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DRAFT GEF POLICY, INSTITUTIONAL, AND GOVERNANCE REFORMS

EXECUTIVE SUMMARY

This document is complementary to the Draft GEF-5 Programming Document, GEF/R.5/14, and proposes supporting reforms covering institutional architecture, governance mechanisms, and policies of the GEF. Reforms are proposed in the following five areas:

(a) Accountability to the conventions for which the GEF acts as the financial mechanism;

(b) Responsiveness to the priorities and needs of recipient countries;

(c) Delivery of tangible, measurable results to the international community;

(d) Increase of resources for the GEF, and enhancement of their diversity and predictability; and

(e) Undertaking key institutional and governance reforms to strengthen the GEF.

To improve accountability to conventions, several proposals are made to work with the convention secretariats to explore steps to be undertaken to build the confidence of the conventions in their financial mechanism.

A cornerstone of the GEF reform package is to improve the responsiveness of the GEF to the needs and priorities of recipient countries. This reform platform consists of several elements, such as (i) implementing a more flexible resource allocation system; (ii) better alignment of GEF programming with country needs, through providing resources for countries to prepare *National Plans for Generating Global Environmental Benefits*; (iii) broadening the access to bring more agencies into the GEF partnership; and (iv) piloting direct access to qualified national/regional and other entities.

Improving effectiveness and efficiency is key to the drive for results at the GEF. During GEF-5, the GEF Results-based Management System will be under full implementation. Proposals are detailed for refining the programmatic approach so that it becomes more widely applied during GEF-5. In parallel, further streamlining is proposed for the GEF project cycle in a bid to reduce the number of approval steps from two to one.

GEF-5 Replenishment target is set as an increase in real terms as outlined in the Draft Programming Document, GEF/R.5/14. Other funding reforms proposed include: (i) replenishment of the LDCF and SCCF concomitantly with the GEF Trust Fund; (ii) resolution of governance issues related to the acceptance of resources from other contributors such as the private sector and foundations; and (iii) consider innovative financing mechanisms, including those that take into account economic capacities and environmental footprints of participating countries.

Finally, to support the above-mentioned set of reforms, the GEF needs to undergo some fundamental institutional and governance reform to: (i) deal with the emerging expectations of its role as a financial mechanism in the various conventions; and (ii) resolve long-standing conflicts of interest with the World Bank in its various roles in the GEF partnership. The GEF (and the Secretariat) needs to clarify/obtain a legal capacity and personality to be able to undertake the challenges facing the institution as it gears to help the international community take on the challenges of global environmental management.

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Introduction

1. At the First Meeting for the Fifth Replenishment of the GEF Trust Fund, held in Paris during March 17-18, 2009, Contributing Participants requested, among other documents, a proposal outlining the policy, institutional, and governance reforms for discussion at the Second Meeting of the Fifth Replenishment scheduled for June 2009. This document prepared by the GEF Secretariat, is a response to the request of the Participants. During the writing of this document, drafts were shared with the GEF Agencies, the Evaluation Office, Trustee, and representatives of the GEF-NGO network, and comments received are posted on the GEF website

Overview of Proposed Reforms

2. The *Draft GEF-5 Programming Document*, GEF/R.5/14, outlines strategies for programming in the GEF focal areas and corporate programs, and sketches an approach to furthering the engagement with the private sector, all within the context of a GEF Results-based management strategy. To support the proposed programming strategy, reforms are necessary covering institutional architecture, governance mechanisms, and policies of the GEF. In the *Future Strategic Positioning of the GEF* document (GEF/R.5/7), discussed at the March 2009 Replenishment meeting, the Secretariat proposed the following five areas for reform:

(a) Accountability to the conventions for which the GEF acts as the financial mechanism;

(b) Responsiveness to the priorities and needs of recipient countries;

(c) Delivery of tangible, measurable results to the international community, particularly to the donors that contribute resources to the GEF;

(d) Increase of resources for GEF, and their diversity and greater predictability; and

(e) Undertaking key institutional and governance reforms to strengthen the GEF for its emerging responsibilities.

3. Details of the above-mentioned reforms are outlined in this document, taking into account feedback received from the Participants during the March Replenishment meeting. Some of the proposed reforms are explained in more detail in GEF/R.5/14, *Draft GEF-5 Programming Document* and appropriate cross-references are made where necessary.

Accountability to the Conventions

4. The GEF is a/the operating entity of the financial mechanism of four international environmental conventions. The GEF formally functions under the guidance of, and is accountable to, the Conferences of the Parties of these conventions. Over the last decade, the relationships between some of the COPs and the GEF Council have sometimes suffered from concerns that COP guidance is not fully reflected in the development of GEF operational policies.

5. In the UNFCCC, there are ongoing discussions regarding a post-2012 financial architecture. In this forum and in other discussions, there are increasing concerns about the governance structure of the GEF, particularly with regard to its accountability to conventions. If the GEF is to continue to be the principal operating entity of the financial mechanism of conventions, then it is important to consider reform of the governance structure to provide appropriate representation to conventions.

6. One approach could be to introduce a two-tier governance structure. The GEF Council would operate at the first-level and play a strategic role dealing with issues such as GEF policies, relations with conventions, linkages between focal areas, and relationships between the replenishment process and the GEF Assembly. At the second level would be focal area boards representing each of the thematic areas of the GEF in which conventions and other stakeholders would participate. The focal area boards will deal with issues related to focal area strategies and programming. The GEF Assembly would remain unchanged and would provide broad-based governance of the *GEF Instrument*.

7. Notwithstanding the above reform, the GEF Secretariat will work with the convention secretariats over the coming months to explore steps that could be taken to build the confidence of the conventions in their financial mechanism. These could include:

(a) Periodic and increased consultations between the GEF Secretariat and the Convention Secretariats, including more engagement during the replenishment process;

(b) Strategic engagements between the GEF and the conventions in developing and implementing convention guidance;

(c) Systematic involvement of the various convention focal points at the country-level in country dialogue and country strategy development and programming.

