committee. The Committee can/will use services of independent adaptation experts to provide input into the review process.

(c) The Secretariat will forward all reviewed project and programme proposals to the Board for decision-making four weeks before the next Meeting. The Board can approve or reject a proposal with clear explanation. Funding will only be reserved for a project or programme after the approval of a full-fledged project or programme document.

(d) All proposals approved by the Board will be posted on the Adaptation Fund website.

Disbursement

38. The Secretariat will draft contracts, Memoranda of Understanding and/or other necessary agreements with implementing entities and provide these agreements for signature by the Chair

⁹ A short project proposal followed by a full-fledged project document.

or any other Member designated to sign these documents. The Board may, at its discretion, review any of the proposed agreements. A template approved by the Board will be used to make agreements.

39. The Trustee will disburse funds on the written instruction of the Board, signed by the Chair and the Vice-Chair, or any other Board Member designated by the Chair and the Vice-Chair, and report to the Board on the disbursement of funds.

40. The Board will ensure a separation of functions between the review and verification of disbursement requests, and the issuance of instructions to the Trustee to disburse.

41. The Board may instruct the Trustee to disburse funds for programmes in tranches based in time specific milestones, and may require a progress review from the Implementing Entity prior to each tranche disbursement.

Monitoring, Evaluation and Reviews

42. All projects and programmes under implementation will submit annual status reports to the Secretariat at the completion of each fiscal year. The status reports will be based on a documentation template approved by the Board.

43. All projects and programmes that complete implementation will be subject to terminal evaluation by an independent evaluator. Terminal evaluation reports will be submitted to the Board after a reasonable time after the project termination.

44. The Secretariat will prepare an Annual Monitoring Report, based on status reports and terminal evaluation reports, for review and approval by the Board.

45. The Adaptation Fund Board reserves the right to carry out independent reviews or evaluations of the projects and programmes as and when deemed necessary. The costs for such activities will be covered by the Adaptation Fund.

Strategic Oversight and Monitoring

46. The Board is responsible for strategic oversight of projects and programmes implemented with funds from the Adaptation Fund. Regular project and programme reports will be required from NIEs and MIEs. The Projects and Programmes Review Committee, with support of the Secretariat, will monitor the AF portfolio of projects and programmes, through reviewing project and programme reports.

47. This project cycle will be kept under review by the Board.

Procurement

48. The procurements by the IEs or any of their attached organization shall be performed in accordance with generally accepted procurement principles, good procurement practices and the

procurement regulations as applicable in a given jurisdiction. IEs shall observe the highest ethical standards during the procurement and execution of the concrete adaptation projects.

49. The project proposal submitted to the Board shall contain adequate and effective means to punish and prevent illegal or corrupt practices. The IEs should promptly inform the Board of any instances of corruption of any kind.

Project Cancellations, Terminations and Suspensions

50. At any stage of the project cycle, either at its discretion or following an independent review-evaluation, the Project and Programmes Review Committee may recommend to the Board to cancel, terminate or suspend a project for several reasons, notably:

- (i) financial irregularities in the implementation of the project, and
- (ii) material breach, and poor implementation performance leading to a conclusion that the project can no longer meet its objectives.

51. The Board may also consider cancelling, terminating or suspending the accreditation of an IE if it had made false statement or provided intentionally incomplete information to the Board both at the time of accreditation to the Board or in submitting a project or programme proposal.

52. Before the Board makes its final decision whether to cancel, terminate or suspend a project, a programme or an IE accreditation, the IE concerned will be given a fair chance to present its views to the Board.

53. IEs may also initiate termination or suspension of projects and programmes subject to the approval of the Board.

54. The Secretariat will report to the Board on an annual basis on all approved projects and programmes that were cancelled, terminated or suspended during the preceding year.

Reservations

55. The Board reserves the right to reclaim all or parts of the financial resources allocated for the implementation of a project or programme, or cancel projects or programmes later found not to be satisfactorily accounted for. The IE shall be given a fair chance to consult and present its point of view before the Board.

Dispute Settlement

56. In case of a dispute as to the interpretation, application or implementation of the project/programme, the IE shall first approach the Secretariat with a written request seeking clarification. In case the issue is not resolved to the satisfaction of the IE, the case may be put before the Board at its next meeting, to which a representative of the IE could also be invited.

57. Subject to development on the legal status of the Board, the Board will draw more comprehensive dispute settlement provisions.

Management Fees

58. Every project proposal submitted to the Secretariat shall state the management fee requested by the Implementing Entity. The reasonability of the fee will be reviewed case by case.

Where to send a Request for Funding

59. All requests shall be sent to:

The Adaptation Fund Board Secretariat
c/o Global Environment Facility Secretariat
1818 H Street, NW
MSN G6-602
Washington, DC, 20433
USA
Tel: +1 202 473 0508
Fax: +1 202 522 3240/5
Email: secretariat@adaptation-fund.org
Contact: Marcia Levaggi (mlevaggi@thegef.org, Tel: +1 202 473-6390)

60. Acknowledgment of the receipt shall be sent to the proposing IEs with copies of the acknowledgement letter to all Members and Alternates of the Board within a week of the receipt of the request for support.

61. All project proposals submitted will be posted on the website of the Adaptation Fund Board.

Annex I: Adaptation Fund relevant CMP decisions

Annex II: *The Strategic Policies and Guidelines of the Adaptation Fund adopted by the CMP*

Annex III: *The Fiduciary standard and management system* Approved by the Adaptation Fund Board

Annex IV: The Project and Programme Templates approved by the Adaptation Fund Board

LEGAL MEMORANDUM

Question Concerning the Conferment of Legal Capacity on the Adaptation Fund and/or the Adaptation Fund Board

Introduction

I have been requested by the Global Environment Facility (GEF) to examine, and provide my opinion on, a legal question with respect to the conferment of legal capacity on the Adaptation Fund Board (the Board) of the Adaptation Fund (the Fund), both established by the Conference of the Parties serving as the meeting of the Parties (COP/CMP) to the *Kyoto Protocol*.¹ The legal question has arisen in the context of the following decision adopted by the COP/CMP [in September 2008]:

“Decides that the Adaptation Fund Board be conferred such legal capacity as necessary for the discharge of its functions with regard to direct access by eligible Parties and implementing and executing entities, in accordance with decision 1/CMP.3, paragraphs 29 and 30, in particular legal capacity to enter into contractual agreements and to receive project, activity and programme proposals directly and to process them in accordance with paragraph 7(a) and (b) above, as appropriate, consistent with decisions 5/CMP.2 and 1.CMP.3;”²

In respect of this decision, I have been asked to advise particularly on:

- (i) the principles of international law on conferring legal capacity to international organizations and their organs;
- (ii) the principles of international law on conferring legal capacity on other types of international organs in situations where (i) the governing multilateral convention, such as the United Nations Framework Convention on Climate Change (UNFCCC), has not established an international organization, and (ii) it is proposed that a board or other similar organ be conferred legal capacity but the parent organ does not have such legal capacity;
- (iii) any legal problems or operational risks that might arise from the conferment of such legal capacity on the Board; and

¹ The Kyoto Protocol is an international agreement concluded pursuant to the authority conferred by Article 17 of the UNFCCC. The Parties to the Protocol are substantially the same as those for the UNFCCC. To date, 192 States have ratified the UNFCCC and 184 States have ratified the Protocol.

² Decision 1/CMP.4, paragraph 11 [taken on September 2008, Poznan, Poland].

- (iv) the steps that would need to be taken to clarify the legal capacity of the Board (and/or the Fund) to enter into contractual agreements and take other operational decisions and actions.

Preliminary Clarification

It is important to clarify at the outset that this memorandum does not propose to examine the broader question of whether the Board or the Fund meets the legal requirements for the acquisition of the status of an international organization. That particular question does not arise here because the UNFCCC and the *Kyoto Protocol* have not so far taken any steps to formally establish any international organization although they have established or authorized the establishment of subsidiary bodies and other organs.