(d) Systematic involvement of the convention secretariats in GEF national dialogues and other sub-regional meetings.

(e) Participation, to the extent possible, in the various awareness raising, scientific and technical workshops organized by the conventions;

(f) Improvement of communications with bodies of the conventions, for example through GEF Secretariat participation, as observers, in bureau meetings;

(g) Refinement of the GEF reporting process to the Conventions;

(h) Support for countries to prepare *National Plans for Generating Global Environmental Benefits* that would be shared with the conventions, and used as a framework for developing programs and projects for GEF financing.

Responsiveness to Recipient Countries

8. A cornerstone of the GEF-5 reform package is to improve the responsiveness of the GEF to the needs and priorities of recipient countries. This reform platform consists of several components such as: (i) implementing a more flexible resource allocation system; (ii) better

alignment of GEF programming with country needs; and (iii) broadening access to more agencies; and (iv) piloting direct access to qualified entities.

Implement a More Flexible System for the Allocation of GEF Resources

9. The RAF system implemented in GEF-4 for biodiversity and climate change projects has helped to strengthen country ownership, at least where countries had an individual allocation. However, the independent mid-term review carried out by the Evaluation Office also found many limitations with the current system. For GEF-5, the Secretariat will propose to the Council a more flexible system that fully takes into account the findings of the mid-term review and the level of available GEF resources (Please refer to document GEF/R.5/Inf.4 *A proposal for resource allocation in GEF-5* for details).

Better Align GEF Programming with Country Needs

10. Specific steps will be taken in programming during GEF-5 to ensure that financing is well-aligned with national development planning (in accordance with the Paris Declaration for Aid Effectiveness) and low carbon development strategies or other environmental strategies developed by recipient countries. These will be brought together in *National Plans for Generating Global Environmental Benefits* that will serve as the central platform for programming GEF resources.

National Plans for Generating Global Environmental Benefits

11. To further strengthen the engagement of the GEF at the country-level, it is proposed that GEF financing be provided to countries to develop *National Plans for Generating Global Environmental Benefits*. Such National Plans will be prepared by National Steering Committees through a broad stakeholder consultation process, coordinated by the GEF operational focal point. The preparation of national plans through a participatory and consultative process, will help raise the awareness of global environmental issues among stakeholders and decisions, and help place these issues more prominently on the national sustainable development agenda. The plans will not be mandatory, and countries could provide to the GEF plans that they have already prepared as a basis for programming. For further details refer to the section on Corporate Programs Strategy in GEF/R.5/25, *Draft GEF-5 Programming Document.*

12. There will also be an emphasis on programmatic approaches rather than projects. Such approaches are proposed based on the recognition that project-based activities provide recipient countries with rather limited leverage to influence a sector-wide transformation.

Broaden Engagement with Agencies

13. GEF Agencies have played key roles, within their areas of comparative advantages, in working with recipient countries to help them develop, implement and manage GEF projects. In addition to being the main channels between recipient countries and the GEF, Agencies also have participated in the policy and strategy development process of the GEF. Engagement of the Agencies in the GEF partnership has reinforced their individual efforts to mainstream or

incorporate global environment concerns into all of their policies, programs and projects. Since the Agencies have been instrumental in achieving the goals of the GEF, the choice of agencies to partner with the GEF is an important consideration in the overall strategic development of the GEF partnership.

14. The evolution of engagement of GEF Agencies in the partnership has gone through three phases: (i) from inception of the GEF to 1999, when only the three Implementing Agencies had direct access to GEF resources; (ii) from 1999 to 2006 when seven additional Executing Agencies were brought in a phased approach, and progressively had direct access to GEF resources; and (iii) the post 2006 period when a level playing field was established for all 10 GEF Agencies with the abolishment of the corporate budget for the Implementing Agencies.

15. From the inception of the GEF to 1999, the issue of access to resources was dealt with in conformity with article 22 of the Instrument, which specifically provided for UNDP, UNEP and the World Bank to be the three Implementing Agencies. They were made accountable to the Council for their GEF-financed activities, including the preparation and cost-effectiveness of GEF projects, and for the implementation of the operational policies, strategies and decisions of the Council within their respective areas of competence. These Agencies established a process for their collaboration on the basis of a set of principles spelled out in the GEF Instrument.

16. By designating them as the Implementing Agencies of the GEF, the role of UNDP, UNEP and the World Bank was recognized at the time as key in the implementation of GEF-financed activities within their respective areas of comparative advantages. They were specifically tasked to facilitate cooperation in GEF-financed activities by multilateral development banks, United Nations agencies and programs, other international institutions, national institutions and bilateral development agencies, local communities, non-governmental organizations, the private sector and the academic community in accordance with paragraph 28 of the Instrument.

17. The notion of expanded opportunities materialized in early 1999 when the regional development banks (RDBs: AfDB, ADB, EBRD and IADB) entered into a dialogue with Council and made a convincing case to enhance their engagement with the GEF. In May 1999 preliminary steps were taken by Council to afford greater GEF access to RDBs (GEF/C.13/3) followed by UNIDO and FAO in 2000(GEF/C.15/4) and then IFAD in 2001 (GEF/C.17/13). The rational was to bring these Agencies in to help the GEF partnership deal with its increasing mandate in additional focal areas such as land degradation and persistent organic pollutants, and to further leverage co-financing, as well as to broaden the range and quality of expertise the GEF can draw upon to meet its objectives.

18. In November 2003, the Council approved, under Expanded Opportunities, direct access to GEF resources to these seven Agencies (GEF/C.22/12), acting within their comparative advantages.

19. In 2006/2007, the Council clarified the comparative advantages and the roles and responsibilities of the GEF Agencies in the GEF partnership. Furthermore, the corporate budget provided for the three Implementing Agencies was abolished in an effort to create a level playing field among all 10 GEF Agencies.

20. The experience with 10 Agencies has provided the GEF partnership with the capacity to deal with an increasing mandate in addition to providing a broader choice of agencies for recipient countries. It has also introduced an element of competition by allowing the GEF to work with the agency with the greatest competitive advantage, which in turn drives towards cost-effectiveness among participating Agencies.

21. The costs to the GEF in choice of Agency are cost-neutral, as Agency fees are set without reference to which Agency is implementing a GEF project. However, the more efficient the agency, the more it could be expected to do with the flat fee provided to it. Alternatively, the GEF Council could choose to return to the practice of negotiating Agency fees project by project, which would also serve to set the more efficient agency apart from the others.

Expanded Access for Additional Agencies

22. The GEF experience with the *Policy of Expanded Opportunities* is that it has added value to the network by including agencies with different strengths and capabilities that operate in a complementary manner. As the GEF gears up for its fifth phase, it is time to consider whether this business model is to be further consolidated by the inclusion of more agencies.

23. First, under discussion is a further increase in the scope of the GEF mandate, which would argue for partnership with agencies with comparative advantages not offered by the current 10 GEF Agencies. These areas include: (i) enlarged scope in chemicals; (ii) a more aggressive approach in climate change both to support countries' efforts to adopt low carbon development strategies, and to increase engagement in adaptation under LDCF and SCCF managed by the GEF; sustainable forest management; and (iii) new funds that may be mandated for management under the GEF (Please refer to GEF/R.5/14, *Draft GEF-5 Programming Document* for details).

24. Moreover, to provide greater selection of appropriate and relevant partners in support of enhanced country ownership of GEF-financed projects, it is important to consider introducing more agencies to the GEF partnership. This broadening of access will further the competitive spirit and drive for cost-effectiveness within the GEF partnership.

25. Three agencies that could offer the GEF network competencies of particular value in GEF-5 are WHO, WFP and UNESCO. WHO has valuable expertise in the area of chemicals and adaptation; WFP offers a unique ability to provide early warning and vulnerability assessments that can strengthen the adaptation responses of GEF recipient countries; and UNESCO, with its science-based work in the area of biospheres and international waters, could add desirable value to a GEF portfolio.

26. It is proposed that the broadening of access in GEF-5 be undertaken following the principles of the *Policy of Expanded Opportunities*. Initially, the GEF Council could request WHO, WFP and UNESCO, based on their comparative advantages, to submit their qualifications to be a GEF Agency. Depending on the final strategic agreement of the GEF Council for GEF-5, the Council may choose to include additional agencies beyond these three.

27. The GEF Secretariat would then arrange to have these agencies assessed against the minimum fiduciary standards and other criteria established by the GEF and report back to the

GEF Council with a recommendation for a Council decision to provide these agencies with access to GEF resources under further Expanded Opportunities.[1] Following a Council decision, these Agencies would enter into the standard Memorandum of Agreement with the GEF Secretariat setting forth GEF policies and procedures and into the standard Financial Procedure Agreement with the GEF Trustee setting forth Trust Fund rules, and would cooperate within the GEF network to propose programs and projects.

Pilot Direct Access

28. In the debate on the architecture for international aid, there are increasing calls for provision of direct access to qualified national/regional entities to receive financial resources and to provide full oversight over project design and implementation. Several countries have, over the years, developed internationally well-regarded capacity to design, implement, and monitor projects, and find the intervening roles of the Agencies a burden rather than a benefit. Recipient countries are increasingly confident that their national institutions have the technical capacity and the ability to meet internationally acceptable fiduciary standards in managing resources while developing and implementing projects that are closely aligned with national needs. Direct access is a consideration in the discussions for the financial mechanism under the UNFCCC.

29. It also makes sense for the GEF to tap into additional skills and expertise by granting direct access to other types of entities, such as international NGOs, community organizations, etc., that could help the GEF meet the needs of its expanding mandate. For example, GEF engagement with the private sector is expected to expand dramatically, starting in GEF-5. During GEF-4, the Council approved a private sector engagement strategy, and earmarked $50 million as the GEF contribution to establish the Earth Fund in collaboration with the World Bank/IFC. During GEF-5, it is proposed that a much larger amount of GEF resources be targeted to the Earth Fund, seeking to leverage substantial additional amounts through new platforms and other activities financed with the private sector. Given this context, it is feasible to consider additional, non-traditional organizations that could provide better access to the private sector.[2]

30. There is precedent to support the case for direct access. The Global Fund for AIDS, Tuberculosis and Malaria, for example, has provided resources directly to funding mechanisms in countries.[3]

[1] Insert reference to GEF document on this.
[2] Prominent international NGOs could provide such access and could be provided direct access to GEF resources.
[3] In each country served by the Global Fund, a Country Coordinating Mechanism (CCM), a country-level management board represented by public and private sectors, is responsible for submission of funding proposals. Global Fund activities are managed by the Secretariat. The Global Fund disburses funds to Principal Recipients (PRs), designated in-country organizations (governments, private entities, NGOs, etc.) chosen by the CCM to receive funding allocations. The Global Fund enters directly into grant agreements with the PRs, under which PRs are responsible for project implementation. The CCM oversees the progress of approved grant activities during implementation.
Global Fund staff oversees grants at the country level. Local Fund Agents (LFAs), usually private sector accounting firms hired by the Global Fund, provide financial oversight over the PRs. LFAs are responsible for the Global Fund's fiduciary risk management at country level. They provide the Global Fund Secretariat with the information

31. The issue of direct access will be central to discussions on the financial architecture for climate change. The GEF simply cannot continue to function as an operating entity of the financial mechanism for the UNFCCC, as it evolves into its post-Kyoto stage, if it is denied the potential to evolve along with the needs of the convention. The GEF has to have, like other bilateral and multilateral financial mechanisms, the capacity to provide direct access to qualified entities in recipient countries. Introducing direct access in the GEF would also deepen the concept of the GEF as a global partnership by embracing agencies, NGOs and countries as partners.