In discussing the legal feasibility of conferring legal capacity on the Board, it will be necessary to review the legal relationship between the Board and the Fund as the Board's functions and powers are inextricably linked to those of the Fund, as its parent organ. Finally, for the same reason, the final conclusions and recommendations will include a discussion of the steps that would need to be taken both with respect to the Fund and the Board in order to fully answer the legal questions raised.

Principles of International Law on Conferring Legal Capacity on International Organizations and their Organs

The general principles of international law on the question on conferring legal capacity on international organizations and their subsidiary organs is particularly helpful in providing some guidance towards resolving the legal questions addressed in this memorandum. These general principles are more fully described in the Annex to this Memorandum. Given the large number (several hundred) and variety of international organizations, the modalities followed for the establishment of such organizations have varied somewhat depending on their origins, functions, and operations. However, the following is a summary of the general rules of international law on the question of conferring legal capacity:

- (i) International organizations have usually been established by a constituent instrument such as a treaty, convention, agreement, constitution, charter, statute or protocol. The constituent instrument usually provides explicitly that the international organization has a legal personality, which is distinct and separate from that of the States Parties to the constituent instrument.
- (ii) The constituent instrument usually contains explicit provisions which confer on the organization "legal capacity" to enter into contracts, to own and dispose property, to initiate and defend legal proceedings; and also grants to the

organization, its operations, and officials and staff various privileges, immunities and exemptions.

(iii) In several international organizations, however, the constituent instrument does not contain any explicit provision on the legal capacity of the organization. In such cases, courts and other tribunals have occasionally recognized the legal capacity of the organizations where it could be deduced from the provisions of the constituent instrument or other facts that that organizations were intended to have such legal capacity in order to effectively discharge their functions. This liberal interpretation is based on the doctrine of “implied powers.”

(iv) The constituent instrument often defines the finances, and thereby limits the scope of the financial liability, of the international organizations on the basis of share capital or other periodic financial contributions. This provides assurance or security to creditors and contractors that the organization will be able to meet its contractual and financial obligations. Such a provision also serves to separate the financial obligations of the international organization from those of its member States.

(v) The constituent instrument usually establishes specific organs to enable the international organization discharge its functions. These organs usually include a general assembly or plenary organ, an executive or subsidiary organ, and a secretariat or administration headed by a chief executive. In many cases, the supreme organ in the organization (often a non-resident body) delegates some of its powers and functions to the subsidiary organ (often a resident body). Thus, when these organs exercise those powers and functions, they are deemed to do so on behalf of the organization, deriving the legal capacity of the organization, and their acts and decisions legally bind the organization.

(vi) The constituent instrument is generally interpreted and enforced under the rules of international law and not under the national laws of its member States. In some cases, international organizations agree that their commercial contracts for the borrowing of money or the provision of goods and services may be governed by a selected national law.

The concept and rules of “legal capacity” under international law are not materially different from those applicable under national legal systems. The parallel to national law needs to be kept in mind because the rights, obligations, responsibilities and liabilities of international organizations and third parties under agreements between them often have to be adjudicated in national courts.

Principles of International Law on Conferring Legal Capacity on Other Types of International Organs

In contrast to the principles of international law applicable to international organizations and their organs, which are fairly well-settled, there are few clear or well-established principles of international law with respect to other types of international organs, namely international organs or entities that are not

established as public international organizations. The law in this area is to be found mainly in “international custom, as evidence of general practice accepted as law”³ or the practice of States on conferring legal capacity to such organs. Here, wide variations in custom or practice have occurred because determinations of whether a particular international organ has “legal capacity” are influenced by a variety of factors such as the nature of the organ, the provisions of its constituent instrument, its purposes and functions, its structure and operations, the particular organization or principal organ to which it is linked (*i.e.*, the parent organization or organ), whether the parent organization or organ is inter-governmental, non-governmental or private, whether such parent organization or organ itself has legal capacity, whether the State making the determination is a member of the organ, the applicable laws of the State itself, and similar factors. Determinations of legal capacity have been made both by States and national or regional courts. Understandably, there is no uniformity in the determinations made and the rules applied. However, based on the accumulated custom or practice, a few specific situations can be identified where questions of legal capacity have been addressed and some general rules of international law established:

A. Recognition of Legal Capacity under a Headquarters Agreement

The first and very common situation arises when a particular international organ seeks to enter into a “headquarters agreement” with the government of a particular State for the establishment of its headquarters or principal office in its territory. It is not always the case that such an international organ had previously acquired legal personality (*e.g.*, that of a corporation, a foundation or a non-governmental organization under national law), but the absence of such personality has not usually been a serious impediment to negotiating an agreement. The purpose of such an agreement is to obtain *recognition* from the host State, under its national laws, of the international organ’s legal capacity to establish the office, to do business or carry on its operations in its territory including entering into contractual agreements, purchasing and disposing property, and often also to obtain certain privileges, immunities and exemptions for the international organ, its operations, its officials and staff. It is important to note, however, that such *recognition* of legal capacity in the host State does not automatically extend to or legally bind other States. Some States may also decide to *recognize* such legal capacity but others might not.⁴ Here are a few examples⁵:

³ Statute of the International Court of Justice, Article 38, defining the sources of international law.

⁴ In the context of multilateral conventions like the UNFCCC and the Kyoto Protocol, it is likely that other States Parties to these agreements may accept such legal capacity as a matter of diplomatic courtesy. Developing country recipients of financial assistance are also unlikely to raise questions on legal capacity as that would delay assistance to them. In both cases, however, the requirements of national law may occasionally require some States to stipulate another procedure for acquiring legal capacity in their jurisdictions.

⁵ This memorandum will not discuss the practice with subsidiary bodies and organs of, or related to, the United Nations (*e.g.*, United Nations Development Programme, World Food Programme, and UNICEF) because, in most of those cases, legal capacity was usually recognized largely on the basis that those organs or bodies derived their legal capacity from their parent organization, the United

1. *The Multilateral Fund of the Montreal Protocol*

Like the Kyoto Protocol, the Montreal Protocol on Substances that Deplete the Ozone Layer is an agreement entered into in 1987 by the States Parties pursuant to the authority conferred on them by the Vienna Convention for the Protection of the Ozone Layer 1985. The Multilateral Fund and its Executive Committee were established by the Montreal Protocol in 1991. On 6 and 7 October 1994, at the Sixth Meeting of the Parties, the Parties to the Montreal Protocol conferred legal capacity on the Multilateral Fund by the following decision:

“Juridical Personality: The Multilateral Fund shall enjoy such legal capacity as is necessary for the exercise of its functions and the protection of its interests in particular the capacity to enter into contracts, to acquire and dispose of movable and immovable property and to institute legal proceedings in defense of its interests.”

The Decision further provided that the Multilateral Fund and the officials of the Fund Secretariat shall enjoy such privileges and immunities necessary for the fulfillment of its purposes.⁶

In 1998, the Multilateral Fund signed a headquarters agreement with the Government of Canada. Article 2 of this agreement provides:

“The Multilateral Fund shall possess juridical personality. It shall have the capacity: (a) to contract; (b) to acquire and dispose of immovable and moveable property; and (c) to institute legal proceedings.”

The agreement further provides that the Multilateral Fund may hold assets in its own name and that the assets and its property, regardless of where they are held, are protected from suit and exempt from taxation.

2. *The Global Fund to Fight AIDS, Tuberculosis and Malaria*

The Global Fund was established as a foundation under the laws of Switzerland by a Deed of Incorporation and By Laws, with its principal office in Geneva, Switzerland. The Fund was established as a financial instrument with wide-ranging powers “to attract, manage and disburse additional resources through a new public-private partnership,” to exercise various executive functions including developing eligibility criteria for access to its resources, evaluating proposals, and taking funding decisions. The Fund signed a headquarters agreement with the Swiss Federal Council to regulate their relationship. Article 1 of that agreement provides:

“The Swiss Federal Council recognizes for the purposes of this Agreement the international juridical personality and legal capacity in Switzerland of the Global Fund”

Nations. These examples are, therefore, not particularly relevant or appropriate in addressing the legal question considered by this memorandum.