32. To introduce the concept of direct access in the GEF partnership, it is proposed that a pilot be developed and implemented during the first two years of GEF-5. At which point, there will be a mid-term review by the GEF Evaluation Office and a reassessment by Council on how to move forward. Piloting offers the opportunity to test the approach in a focused manner and to reflect on all risks, while gathering lessons from the experience. This section outlines some key principles and a process for granting direct access.

General Principles.

33. It is proposed that GEF projects in which there is very little procurement will be eligible for the direct access pilot, specifically: (i) preparation of national communications; (ii) reporting to the conventions: (iii) preparation of *National Plans for Generating Global Environmental Benefits*; (iv) projects to change legal, institutional and fiscal policies for the creation of an enabling environment; and (v) enabling activities.

34. The pilot will provide direct access to GEF resources to countries through one entity per country identified through the country's National Steering Committee and approved through a Council-approved accreditation process. These entities, termed GEF Accredited Entities, may be government agencies, regional organizations or other national institutions. These entities will have to meet minimum GEF fiduciary and other standards (GEF Management Standards), and follow all GEF policies and procedures with respect to their use of GEF resources and be accountable to the GEF Council. These entities will also bear the full responsibility for the overall management of the GEF-financed projects and programs under their responsibility. In addition, GEF Accredited Entities must be able to and agree to sign MOUs with the Secretariat for management of the project cycle and sign Financial Procedures Agreements with the Trustee for the transfer of funds.

35. The Secretariat will make arrangements for all financial, monitoring and reporting responsibilities to be handled. The Secretariat will present an assessment of the pilot for Council consideration in mid-2012 and a full report at the end of GEF-5.

Accreditation of Entities

36. Candidates for GEF Accredited Entity status will be approved through a Council-established accreditation process that will determine, among other things, whether the entity

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required to make grant management decisions. They regularly verify, assess and report on the program implementation by PRs and on program results.

meets the fiduciary and other standards established by the GEF Council (GEF Management Standards).

37. The accreditation process will be carried out by an independent, world-renowned international auditor reviewing the qualifications of the nominated entity and making recommendations to the GEF Council. The GEF Secretariat will administer the accreditation process and will be responsible for the selection, terms and conditions of the provision of services by the auditor.

38. The review of the nominated GEF Accredited Entity shall include an assessment of its ability to undertake procurement, project preparation, monitoring and evaluation, as well as financial management and shall include proper testing of the entity's financial systems and a control audit.

39. The GEF Council may choose to approve direct access status for entities that have been deemed to meet GEF Management Standards and any other Council- approved criteria by the evaluation of the independent auditor.

40. Once an entity has been accredited as a GEF Accredited Entity, it may function within the boundaries of the pilot program as a GEF Agency for eligible categories of projects, undertaken in the relevant recipient country. Unless otherwise decided by the GEF CEO or the recipient country, the accreditation of the GEF Accredited Entity will remain through GEF-5.

41. If the determination is that an entity under consideration does not meet the GEF Management Standards and is therefore ineligible for accreditation, the GEF Council shall refuse to accredit the entity as an implementing entity of the GEF for the Pilot Period. It may suggest that a GEF-financed capacity building activity be undertaken to strengthen the capacity of the entity and make it ready for a possible accreditation process in the future.

Secretariat Support during the Pilot Phase

42. For the entities participating in this pilot experience, it will be their first experience in accessing directly GEF resources. While some may be familiar, to varying degrees, with GEF project execution modalities, others may be working with the GEF for the first time. In addition, the nature of the pilot and modalities for its execution must be well understood by the entities. The Secretariat will handle all the planning, organize consultations, and provide technical assistance and deal with other capacity building needs of the entities.

43. There will be several levels of Secretariat support required in the piloting. In addition to planning, the first main activity will consist of a formal launch of the pilot process. This will require consultations with countries and potential entities interested in the participating in the pilot phase, as well as preparation of relevant documentation, including guidelines and other guidance documents and tools. The Secretariat will also develop accreditation procedures and rules and procedures governing the piloting and execution modalities.

44. Once the GEF Accredited Entities have been selected, their performance will depend on how well they understand the GEF, its procedures and mode of operations. To meet this goal, formal training sessions need to be organized on the basis of a capacity needs assessment of the

entities early in the process. The training sessions will provide information on the pilot phase, discuss key responsibilities of entities that access GEF resources, modalities for implementation, GEF financial management and fiduciary responsibility requirements, project cycle, project development and implementation, etc.

45. The Secretariat will ensure technical assistance is available to the Accredited Entities throughout the pilot period through a pool of consultants recruited for this purpose. Expected services from these consultants will include provision of support to assist and train key staff in the GEF Accredited Entities in project development and implementation.

46. To sustain the level and intensity of activities during the pilot period, the Secretariat will put in place proper tools for the pilot experiment. The coordination tasks will be handled as part of the new strategy of the Secretariats' External Team that is consolidating the Country Support Programme and the National Dialogue Initiative.

47. NGO and Foundations. The pilot can also provide direct access to GEF resources to International NGOs and/or foundations that have been accredited as GEF Accredited Entities through the Council-approved accreditation process. Once approved, they, too, will be able to function as GEF Agencies for categories of projects that are eligible under the direct access pilot.

48. Countries may also provide national NGOs with the ability to bring forward their own projects for GEF funding by building upon a successful GEF-3 pilot project.[4]

Performance Management and Supervisory System for Entities with Direct Access

49. The Secretariat will develop a performance management and supervisory system to review and supervise the performance of GEF Accredited Entities. It will:

(a) Conduct an upstream review to assess the potential entities capacity to implement the grant, prior to the formal accreditation process;

(b) Undertake site visits to monitor implementation performance and verify results;

(c) Provide inputs to improve implementation of activities;

(d) Undertake a mid-term and closure review; and

[4] GEF is currently supporting, through implementation by the World Bank and UNDP, a Medium-size project in Argentina (UNDP Arg/06/G38 "Support to the Decentralised Medium Grant Programme") that finances projects presented by national as well as local institutions (NGOs, foundations, universities, public and private research institutions…). This initiative has a simple design. It is implemented by a traditional GEF Agency, but it is run almost completely by a national committee with a secretariat that has oversight responsibilities. Through an open call for proposals, the Committee receives, appraises and approves project proposals on the basis of operational guidelines. Peer reviewers are solicited. An evaluation conducted in March 2009 shows that nineteen sub-projects have been approved with GEF funding of $2,267,198; these projects have provided an additional $6,529,796 in cofinancing. The sub-projects are currently located in fifteen provinces and are executed by 5 NGOs, 6 universities and 8 provincial government agencies. Eighteen of the approved sub-projects are under execution. SGP graduating countries would be particularly well-suited to build upon this GEF success story.

(e) Work with the Trustee to conduct ad-hoc assignments to support due-diligence requirements.

Monitoring and Evaluation of the Pilot Phase

50. It is essential that an effective monitoring system be established to document the experience and identify lessons to enable the Council to make an informed decision on how to proceed further with the conclusion of the pilot. To inform Council better and provide follow-up on decision making, the Secretariat will organize close monitoring of the pilot experiment to provide information on a number of key issues, including: (i) specific lessons learned; (ii) a review of the process established by the Secretariat; (iii) the minimum fiduciary standards; and (iv) an assessment of the performance of entities by type.

51. At the end of the pilot period, the Secretariat shall present to Council a full report on the results of the pilot phase. The report will, in particular, address the pilot phase GEF Accredited Entities' experience in project preparation, appraisal, monitoring and evaluation, and procurement, and make recommendations regarding the expansion or closure of the pilot experiment.

52. For all projects under implementation during the pilot phase, the GEF Accredited Entities will submit annual project status reports to the Secretariat at the completion of each fiscal year. The status reports will be based on current documentation template.

53. All completed projects implemented in the pilot phase will be subject to terminal evaluation by the Evaluation Office. Terminal evaluation reports will be submitted to the Council at the end of the pilot period.

Legal Status of the GEF

54. The ability of the GEF to undertake direct access is dependent on how the replenishment participants, GEF Council and ultimately GEF Assembly address the related legal questions that are articulated in detail in the section on Institutional and Legal Reform. Today, the World Bank is of the opinion that the GEF lacks the legal capacity to undertake direct access. Therefore, the steps that would need to be taken to provide the GEF with the requisite legal capacity to implement a direct access mandate are set forth for consideration in this replenishment process, as well (cf. below paragraphs 83 to 99).

RESOURCES FOR RESULTS – IMPROVING EFFECTIVENESS AND EFFICIENCY

55. As an institution with a partnership arrangement, the GEF has been in a constant mode of improving its effectiveness in achieving results, and enhancing its efficiency in delivering resources to recipient countries. Proposed reforms in GEF-5 under this reform platform include: (i) implementation of the GEF Results-based Management system; and (ii) refining the programmatic approach, including a streamlining of the project cycle.

Results-based Management

56. Results Based Management (RBM) has been on the GEF agenda for several years. It is codified in policy, embedded in strategy at the Focal Area level and helps to drive reporting. While these steps have generated well documented successes, a number of issues still hinder the GEF's ability to consistently report outcome level results, such as: (i) overemphasis on reporting and insufficient attention to employing information for management; (ii) difficulties in attribution; (iii) focus and attention on long term high-level results (impact) with less focus on immediate outcomes, outputs and other measures of performance that are good proxies or progress for achieving higher-level results. As a result, it has been difficult to show interim progress towards overall results, identify management issues and take corrective action.

57. RBM is being given a central place in GEF-5 strategy development. All focal area (and corporate program) strategies have been developed with results-frameworks that are integrated with the overall corporate results framework. An intense Secretariat-led monitoring process is also envisaged in GEF-5. Details are in GEF/R/5/15, *GEF-5 Programming Document*.

Refining the Programmatic Approach & Streamlining the Project Cycle

58. Since the early 1990s, the importance of embarking on a programmatic approach in GEF operations has been recognized and discussed by GEF partners, including countries, GEF Agencies, the GEF Secretariat and the Council. In 2008, the GEF Secretariat provided more clarity to the programmatic approach in a Council paper *"From Projects to Programs – Clarifying the GEF Programmatic Approach"*.

59. The advantage of a programmatic approach over a project-by-project approach is that it allows for: (i) shifting national economic sectors negatively affecting the global environment to a more sustainable path: (ii) enhancing opportunities to generate synergies across the focal areas of the GEF within the framework of national and/or regional sustainable development: (iii) increasing scope for catalyzing action, replication, and innovation; (iv) improving opportunities for maximizing and scaling up of global environmental benefits; (v) disbursing effectively and efficiently large-scale GEF resources to countries and regions without losing accountability and other MRV standards; and (vi) creating opportunities for interested donors and other partners, including the private sector, to invest additional and focused funding based on the scope of the program.

60. In the recent years, the GEF experienced an increase in program submissions to Council work programs. The current policy on programmatic approaches, however, still obliges the countries and agencies to go through the entire project cycle with projects financed under a program. There is neither delegated authority for the approval of certain steps in the project cycle nor does Council allow for setting aside a GEF funding envelope for an approved program for projects to draw upon.