⁶ UNEP/OzL.Pro/6/7 Decision VI/16

The agreement then goes on to guarantee to the Fund a comprehensive set of privileges, immunities and exemptions comparable to those usually granted to international organizations. It is important to note, in this case, that (i) the Fund had, prior to the signing of this agreement, already obtained legal capacity through incorporation under Swiss law; and (ii) the agreement only recognizes the Fund's legal capacity *in Switzerland*.

3. *UNFCCC Climate Change Secretariat*

After initially establishing its Secretariat offices in Geneva, Switzerland, in 1996, the UNFCC Secretariat (called the Climate Change Secretariat) was established in Bonn, Germany. The UNFCCC Secretariat signed an agreement with the Government of Germany on 20 June 1996 under which Germany:

*“...transferred permanently to the United Nations the right to use and to occupy, free of rent, the premises to be used by UNV, the Convention secretariat and other offices of the United Nations established in Bonn”.*⁷

4. *International Committee of the Red Cross*

The International Committee of the Red Cross (ICRC) is one of the oldest international organs operating on the world stage. It is a private humanitarian non-governmental organization. The ICRC plays a very important role in extending humanitarian assistance especially in protecting the human rights of prisoners of war and other persons in situations of armed conflict under the Geneva Conventions of 1949. In fact, the ICRC's role is referred to specifically in these Conventions. For many years, the ICRC operated its offices in Switzerland on the basis of its status as a private humanitarian non-governmental organization. However, in 1993, it finally entered into a headquarters agreement with the Swiss Government “to determine the legal status of the Committee in Switzerland.” Article 1 of this agreement provides:

“The Federal Council recognizes the international juridical personality and the legal capacity in Switzerland of the International Committee of the Red Cross...whose functions are laid down in the Geneva Conventions of 1949 and the Additional Protocols of 1977 and in the Statutes of the International Red Cross and Red Crescent Movement.”

5. *The General Agreement on Tariffs and Trade*

A final good example to mention is the General Agreement on Tariffs and Trade (GATT), which was signed in 1947 by 23 major trading States. The GATT secretariat maintained its offices in Geneva, Switzerland. GATT was intended to be a provisional agreement pending the establishment of the International Trade Organization (ITO) as the third pillar of the Bretton Woods

⁷ FCCC/SBI/1996/7

institutions. There was no expectation that it would gradually evolve into and operate as an international organization but this outcome was a result of the failure to establish the ITO. GATT has been able to sign numerous agreements with other international organizations and States, including a headquarters agreement with Switzerland.

B. Recognition of Legal Capacity under Ad Hoc Agreements

There are several cases where international organs have obtained legal capacity by entering into *ad hoc* agreements with particular States, regional groupings of States or international organizations for limited and specific purposes. “Specific purposes” have included the need to implement specific programs or activities of the organ in the State, such as holding conferences or meetings in the territory of the State or to extend technical or financial assistance to entities or persons in the territory of the State or internationally. In such cases, an agreement or exchange of letters between the international organ and the State, regional grouping or international organization usually sufficed to accord legal capacity to the international organ for those limited purposes.

C. Recognition of Legal Capacity in Judicial Proceedings

The second context in which the question of the legal capacity of an international organ has frequently arisen is when there is a dispute between that organ and third parties that needs to be resolved. The dispute will need to be adjudicated in a national court, regional court, and other tribunal or even through arbitration. The question is of concern to both parties who wish to seek appropriate remedies for breach of contractual agreements or other legal commitments. In such a situation, the courts would have to decide whether the international organization in question had legal capacity to bring suit. Two good examples may be mentioned. The first is a case involved the **Arab Monetary Fund** (AMF), an organization whose members were twenty-two Arab States, which instituted legal proceedings in the English courts against its former managing director for embezzlement of funds. In this case, the English courts recognized the legal capacity of the AMF on the basis that it had been accorded legal personality by a decree of the United Arab Emirates (Abu Dhabi) under its law; this was considered sufficient evidence of its legal capacity to bring suit in England.⁸ The other case involved the **International Tin Council**, whose capacity was also recognized by the English courts on the basis that it had “been granted the special status of a body corporate in English law,”⁹ separate and distinct from its member States.¹⁰

⁸ *Arab Monetary Fund v. Hashim and Others (No.3)*, 1990 All England Reports 691-2.

⁹ This was done by Parliament by an Order in Council in 1972.

¹⁰ *McLaine Watson & Co., Ltd vs. Department of Trade and Industry*, decision of July 29, 1987, High Court, Chancery Division, in 80 ILR 39. An appeal from this decision and another related proceeding to the House of Lords was dismissed; see *McLaine Watson & Co., Ltd v Department of Trade and Industry*, and *McLaine Watson & Co., Ltd v International Tin Council*, decision of October 26, 1989, House of Lords, in 81 ILR 670.

The Institutional Arrangements of the UNFCCC and the Kyoto Protocol

A. The Multilateral Environmental Agreements: General Features¹¹

Before analyzing the institutional arrangements of the UNFCCC and the Kyoto Protocol, it would be relevant to look briefly at the institutional features of the many multilateral environmental agreements (MEAs) adopted after 1972. This would be of considerable help in understanding the legal and institutional structure of the UNFCCC and the Kyoto Protocol.

Today, there are over 500 MEAs, including more than 40 core conventions such as the atmosphere conventions (UNFCCC, Kyoto Protocol, Vienna Convention for the Protection of the Ozone Layer, and the Montreal Protocol on Substances that Deplete the Ozone Layer), the Biodiversity-related Conventions (*e.g.*, Convention on Biological Diversity, Convention on International Trade in Endangered Species, Convention on Migratory Species, Ramsar Convention on Wetlands), chemical and hazardous wastes conventions, land conventions, and regional seas conventions.

The MEAs generally have the following institutional features:

- (a) a Conference of the Parties;
- (b) a Secretariat
- (c) subsidiary bodies;
- (d) a clearing house mechanism; and
- (e) a financial mechanism

The **Conferences of the Parties** of each convention, usually operating as a meeting of the parties, are the ultimate decision-making bodies regarding the overall implementation and development of the respective convention, including its overall operational policies and priorities, the program of work, budget, preparation and adoption of protocols, and revision of annexes to the agreements. All or most of the substantive powers under the convention are reserved to them.

Secretariats are of two types. The first type is secretariats that prepare and service meetings of the COP and their subsidiary bodies, coordinate with other international organizations, and provide administrative, technical and scientific support to the COP and the subsidiary bodies, and advise on implementation to the Parties. The second type is secretariats that, in addition to performing the functions of the first type, are also involved in actually implementing programs or projects at

¹¹ For an excellent discussion of the status and principal features of the multilateral environmental agreements, see the detailed report prepared by UNEP in UNEP, *International Environmental Governance: Multilateral Environmental Agreements (MEAs)*, UNEP/IGM/1/INF/3 dated April 6, 2001. This report was submitted to the Meeting of the Open-Ended Intergovernmental Group of Ministers or their Representatives on International Environmental Governance held in New York on April 18, 2001.

the regional and country level. There are many examples of Secretariats of conventions signing agreements with host States both with respect to establishing an office in such States (*e.g.*, through a headquarters or other agreement) or coordinating their activities with international organizations (*e.g.*, cooperation, coordination and trustee agreements or Memoranda of Understanding of the type frequently signed the World Bank, the GEF, the International Monetary Fund or the United Nations and its various specialized agencies and other organs including UNDP.

Subsidiary bodies are largely advisory in nature and present their recommendations to the COP and CMP for their consideration and decision. Some of these subsidiary bodies are scientific and technical bodies that provide the COP and CMP with advice and recommendations on the scientific and technical aspects of the implementation of the conventions. In a unique case, under the Montreal Protocol, a Multilateral Fund has been established with an Executive Committee comprised of 14 members representing the Parties, which considers and approves projects for phasing out ozone depleting substances in developing countries. The Multilateral Fund was also explicitly conferred legal capacity to enter into contracts.

The above legal and institutional structure of the MEAs indicates clearly that the underlying philosophy and approach has been to reserve all or most of the important decision-making powers in the Conference of the Parties (*i.e.*, the States that are parties to the convention or protocol) but to delegate specific and discrete functions to the subsidiary bodies. The rationale for this philosophy and approach is largely political as there is some divergence of views among States about the implementation of the core principles of the convention (especially the UNFCCC and the Kyoto Protocol) and, consequently, there has been a strong resistance to taking any strong or “regulatory” approach towards implementation.¹² The conventions have frequently emphasized the voluntary approach adopted towards achievement of shared goals although they have usually included some commitments by States to adopt national [and regional] policies and corresponding measures¹³, often by agreed timetables. Furthermore, the general rule on decision-making (including amendments to the conventions) is agreement by consensus; if efforts to achieve consensus fail, decision by a high voting majority (*e.g.*, a vote by a two-thirds majority of the States) is required. Finally, some of the conventions have repeatedly emphasized the principle of “flexibility” in developing future

¹² For example, in the last eight years under the Bush administration, the United States Government has withdrawn from the Kyoto Protocol because of its serious disagreements over some of the commitments thereunder. This position is likely to change now under the new Obama administration.

¹³ *See, e.g.*, UNFCCC, Article 4. *See also* Thomas A. Mensah, “The International Legal Regime for the Protection and Preservation of the Maritime Environment from Land-Based Sources of Pollution,” in ALAN BOYLE & DAVID FREESTONE (eds.), *INTERNATIONAL LAW AND SUSTAINABLE DEVELOPMENT* 297 AT 312-3 (1999).

policies, strategies, commitments and modalities for the implementation of the conventions.¹⁴

To sum up, with a few notable exceptions (*e.g.*, the Multilateral Fund of the Montreal Protocol), it was clearly not the intention of the States Parties to establish a formal legal and institutional structure or international organization under any convention that would be conferred international juridical personality and legal capacity although many of them have *operated* very much like international organizations.¹⁵ This intention is also evidenced by the conspicuous absence of any explicit provisions conferring legal capacity on the organs of the conventions, including the secretariats and subsidiary bodies. Where particular secretariats or subsidiary bodies have moved towards acquiring legal capacity, this has largely been done in very limited cases where specific States (*e.g.*, Switzerland, Canada, and Germany) have agreed on a bilateral basis to grant such legal capacity to those organs for the establishment of the convention's offices. For example, the UNFCCC Secretariat has in 1996 entered into an agreement with the Government of Germany to establish an office in Bonn, under which its legal capacity was recognized by Germany. As noted earlier in the discussion of headquarters agreements, it is important to remember that such bilateral recognition does not automatically extend legal capacity to or bind other States even though some States may accept such agreements as evidence of legal capacity.

B. The UNFCCC and the Kyoto Protocol

The legal and institutional arrangements under the UNFCCC and the Kyoto Protocol largely mirror the scheme of arrangements that exist for many of the other MEAs, including the core conventions.

1. The Conference of the Parties

The UNFCCC, which was entered into in 1992, explicitly identifies “[t]he **Conference of the Parties** as the supreme body of this Convention”¹⁶ and vests all of the general powers under the UNFCCC on the Conference of the Parties.

¹⁴ *See, e.g.*, Kyoto Protocol, Article 3, which speaks of allowing “a certain degree of flexibility” to the Parties. Further, Article 5, paragraph 5(a) in speaking of emissions reduction certifications refers to “voluntary participation approved by each Party involved.”

¹⁵ Some international law experts in the field of international institutional law have suggested, in relation to the MEAs, that “these self-governing, treaty-based [autonomous institutional arrangements] may be considered to be intergovernmental organizations, albeit of a less formal, more ad hoc nature than traditional intergovernmental organizations.” *See, e.g.*, R.R.Churchill & G. Ulfstein, “Autonomous Institutional Arrangements in Multilateral Environmental Agreements: A Little-Noticed Phenomenon in International Law,” 94 *AMERICAN JOURNAL OF INTERNATIONAL LAW* 623-659, quotation at 658 (2002); and HENRY G. SCHERMERS & NIELS M. BLOKKER, *INTERNATIONAL INSTITUTIONAL LAW* 24 (4th ed., 2003). There have also been various calls for the establishment of a world or international environmental organization.

¹⁶ UNFCCC, Article 7, paragraphs 1 and 2.

These powers include the authority to make the decisions necessary to promote the effective implementation of the Convention by, among other things, examining the obligations of the Parties and the institutional arrangements under the Convention, mobilizing financial resources, and establishing subsidiary bodies as are deemed necessary for the implementation of the Convention.¹⁷

The Kyoto Protocol, which was entered into in 1997, also states that “the COP, the supreme body of the Convention, shall serve as the meeting of the Parties to this Protocol.”¹⁸

In the absence of any formally-constituted international organization structure under the above two agreements, one question that arises is: what exactly is the legal status of the COP/CMP? Under international law, the COP/CMP has the legal status of an inter-governmental conference or meeting of the States Parties to the agreements. The COP/CMP are empowered to take various decisions and actions, as specified in the agreements, regarding the implementation of the agreements. Such decisions include entering into various cooperation agreements with other international and national implementing bodies. However, there are no provisions in the UNFCCC or the Kyoto Protocol explicitly conferring legal capacity on the COP/CMP to enter into contractual agreements (including financing agreements or contracts for goods and services) with third parties. It is worth noting that some leading international law experts have suggested that “these self-governing treaty-based [autonomous institutional arrangements] may be considered to be intergovernmental organizations, albeit of a less formal, more ad hoc nature than traditional intergovernmental organizations.”¹⁹

2. The Secretariat and Subsidiary Bodies

The organs established by the UNFCCC include the Secretariat²⁰, the Subsidiary Body for Scientific and Technological Knowledge²¹, the Subsidiary Body for Implementation²², and the financial mechanism²³. The UNFCCC confers powers on the COP to “to establish such subsidiary bodies as are deemed necessary for the implementation of the Convention.”²⁴

It is particularly significant to note that the UNFCCC explicitly states, as one of the functions of the Secretariat, the following:

“To enter, under the overall guidance of the Conference of the Parties,
into such administrative and contractual arrangements as may be

¹⁷ UNFCCC, Article 7.

¹⁸ Kyoto Protocol, Article 13, paragraph 1.

¹⁹ *See, supra* note 14.

²⁰ UNFCCC, Article 8.

²¹ UNFCCC, Article 9.

²² UNFCCC, Article 10.

²³ UNFCCC, Article 11.

²⁴ UNFCCC, Article 7, paragraph 2(i)

required for the effective discharge of its functions.”²⁵

It is arguable that the above provision in the Secretariat’s functions may be read to confer legal capacity to the Secretariat to enter into contracts with third parties in the discharge of its functions. No similar provision is included for any of the other subsidiary bodies.

Pursuant to the above-cited provision, the UNFCCC Secretariat has entered into an agreement with the Government of Germany on 20 June 1996 to establish the offices of the Secretariat, the Climate Change Secretariat, in Bonn, Germany.²⁶

3. The Executive Board of the Clean Development Mechanism

The Clean Development Mechanism was established by the Kyoto Protocol to assist parties not included in Annex I in achieving sustainable development and in contributing to the ultimate objective of the Convention... [and] in achieving compliance with their quantified emission limitation and reduction commitment under Article 3.”²⁷ The CDM was to be “subject to the authority and guidance of” the COP and was to be “supervised by an executive board.”²⁸ The Executive Board was established by the COP/CMP on 30 March 2006 with responsibilities for the day-to-day operations of the CDM and the preparation of decisions for the CMP. Some of the responsibilities of the Executive Board include: making “recommendations to the COP/MOP on further modalities and procedures for the CDM, as appropriate; ...approving new methodologies relating to, inter alia, baselines, monitoring plans and project boundaries; ...[and] be responsible for the accreditation of operational entities... and make recommendations to the COP/MOP for the designation of operational entities.”²⁹

4. The Adaptation Fund and the Adaptation Fund Board under the Kyoto Protocol

The UNFCCC authorizes the COP to “adopt protocols to the Convention.”³⁰ Pursuant to this authority, the **Kyoto Protocol** was entered into in 1997. The Kyoto Protocol reiterates the principle of the UNFCCC that the COP as “the supreme body of the Convention shall serve as the meeting of the Parties to the Protocol.”³¹ In addition, the Protocol authorizes the COP/CMP to “make, within its mandate, the decisions necessary to promote [the Protocol’s] effective implementation” and, again following the parallel provision in the UNFCCC,

²⁵ UNFCCC, Article 8, paragraph 2(f).