61. As GEF moves into GEF-5, the eternal need to improve the efficiency and effectiveness of GEF operations calls for renewed efforts to streamline the project cycle and as a vital part of that process, the enhancement of the GEF programmatic approach.

Streamlining the Project Cycle

62. To further streamline the project cycle, it is proposed that the approval of full-sized projects (FSPs) be simplified by reducing Council involvement to one step (approval of the Project Information Form (PIF) as part of a Work Program) and delegating the endorsement of the full project document to the CEO. Once the CEO endorses the project, the GEF Agency may proceed to finalize the legal agreements with recipient countries, seek approval by their respective approval authorities, and begin implementation.

63. Medium-sized projects (MSPs) are already processed under the delegated authority of the CEO. For reasons of cost-effectiveness and reduce transaction costs, it is proposed that the GEF amount for MSPs be increased from $1 million to $3 million. The CEO will continue having the delegated authority to approve PIFs as well as the final project document.

64. The CEO will continue to have delegated authority for the approval of Enabling Activities and project preparation grants.

Strengthening the Programmatic Approach for Wider Application

65. The types of programmatic approach (PA) can be classified as: (i) country (ii) regional and (iii) thematic. The coordination of the parties involved in a program is an important step for the successful design and implementation of such program. Also, programs will be based on the GEF National Plans prepared by recipient countries. Each program has a GEF Lead Agency which has the overall responsibility for the implementation of the program. The CEO and the Secretariat will take the lead, working with recipient countries to define the overall scope of the program and to identify the GEF Lead Agency. The GEF Lead Agency will coordinate all the preparation work, including the consultation with various stakeholders, completion of a Program Framework Document (PFD) for CEO approval and a final Program Document for submission to Council approval through a work program. CEO will endorse the final Program Document upon Council approval of the work program, similar to the process for FSP.

66. To truly expedite the GEF project cycle for PAs while at the same time upholding the fiduciary responsibility of project/program oversight, the approval process of a PA can be classified into the following degrees of delegation of authority for approval of projects under the program:

(a) **Low:** Follows the regular GEF project cycle described above, Council approves the PIFs for projects supported under the program on a rolling basis, and delegates the endorsement of the full project document to the CEO. The set-aside program amount will be disbursed through individual projects once they have been endorsed by the CEO. This option would be open to all GEF Agencies.

(b) **Medium:** Delegated authority is given to the CEO for the approval of PIFs for projects under the program and their endorsement. Council will not have the opportunity to comment on either the PIF or the fully prepared project. The set-aside program amount will be disbursed through individual projects once they have been endorsed by the CEO. This option would be available to all GEF Agencies.

(c) **High:** When a program is submitted by one or more of the GEF Agencies that are multilateral development banks where an executive board approves their programs and projects, delegated authority of project approval under the program is given to the GEF Agency. Neither the CEO nor the Council will be involved in this approval process. The entire set-aside for the program is disbursed to the GEF Agency.

Results-based Management and Performance Monitoring

67. To ensure that projects or programs receiving GEF funding are progressing as planned and on track to achieve the expected global environmental benefits, the use of a results-based management framework and performance monitoring at the program level is critical. In line with the proposed revised GEF project cycle, a fully prepared Program Framework Document (PFD) will be submitted as part of the work program for Council approval. The results framework for the program would lay out program objectives, SMART outcomes, indicators and targets, and core outputs with targets, to allow for tracking program progress towards outcomes and for tracking process results. Process indicators would include targets for key performance measures, for example, disbursement rates, and milestones would be included to provide evidence that programs and projects supported under it are on track.

68. The GEF Secretariat will ensure the quality of the results frameworks and that a performance monitoring plan includes sufficient oversight and funding. It will also undertake performance monitoring at the program level. At CEO endorsement stage, all projects under a program will submit, apart from the regular documentation, a fully prepared Project Results Framework, aligned with the program objective and outcomes, GEF Strategic Goals and respective Focal Area objectives. The project results framework will need to clarify what this project will contribute to the program objective and outcomes.

69. Currently all Agencies submit on an annual basis a Project Implementation Review report (PIR) for each project in implementation more than one year. This process will apply to programs as well. The GEF Lead agency for a program will be obliged to submit a program implementation report to the GEF Secretariat on an annual basis. The Secretariat will review the PIR and the content of the report to better support the preparation of Annual Monitoring Report (AMR). The AMR will be submitted to Council as a status report and an analysis of portfolio and program implementation progress.

70. All projects and programs should plan for mid-term review and submit to the GEF Secretariat a Mid-term Review with progress on outcome and process results. For programs, depending on the degree of delegation of authority to the GEF Lead Agency, the mid-term review will have different requirements: when given **Low** and **Medium** delegation, the Agency will undertake a Mid-term Evaluation with internal independent evaluation staff. With a **High** degree of delegated authority, the Agency would be required to conduct an independent Mid-term Evaluation. In all cases a mid-term report would be submitted to the GEF Secretariat.

Strengthening the Funding Base

71. GEF-5 replenishment should be an increase in real terms as outlined in GEF/R.5/14, *Draft GEF-5 Programming Document*. Other reforms suggested to strengthen the funding base of the GEF are as follows: (i) replenish the Least Developed Country Funds (LDCF) and Special Climate Change Funds (SCCF) concomitantly with the GEF Trust Fund; (ii) introduce flexibility in the GEF Trust Fund Agreement so that interested Contributing Participants may contribute earmarked supplementary contributions between replenishment periods, and resolve governance issues related to the acceptance of resources from other potential contributors such as the private sector and foundations; and (iii) consider innovative financing mechanisms.