²⁶ Since 1996, the secretariat has been located in Bonn, Germany. It moved from its previous location in Geneva, Switzerland, following an offer from Germany to host the secretariat, an offer accepted by COP 1.

²⁷ Kyoto Protocol, Article 12, paragraph 2.

²⁸ Kyoto Protocol, Article 12, paragraph 4.

²⁹ FCCC/KP/CMP/2005/8/Add.1

³⁰ UNFCCC, Article 17.

³¹ Kyoto Protocol, Article 13, paragraph 1.

further authorizes it to “establish such subsidiary bodies as are deemed necessary for the implementation of this Protocol.”³² To date, the COP/CMP has taken specific decisions under this authority to establish the Adaptation Fund (the Fund) and the Adaptation Board (the Board) to serve specific functions under the UNFCCC.³³

In order to assess the legal feasibility and modalities of conferring legal capacity to the Fund and the Board, it is necessary now to examine the functions and powers that have been conferred on them by the operative decisions taken by the COP/CMP under the Kyoto Protocol.

The **Adaptation Fund** was established by the COP to the Kyoto Protocol by a decision taken at its 8th plenary meeting in Marrakesh, Morocco on November 10, 2001.³⁴ The Kyoto Protocol requires the COP to “ensure that a share of the proceeds from certified project activities is used to cover administrative expenses as well as to assist developing country Parties that are particularly vulnerable to the adverse effects of climate change to meet the cost of adaptation.”³⁵ The operative parts of this decision provide that the Fund was being established, *inter alia*, “to finance concrete adaptation projects and programmes in developing country Parties to the Protocol” and that the Fund “shall be financed from the share of proceeds on the clean development mechanism project activities and other sources of financing.” Presumably, this means that the Fund is the financial instrument or entity that will maintain an account in its name that will hold “the share of proceeds” contributed by developed countries. In this initial decision and subsequent decisions, the COP has provided that the Fund shall operate under the authority and guidance of and be accountable to the COP to the Protocol.

Subsequently, the COP/CMP invited the International Bank for Reconstruction and Development (the World Bank) to serve as interim Trustee of the Adaptation Fund and proposes to enter into certain legal arrangements with the World Bank. These legal arrangements provide, *inter alia*, that the Trustee would establish a trust fund for the Adaptation Fund that would hold in trust, as a legal owner, and administer the funds, assets and receipts which constitute the trust fund, on behalf of the Adaptation Fund and supervised and managed by the Adaptation Fund Board. The Trustee would “act upon decisions, instructions directions or guidance of the CMP or the Adaptation Fund Board”; and that the Trustee “shall not be responsible for inquiring or investigating if any decisions, instructions, directions or guidance....do not contravene an existing decision or act of the CMP, and shall have no liability for relying in good faith on any written decision, direction or guidance of the CMP, Adaptation Fund Board....”³⁶

The **Adaptation Fund Board** was established by a decision of the COP taken at its 9th plenary meeting in Bali, Indonesia in December, 2007.³⁷ The

³² Kyoto Protocol, Article 13, paragraph 4(h).

³³ Decisions 10/CP.7, 28/CMP.1 and 1/CMP.3. *See further, below.*

³⁴ Decision 10/CP.7.

³⁵ Kyoto Protocol, Article 12, paragraph 8.

³⁶ Decision 1/CMP.4

³⁷ Decision 1/CMP.3

COP decided that “the operating entity of the Adaptation Fund shall be the Adaptation Fund Board, serviced by a secretariat and a trustee” and the Board shall “supervise and manage the Adaptation Fund, under the authority and guidance” of the COP/CMP to the Protocol and “shall be fully accountable to the COP/CMP...which shall decide on its overall policies in line with relevant decisions.” The Board was to comprise sixteen members representing the Parties to the Kyoto Protocol, taking into account fair and balanced representation among five designated groups. The Decision further went on to identify the functions of the Board which were to include, *inter alia*, developing strategic priorities, policies and guidelines for adoption by the COP/CMP, developing and deciding on specific operational policies and guidelines, developing criteria on principles and modalities, deciding on projects, including the allocation of funds, monitoring and reviewing the operations of the Fund, and developing and approving draft legal and administrative arrangements for secretariat services and the trustee for approval by the COP/CMP. Finally, the Decision provided that decisions of the Adaptation Fund Board shall be taken by consensus and, if all efforts to achieve consensus have been exhausted, decisions may be taken by a two-thirds majority of the members present at the meeting.³⁸ It was further provided that the Board would meet at least twice a year. Finally, the Decision provided as follows:

18. *Decides* that secretariat services shall be provided to the Adaptation Fund Board in order to support and facilitate its activities, that a dedicated team of officials shall be identified to render secretariat services to the Adaptation Fund Board in a functionally independent and effective manner and that the head of the secretariat responsible for rendering the services shall be accountable to the Adaptation Fund Board;
19. Invites the Global Environmental Facility to provide secretariat services to the Adaptation Fund Board on an interim basis.

The same Decision then went on to “invite the World Bank to serve as the trustee of the Adaptation Fund on an interim basis.”

Finally, it is significant to note, by way of comparison, that unlike the authority conferred on the UNFCCC Secretariat “to enter...into such administrative and contractual arrangements as may be required for the effective discharge of its functions,” no such authority was explicitly given to either the Fund or the Board in the initial decisions establishing these organs. The silence on this matter leaves room for interpretation that: (i) the COP/CMP did not wish to confer such authority to the Fund or the Board; or (ii) the omission of such authority was an oversight. In either case, the question is now moot as the COP has subsequently decided that the Board *should be* conferred “such legal capacity as necessary for the discharge of its functions with regard to direct access by eligible parties...in particular the legal capacity to enter into contractual arrangements...”³⁹ It is this last decision which has raised the legal question noted in the Introduction to this memorandum, and which will now be addressed.

³⁸ Decision 1/CMP.3, paragraph 12.

³⁹ Decision 1/CMP.4, paragraph 11.

Application of International Law and Practice to the Fund and the Board

As noted at the outset under Preliminary Clarification, the question of legal capacity of *both* the Fund and the Board will need to be addressed as the two organs are inextricably linked by purpose, functions and design. This question will now be examined in the context of (i) the respective functions of the Fund and the Board, and the relationship between the two organs, and (ii) the principles of State practice or customary international law applicable to international organs operating outside the traditional framework of international organizations.