LDCF and SCCF Replenishment

72. In addition to the GEF Trust Fund, the GEF is now responsible (under mandate from the UNFCCC) to raise resources and manage the Least Developed Country Funds (LDCF) and the Special Climate Change Funds (SCCF). Resources pledged to these funds have been modest -- $175 million for the LDCF and $110 million for the SCCF until now – and all the resources have been committed. Besides being far below the demand from eligible recipient countries, resources have not been pledged and delivered with a consistent timetable.

73. Beginning with GEF-5, it is proposed that the LDCF and SCCF be replenished following a process and timetable similar to the GEF Trust Fund. Refer to GEF/R.5/12, *Draft LDCF and SCCF Programming Strategy for Adaptation* for details. Initiation of the LDCF and SCCF Replenishment process is proposed to begin at the June 2009 Replenishment Meeting.

Flexibility in the GEF Trust Fund

74. Since the restructuring of the GEF, the Trust Fund has been replenished on a four-yearly frequency on the basis of a well-defined replenishment process. Such an approach has been key to the evolution of the GEF, as Contributing Participants and other stakeholders have been able to identify critical reforms required for success of the GEF during each phase. The informal burden-sharing arrangements have been useful in providing the Participants with a framework for their basic and supplementary contributions.

75. The current arrangement, while providing a basic stability for the GEF Trust Fund, has also been somewhat limiting in that it does not provide room for Participants to contribute earmarked resources between replenishment cycles. There have been instances in the recent past, when Participants indicated availability of resources and willingness to contribute to the GEF Trust Fund between replenishment cycles, but have not been able to do so due to the arrangements of the Trust Fund.

76. It is proposed that the GEF-5 Replenishment Resolution and Trust Fund arrangements provide for receipt of supplementary resources (in addition to the resources agreed to during a replenishment process) between replenishment periods; at the discretion of the Contributing Participant, such resources be earmarked for specific purposes under the mandate of the GEF. Supplementary contributions shall not count towards the voting share in the GEF Council.

77. In addition to the above-mentioned reform in the Trust Fund arrangements, resolution needs to be reached on the governance issues (whether and how these donors will be included in the decision making process of the GEF, including participation in GEF Council meetings) related to receipt of contributions from the private sector and foundations.[5]

78. It is also proposed that the GEF Trust Fund consider fund management techniques, including hedging to manage the volatility resulting from currency fluctuations.

Innovative Financing Mechanisms

79. Over the last two decades, the GEF has operated with the same resource mobilization approach that was used when it was first set up. The burden-sharing key for determining donor countries' contribution was modeled after the International Development Association (IDA) distribution key loosely based on a country's GDP. Pledges to the GEF trust fund are allocated within the foreign affairs, finance or development cooperation budgets of individual countries. The GEF's resource base has however declined in real terms, despite the fact that demand for resources to meet global environmental challenges has increased dramatically, and Official Development Assistance has increased significantly since 2002.

80. Innovative financing mechanisms could be a way to help overcome the structural constraints that the traditional burden-sharing approach to fund raising has imposed on the GEF. The fiscal and economic adjustments being currently undertaken to deal with the global financial crisis actually provide opportunities to introduce growth patterns that are environmentally sound.

81. In addition to the standard replenishment process, resources could be raised for the GEF by contributions from countries that would take into account economic capacities and environmental footprint indicators. Such an approach would mirror the current discussion within the UNFCCC, e.g., Mexico has tabled a proposal that raising resources for international cooperation on climate change should be determined through the "adequate" use of three simple indicators: greenhouse gas emissions, population and gross domestic product (UNFCCC, Mexico Proposal). For the purpose of determining GEF Trust Fund contributions, indicators could be included that reflect other focal areas than climate change, such as land area per person, forest cover, and other factors.

82. There could be periodic amendments to the burden-sharing arrangement involving adjustments to the relative indicator weights in the calculation formula. If countries could also agree on a progressive scale of the assessment key, contributions could be set to automatically increase over the years. One advantage of an eco-based burden-sharing approach would also be that it could provide a stepping stone for bringing in emerging economies into the donor country group.

INSTITUTIONAL AND LEGAL REFORM

83. To implement many of the ideas articulated above, it will be necessary to make some institutional and other legal reforms at the GEF. Initially, the GEF was legally structured to

[5] This would necessitate an amendment of the GEF Instrument.

service a single trust fund and to serve as the financial mechanism for two conventions. But this structure has become increasingly constraining as the GEF now manages two additional conventions and other trust funds, and is considering additional changes to its future role. These developments call for a review of the GEF's existing legal structure. A more complex mandate requires a legal and governance framework that can enhance synergistic programming and results.

Changing International Environmental Landscape

84. GEF stakeholders are placing new demands on the GEF with increasing pressure, particularly in the context of a post-2012 climate change regime. In particular, recipient countries want the GEF to be more responsive to their needs and priorities, including by providing them with direct access to GEF resources. Many stakeholders would also like the GEF to respond more nimbly to the guidance of the conventions. On the other hand, some donors have expressed the desire for greater flexibility in making contributions to the GEFTF, and some also wish to place money in new funds separate from the GEFTF, but under the overall management of the GEF. Finally, in addition to the above demands being placed on the financial mechanism of UNFCCC, dramatic changes to the sources of multilateral financing for climate change are being considered that cannot be ignored by the GEF.

Evolving Relationship with the World Bank

85. An overarching issue impacting many aspects of the needed legal and institutional reforms is the relationship between the World Bank and the GEF. Under the GEF Instrument, the Bank has three distinct roles and relationships with the GEF: as Implementing Agency, Trustee and Host of the GEF and provider of its administrative support. These roles and relationships confer important but different responsibilities on the World Bank, such as the right, as Implementing Agency, to participate in the selection of the CEO, and the responsibility, as Trustee, to mobilize resources for the GEF.