At the outset, it needs to be stated that there is no legal impediment to conferring legal capacity on any international organ under the framework of the UNFCCC and the Kyoto Protocol. If the States Parties clearly intend and explicitly provide for such legal capacity for any organ, that should definitively determine and establish the legal capacity of the organ. In fact, the UNFCCC has *effectively* conferred legal capacity on the UNFCCC Climate Change Secretariat by providing explicitly that one of its functions shall be “to enter, under the overall guidance of the Conference of the Parties, into such administrative and contractual arrangements as may be required for the effective discharge of its functions.”⁴⁰ Further, as noted at the outset, the COP/CMP has taken a decision in September 2008 that “the Adaptation Fund Board be conferred such legal capacity as necessary for the discharge of its functions...., in particular the legal capacity to enter into contractual arrangements...”⁴¹

Furthermore, it also needs to be clarified that there are several instances in international practice where a subsidiary body or organ under a convention or international agreement or of an international entity has been conferred legal capacity in circumstances where the parent body itself has no legal capacity. The following are a few examples of such precedents:

- (a) The **European Commission** and the **European Investment Bank**, both organs of the original European Economic Community (EEC), at a time when the EEC was not considered to be an international organization with legal personality or legal capacity;
- (b) The **GATT Secretariat**, an organ under the GATT Agreement, at a time when GATT was not considered to be an international organization;
- (c) The **Antarctic Treaty Consultative Meeting**, a plenary organ under the Antarctic Treaty 1975, which concluded a headquarters agreement with Argentina;
- (d) The **International Whaling Commission**, the principal organ established under the International Whaling Convention 1946; and

⁴⁰ UNFCCC, Article 8, paragraph 2(f) by providing that one of the functions of the Secretariat shall be “to enter, under the overall guidance of the Conference of the Part

⁴¹ *Supra note 1*

(e) Several **River Commissions** for the Danube, the Rhine, the Moselle, etc. The Danube Commission, the principal organ established under the Danube Convention 1948. The original legal authority for the Central Commission for the Navigation of the Rhine comes from agreements made at the Congress of Vienna 1815. The Moselle Commission, the principal organ established under the Moselle Convention 1956.⁴²

Initial research of precedents has not disclosed any case where an organ named or designated as a “board” has been conferred or acquired legal capacity. However, it should be noted that organs established under multilateral conventions have been called or designated by different names although their legal status, functions and powers may often be similar or identical.

A. Should the Board (and/or the Fund) be conferred legal capacity?

From the description of its functions in the relevant COP/CMP Decisions, it is clear that the Fund was established as a [financial instrument or financial mechanism] of the COP/CMP, with overall responsibility for financing concrete development adaptation projects and programmes. The Fund was also expected to function under the guidance of, and to be accountable to, the COP/CMP. However, the actual day-to-day operations of the Fund were to be executed by the Board as the “operating entity” of the Fund. As noted earlier above, “the share of proceeds” contributed by developed countries will presumably be held (at least initially, until transfer to the World Bank [as Trustee] of the Adaptation Fund) in an account in the name of the Fund, as the **financial entity** established for this purpose. In practice, the decisions of the Fund to finance specific adaptation projects and programmes would involve the execution of financing agreements with eligible developing member countries [and/or their implementing executive agencies] that need and apply for such assistance. On the basis of these provisions and arrangements, it would appear that the Fund (acting in its own name) or the Board (acting on behalf of the Fund) would be the appropriate organ to execute such agreements, while the World Bank would serve as Trustee of the Fund and the GEF would provide secretariat services to the Fund.

The more difficult issue that is raised is whether the Board alone should be conferred legal capacity, as decided by the COP. In my considered view, there are several good legal arguments why it would be inappropriate and undesirable to confer legal capacity solely on the Board:

First, in a strictly legal sense, the Fund and the Board are essentially one and the same legal entity, the Fund being the principal organ and the Board being its sub-organ. The Board acts as the agent or instrumentality of the Fund and,

⁴² More examples can be found but this will require further research.

as such, its legal personality, legal status, legal capacity, responsibilities, rights and obligations should be considered as indivisible from those of the Fund. The Board, as the sub-organ of the Fund, is an integral part of the Fund.

Second, the conferment of legal capacity solely on the Board somehow implies that the Fund itself has no such legal capacity. This implication is most peculiar when the Fund has been conferred the authority “to finance concrete adaptation projects and programmes” under the Protocol and related COP/CMP decisions.

Third, external parties with whom the Board enters into contractual agreements are likely to be confused in their dealings with the Fund and the Board and would almost certainly raise very basic or fundamental questions as to which party carries the obligations, rights, responsibilities and liabilities under any contractual agreements or other commitments entered into between the Board and them. More particularly, if the need ever arises, against which entity will they be able to file a legal claim for breach of contract -- the Board or the Fund?

Fourth, if it is the Board that is the contracting party under contracts with third parties, what will be the nature and scope of its responsibility and liability, if any, to third parties for any injury or damage caused to them by its decisions or actions? Is it the Board *as a whole* that will be responsible or liable? Or will *individual members* of the Board also carry such responsibility or liability? If individual members carry such responsibility or liability, it would have to include not only current members of the Board but also *former* members of the Board who were involved in making the decisions or taking the actions that resulted in injury or damage to third parties.

Under national corporate laws, individual directors assume fiduciary duties of loyalty and good faith (analogous to the duties of trustees) and also assume duties of care and skill⁴³, due diligence, and obedience (*i.e.*, to comply with the laws, rules, regulations and policies of the corporation and other applicable national or state laws). While these duties are primarily owed to the corporation and its shareholders, in the case of other legal entities such as non-profit organizations, these duties are also owed to any one else who may be affected by the decisions or actions of the board and the activities of the organization, including the general public. Therefore, any breach or failure to exercise these duties could expose individual members or directors of the board (current and/or former members or directors) to legal liability for the consequences. Such liability could result in court orders to pay financial compensation to injured parties, the issuance of injunctions and specific performance orders in respect of actual or threatened breaches of contract or for payment of damages and compensation for injury or damage to other persons in tort. It is precisely because of this potential risk of liability that corporations usually purchase liability insurance to protect individual directors and/or otherwise agree to indemnify directors for any such liability. Thus, absent any clarification in the Protocol or relevant operational decisions of the COP/CMP,

⁴³ PAUL L. DAVIES, *GOWER'S PRINCIPLES OF MODERN COMPANY LAW*, Chapter 22 at 598-599 and 649-652 (6th ed., 1997)

it needs to be fully appreciated that the members and alternates in the Board (current and/or former members and directors) could be similarly exposed to legal liability in their personal capacity for actions and decisions taken and for contracts executed by them in the discharge of their functions.

Fifth, it is important to realize that the Board's responsibility and potential liability with respect to financing agreements or other contracts does not end with the signing of these agreements. There is an even more important function that will need to be performed on a continuing basis and that is the monitoring of the actual implementation of these agreements. This second and more important function is performed routinely by international financial institutions like the World Bank and the multilateral development banks and by United Nations agencies. It is difficult to see how the Board will be able to perform this function on the basis of the present facts which indicate that (i) the Board will be a non-resident body of representatives of the States Parties, (ii) the World Bank has been invited to serve as the Trustee of the Fund, (iii) the GEF has been invited to provide secretariat services to the Board; and (iv) other implementing agencies would also perform other functions.

In this regard, one question that may be raised is whether the GEF, as the Board's secretariat, should be delegated the responsibility of signing agreements on behalf of the Fund. Further consideration of this possibility would be dependent, of course, on the COP/CMP agreeing to such delegation and also on the World Bank [and the GEF Participants] agreeing to grant greater operational autonomy and legal authority to the GEF, including the power to sign financing and other agreements.⁴⁴ [Alternatively, implementing agencies could also be asked to perform this role.]

Sixth, legitimate questions will inevitably be raised by third parties as to the responsibility or liability of the States Parties to the Kyoto Protocol that established the Fund and the Board and took various decisions on the establishment of the Fund and the Board and its operational policies, procedures and actions. There are several court decisions that have examined such questions. Both the courts and several international law scholars have suggested that there may be situations where the States Parties to the conventions may have to assume joint and/or several liability for the obligations or undertakings of its organs. One international law scholar has explained this liability as follows:

It is easy to see that, if an organization has no international personality its actions are no more than actions of all its member States, whoever acts ostensibly in the name of the organization being only an agent of some or all of the member States. In such a situation there is no liability to a third party incurred by an international organization

⁴⁴ The legal relationship, including especially the distribution of powers and authorities, that has evolved among the World Bank, the GEF Participants and the GEF under the Instrument for the Establishment of the Restructured Global Environmental Facility is somewhat murky and may need further investigation and clarification. While the World Bank may continue to provide administrative and financial support to the GEF, one issue that deserves further inquiry is as to who, legally speaking, is the appropriate decision-maker with respect to the role, powers and functions of the GEF.

as such because there is no such entity. The liability incurred is a direct liability, probably joint and several, of all the States on behalf of whom the agent acts.⁴⁵

This point is elaborated on by another international law scholar thus:

An international organization created by states that does not itself possess legal personality cannot be the bearer of rights or obligations separate and distinct from those of the member states. It therefore follows that such organizations cannot be interposed as between the injured third parties and the member states of that organization. In such cases any liability for the debts or delicts attributable to the organization causing harm to third parties would fall upon the member states.⁴⁶

Several other factors may strongly point to the existence of such responsibility or liability on the part of the States Parties, including the following:

(i) No international organization was established under the Kyoto Protocol against which third parties could file a claim. Furthermore, several of the States Parties of the COP have contributed funds or assets for the purposes of the Protocol, including the CDM, and they effectively control all the operational policies, procedures and modalities for the use of those funds or assets. In addition, the Fund and the Board are also fully accountable to the COP.

(ii) Although there is no international organization, a plausible argument could be advanced that the COP/CMP has acted or purported to act in a manner similar to international organizations and, therefore, could be deemed to have quasi-international organization personality and attendant responsibilities and liability.⁴⁷

(iii) There is no explicit provision in the Kyoto Protocol specifying any limitation of liability or disclaimer of liability of the States Parties. While such a limitation of liability or disclaimer of liability will not necessarily be dispositive of the issue as to whether the States Parties are liable in a particular dispute, a provision clarifying the position of the States Parties as to the assumption or apportionment of responsibility or liability among the States Parties and its organs would have been helpful in clarifying the intention of the States Parties.

(iv) The Fund and the Board are duly constituted organs, established by the States Parties themselves through the COP/CMP and, as such, the actions and decisions of these two organs should legally bind the States Parties. Furthermore, the operative decisions on the establishment of the Fund and the Board clearly stipulate that the

⁴⁵ C.F. AMERASINGHE, *supra note 3*, 254. The terms “international organization” and “organization” in this quotation should be read and understood as “international organ” and “organ” in the present discussion.

⁴⁶ MALCOLM N. SHAW, *INTERNATIONAL LAW* 1201-1202 (5th ed., 2003). Here again, the terms “international organization” and “organization” in this quotation should be read and understood as “international organ” and “organ” in the present discussion.

⁴⁷ *Supra note 14*

Fund and the Board shall operate under the authority and guidance of the COP/CMP and shall be accountable to the COP/CMP. Thus, in the absence of any formal international organization, third parties will have a convincing argument (which will be very difficult to rebut) that the Fund and the Board were acting with the full authority and on behalf of the States Parties to the Kyoto Protocol and, therefore, the States Parties carry responsibility and are liable for any injury or damage caused to third parties by the acts or decisions of their duly constituted organs.

To sum up, it will be evident from the foregoing discussion that there are several legal and operational problems and risks associated with proceeding on the present course of conferring legal capacity solely on the Board. Furthermore, such a course of action would raise very legitimate and serious questions as to the nature and scope of legal liability that is being assumed by the Board in signing financing agreements and other contracts with third parties. It is recommended, therefore, that the neatest and simplest way to resolve these potential legal problems or incongruities is to confer legal capacity on the Fund. **The Montreal Protocol, which established the Multilateral Fund and conferred legal capacity on it, offers a clear precedent for this recommended course of action.** Once the Fund is conferred legal capacity, the Board would automatically enjoy the same legal capacity as the sub-organ of the Fund. As discussed earlier, the Board would enjoy such legal capacity on the basis that it derives such capacity as the designated sub-organ and agent of the Fund. However, to avoid any doubt or question on the matter, it is recommended that, in conferring legal capacity on the Fund, the relevant amendment or Decision explicitly state that such legal capacity of the Fund extends to the Board. The modalities for conferring such legal capacity on the Fund are examined below.

B. Modalities for Conferring or Acquiring Legal Capacity

If the above recommendation is accepted, there are several modalities or options that may be considered for conferring or acquiring legal capacity for the Fund and/or the Board:

1. Amendment of the Kyoto Protocol

One way to confer legal capacity on the Fund is to propose an amendment to the Kyoto Protocol.⁴⁸ The rationale for this approach is that the Fund was established by the COP/CMP pursuant to powers conferred by the Kyoto Protocol. In international organizations, legal capacity is usually conferred under the constituent instrument. Where there is no overarching international organization, as in this case, the framework convention or the relevant protocol may

⁴⁸ Kyoto Protocol, Article 20.

be considered the legal equivalent of the “constituent instrument.” The content of the amendment could simply be that certain designated subsidiary bodies shall be conferred legal capacity to enable them to effectively discharge their functions.

However, there are two possible disadvantages or problems with taking this approach. *First*, the amendment could be more complex because the Fund and the Board were not established directly by the Kyoto Protocol, but instead by Decisions of the COP taken pursuant to the authority conferred on it by the Kyoto Protocol to “establish such subsidiary bodies as are deemed necessary for the implementation of this Protocol.”⁴⁹ Thus, any amendment would seek not just to clarify the legal capacity of subsidiary bodies such as the Fund but also to effectively amend or undo certain Decisions of the COP. *Second*, the process for seeking an amendment to the Kyoto Protocol is likely to take considerable time because of the fairly stringent requirements for its approval.⁵⁰

2. *Decision of the COP*

As the Decisions establishing the Fund and the Board were adopted by the COP, the simplest and most straightforward way to confer legal capacity on the Fund is to adopt a new Decision that would explicitly confer such legal capacity on the Fund. This Decision would clarify that the Board would also enjoy such legal capacity to execute financing and contractual agreements and other arrangements with third parties. The great advantage of this approach is that such a Decision would constitute yet another in a series of Decisions that seek to clarify and elaborate on the role, functions and responsibilities of the Fund and the Board. Moreover, the COP has specifically asked that steps be taken to confer legal capacity on the Board.

In this regard, it is significant to note that the Montreal Protocol conferred legal capacity on the Multilateral Fund through a decision of the Conference of the Parties to the Protocol. It is a directly relevant precedent that should provide guidance to the COP of the Kyoto Protocol in this case.

One important issue that may need to be addressed in such a decision is the nature and scope of liability that the Fund and/or the Board are assuming under contractual agreements and other commitments to third parties. Preferably, there should also be a specific limitation of liability clause to define the liability being assumed and/or a clear disclaimer of the liability of the States parties themselves. (This will have to be the subject of a separate discussion).

The possible disadvantages of taking this approach are two-fold. *First*, the COP would effectively be asked to amend its earlier decision by now conferring legal capacity to the Fund (instead of the Board alone), but this sensitivity could be handled

⁴⁹ Kyoto Protocol, Article 13, paragraph 4(h).

⁵⁰ For example, at least six months notice of any proposed amendment shall be given to all the States Parties (Article 20 of the Kyoto Protocol, paragraph 1). Further, agreement on any proposed amendment should be reached by consensus but, if all efforts at consensus have been exhausted and no agreement is reached, the amendment may as a last resort be adopted by a three-fourths majority vote of the Parties present and voting at the meeting (Article 20, paragraph, 3).

by proposing to the COP that, on the basis of several good legal arguments (discussed here), both the Fund and the Board should be conferred legal capacity. *Second*, like an amendment to the Protocol, this approach would also involve some delay although it will probably not be as substantial as an amendment to the Protocol. However, the Fund could still be operational in the meantime through the GEF Secretariat (as the currently designated interim secretariat for the Board), the implementing entities, and the Trustee (World Bank).

3. Limited Agreements with States and International Organizations on Headquarters or for other Purposes

The Fund could enter into a headquarters agreement with a State (a member of the Conference of the Parties to the Protocol) under which that host State would confer legal capacity as necessary for the establishment of the headquarters and the discharge of its functions. However, as noted earlier, it is important to reiterate again that such limited recognition of legal capacity by one State does not automatically extend to or bind other States although some other States may accept that as evidence of the Fund's legal capacity. Keeping in mind also that the Board may enter into financing agreements with recipient States and sign contracts with consultants and contractors in several different jurisdictions, this modality may have limited value. It is also likely to lead to prolonged and repeated negotiations with other States, not to mention third parties, about the legal capacity of the Board.

4. Liberal Interpretation of the Kyoto Protocol and Decisions of the Conference of the Parties: "Implied Powers"

This is the least favored modality for clarifying the legal capacity of the Fund and the Board. Such a clarification would only come in the event that the question of the Fund's or Board's legal capacity is brought before a court or other tribunal in a dispute situation. There is no predicting when such an occasion will arise or how the question will be resolved in different jurisdictions. In the meantime, confusion and uncertainty will continue to reign about the legal capacity of the two organs. For these reasons, this is not a recommended approach to resolving the legal questions at hand.

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Annex**PRINCIPLES OF INTERNATIONAL LAW ON CONFERRING LEGAL CAPACITY ON INTERNATIONAL ORGANIZATIONS AND THEIR ORGANS**

By way of background and to provide the appropriate context for addressing the legal question discussed in this legal memorandum, it would be necessary and useful to briefly outline the general principles of international law applicable to the conferment of “international juridical personality” and “legal capacity”⁵¹ on international organizations. This is necessary for two reasons. *First*, these principles are, to a large degree, also relevant and applicable to organs established by other multilateral conventions or agreements such as the UNFCCC and the Kyoto Protocol or by the COP/CMP. *Second*, it will highlight important differences between organs of international organizations and other types of international organs. *Third*, the differences will provide some guidance in resolving the legal question.

There are in existence today several hundred public international organizations or inter-governmental organizations, whose members or parties are usually sovereign States. Given the number and variety of such international organizations, it is fair to say that the modalities followed for the establishment of such organizations have varied somewhat depending on their origins, functions, and operations. However, if some general rules of international law are to be gleaned from the experience of international organizations established after the Second World War, they would include the following:

(i) International organizations have usually been established by a constituent instrument. These constituent instruments are called by various names such as treaty, convention, agreement, articles of agreement, constitution, charter, statute or protocol. The purpose of such constituent instruments is to make clear that the international organization has a legal personality distinct and separate from the States Parties to the constituent instruments.

⁵¹ The terms “international juridical personality” and “legal capacity” are often used loosely and interchangeably. It is important, therefore, to clarify that “personality” is the broader and more fundamental concept that relates to the existence of an entity as a subject or legal person under national or international law, whereas “capacity” is usually regarded as a qualification or attribute of personality indicating specific legal powers possessed by an entity having personality. *See* AUGUST REINISCH, *INTERNATIONAL ORGANIZATIONS BEFORE NATIONAL COURTS* 12 (2000) and, more generally, C.F. AMERASINGHE, *PRINCIPLES OF INTERNATIONAL INSTITUTIONAL LAW*, Chapter 3 (1996). Legal capacity is usually understood to refer to the capacity of the entity to contract, to acquire and dispose of immovable and movable property, and to institute or defend legal proceedings. For the purposes of this memorandum and the legal question discussed, the narrower term “legal capacity” will be used throughout.

(ii) The constituent instruments of many of these international organizations contain explicit provisions conferring on the organizations “legal capacity” to enter into contracts, to own and dispose property, to initiate and defend legal proceedings; and also granting to the organization, its operations, officials and staff various privileges, immunities and exemptions including tax exemptions and immunities from legal and judicial process. Such explicit provisions are extremely helpful in informing and assuring third parties that have relations with the international organizations that the international organizations possess legal capacity to enter into contractual agreements and other arrangements with them. Such provisions also ensure that both parties to such transactions will be able to seek legal remedies for breach of contract and undertakings. Where the constituent instrument contains explicit provisions conferring legal capacity on the international organization, the rule of international law is clear and well-settled: all signatories or State Parties to the constituent instrument are legally committed to recognize such legal capacity to the international organization under their national laws, usually by the passage of legislation to give effect to such commitments. Furthermore, it makes clear that the obligations, rights, duties and liabilities of the international organization are undertaken in its own name.

Unfortunately, however, in several other international organizations, the constituent instruments do not contain any provisions at all or any explicit provisions on the legal capacity of the organization. In such cases, international courts (including the International Court of Justice), tribunals and States have had to determine, on a case-by-case basis, whether the organization in question had such legal capacity. There are many cases where courts, tribunals and States have recognized the legal capacity of the organizations where it could be deduced from the provisions of the constituent instrument or other facts and circumstances that that organizations were clearly intended by the Member States to have such legal capacity in order to be able to effectively discharge their functions. This liberal interpretation of the constituent instruments is based on the doctrine of “implied powers.”⁵²

(iii) Several international organizations, especially the international financial institutions, also define or limit the scope of their financial liability. For example, in the World Bank and the multilateral development banks, the financial structure of these institutions is based on a share capital consisting of a small portion of paid-in capital and a large reserve of callable capital. The ability of these financial institutions to call up the callable capital provides security to their creditors, such as investors in their bonds in borrowings in the international capital

⁵² The landmark judicial authority for this doctrine of “implied powers” is the Advisory Opinion rendered by the International Court of Justice in the *Reparations for Injuries Suffered in the Service of the United Nations*, ICJ REPORTS, 1949. This case confirmed the legal capacity of the United Nations to bring legal proceedings against Israel to obtain reparations from Israel in connection with the assassination of a United Nations official (Count Bernadotte) while on official business in this member country.

markets and other contractors, that they will be able to meet their financial obligations.

(iv) Most constituent instruments establish specific organs to enable the organizations to discharge their functions. These organs usually include a general assembly or plenary organ (sometimes called an Assembly, Board of Governors), an executive or subsidiary organ (sometimes called a Board of Directors, or Executive Board, or Executive Directors), and a secretariat or administration headed by a chief executive.⁵³ The specific functions and powers of these organs are then spelled out clearly in the constituent instrument. In many cases, the supreme organ in the organization (often a non-resident body) delegates some or all of its functions to the subsidiary organ (often an organ that resides and functions full-time in the headquarters or principal office of the organization. In such cases, where the organs exercise the functions and powers of the international organization in relation to third parties, they are generally deemed to do so in the name and on behalf of the organization. The organs derive the legal capacity of the organization and their acts and decisions legally bind the international organization.

(v) The constituent instrument of international organizations, as international treaties or agreements, are generally interpreted and enforced under the rules of international law and not under the national laws of their member States. Some international organizations have, however, accepted that their commercial contracts with third parties for the borrowing of money or the provision of goods and services may be governed by a selected national law (*e.g.*, English law or New York law) and waived its immunity from judicial process.⁵⁴

The concept and rules of “legal capacity” under international law are not materially different from those applicable under national legal systems. A leading scholar on international institutional law, the late Professor Henry G. Schermers, best describes this parallel as follow

“National law prescribes the conditions and procedure for and by which corporations, foundations, societies, partnerships, trusts, limited liability or incorporated companies and other entities may enter into the legal domain by obtaining the status of a legal person and consequently become capable of bearing rights and duties distinct from their members. The legal personality thus acquired is also referred to as derived personality...”⁵⁵

The parallel to national law needs to be kept in mind because the rights, obligations, responsibilities and liabilities of international organizations and third parties under agreements and other transactions between them usually have to be adjudicated in national courts.

⁵³ Good examples are the United Nations and its Specialized Agencies, the institutions of the World Bank Group, the International Monetary, and the regional development banks.

⁵⁴ For example, the World Bank and the regional development banks have accepted the application of such national or state law when issuing its bonds in the international capital markets.

⁵⁵ HENRY G. SCHERMERS & NIELS M. BLOKKER, INTERNATIONAL INSTITUTIONAL LAW 986 (4th ed., 2003)