86. The World Bank's responsibility to provide administrative support to the GEF has translated into the practice that all World Bank general policies and rules applying to trust funds are applied equally and without differentiation to the GEF. However, the functional independence of the GEF, as mandated by the Instrument, and the new responsibilities that the GEF has undertaken in response to the evolving demands of some multilateral environmental agreements, call for more flexibility within the administrative support arrangements of the Bank. For example, the rules of procedure of the Adaptation Fund, for which the GEF provides secretariat services, whose rules have been adopted by the Conference of the Parties, state that travel arrangements for the Board members should be made under UN travel rules. It is, therefore, incumbent upon the GEF to secure the administrative flexibility necessary to apply those rules on behalf of the Adaptation Fund. Also, there is no clear rationale why, in the field of human resources, the GEF should necessarily follow the World Bank rules on treatment of seconded staff from other governments and international organizations. Finally, there is no reason that the high level of transparency of the GEF, such as its policy for the publication of documents and audits, should be curtailed by the World Bank policies and rules.

87. Beyond the issue of administrative support, it is also clear that the World Bank's interests are not always aligned with those of the GEF, so that there is a clear and growing potential for conflict of interest for the Trustee and for the World Bank legal department (Legal Vice Presidency) in its role of legal advisor to the GEF. Since the establishment, within the World Bank, of a new set of climate change funds that have overlapping mandates with the GEF, the Trustee has been engaged in fundraising for competing funds. The World Bank's Legal Vice Presidency nevertheless continues to hold to the view that there cannot be any accommodation of the GEF's need for independent legal advice because the Bank retains ultimate responsibility for providing legal advice to all units of the Bank even though the GEF is not a member of the World Bank Group.

Proposed Reforms

88. The GEF Secretariat's suggested reforms to address the conflict of interest concerns and the new demands being placed on the GEF as financial mechanism for many major multilateral environmental conventions include:

(a) Conferring onto the GEF Secretariat the primary role for resource mobilization;

(b) Providing the GEF Council with flexibility to invest GEF trust funds' resources in a manner different from those applying to other trust funds administered by the Bank so as to maximize the GEF investment returns, taking into account its specific disbursement patterns;

(c) Providing the GEF Council with the ability to more effectively manage currency risks with the GEF trust funds, possibly through hedging;

(d) Recognizing the authority of the GEF Council to determine which rules apply to the GEF by requesting the Bank to exempt the GEF from the application of certain Bank policies and rules, absent a compelling reason to the contrary;

(e) Providing GEF funding directly to recipient countries instead of exclusively through the Implementing and Executing Agencies, as now provided in the GEF Instrument; and

(f) Allowing the GEF to retain its own legal advisor**.**

89. Some of these reforms may require changes to the structure of, or to, the rules relating to the administration of the GEFTF; some may require changes to the GEF Instrument; some may merely require changes to the practices at the GEF or to the administrative support arrangements that GEF currently has with the World Bank. A legal analysis prepared jointly by the GEF Secretariat and the Bank's Legal Vice Presidency examines the legal feasibility of reforms (a) through (e) above and is attached as Appendix 1.

Legal Personality and Capacity of the GEF

90. Since the restructuring of the GEF in 1994, there have been some differences of opinion over the exact legal status of the GEF, including the legal capacity of the GEF Secretariat to execute agreements and contracts. These differences of opinion appear to have arisen largely

because of the practice that has been followed by the World Bank under the administrative support arrangement: in the absence of a comprehensive agreement governing that arrangement, the policies and rules of the Bank have been fully applied to the GEF Secretariat and in relation to the administration of the trust funds managed by the GEF.

91. The GEF Secretariat believes that, both on the basis of the relevant terms of the GEF Instrument and the rules of international law and international practice, the GEF and the GEF Secretariat already possess all of the key elements of legal personality, including the legal capacity to sign agreements and contracts. This view is not shared by the Bank's Legal Vice-Presidency, which believes that the only way for the GEF to acquire legal personality is through the restructuring of the GEF to become a separate international organization or an organization constituted under national law. In light of this difference of opinion, the legal note prepared jointly by the World Bank's Legal Vice Presidency and the GEF Secretariat, attached as Appendix 1, does not discuss the alternative option of clarifying or confirming the GEF's legal personality simply by amending the GEF Instrument.

92. The GEF Secretariat believes that the question of GEF's legal personality, including its legal capacity to sign agreements and contracts, could be clarified or confirmed by a simpler process of amendment of the GEF Instrument. Such an approach was taken by the Parties to the Montreal Protocol in relation to the Multilateral Fund and by the Parties to the Kyoto Protocol in relation to the Adaptation Fund Board. Such a clarification or confirmation of the GEF legal personality would pave the way for many of the reforms outlined for GEF-5, including the provision of direct access to recipient countries, securing independent legal advice outside the World Bank, and obtaining more flexibility in developing rules for Trust Fund management.

Recommended Actions by Participants

93. Taking into consideration the need for the reforms outlined above, the legal analysis provided by the joint note of the World Bank Legal Vice Presidency and the GEF Secretariat, and the analysis of the legal consultant engaged by the GEF Secretariat, it is recommended that the GEF Instrument be suitably amended to recognize the legal personality of the GEF, and that the following actions and/or decisions also be taken by the Participants:

Conferring on the GEF Secretariat the primary role for resource mobilization

94. Recommended Action: Participants should recommend that the GEF Council take necessary action to vest resource mobilization responsibilities solely within the GEF Secretariat. As noted in the joint legal analysis of the World Bank's Legal Vice Presidency and the GEF Secretariat, this would require some amendments to the Instrument and its Annex B. The Instrument itself would need to be amended by dropping all references to the Trustee's resource mobilization responsibilities from paragraphs 10 and 20(e) of the Instrument, and paragraph 4(a) of Annex B to the Instrument. The attribution of responsibility for resource mobilization could be explicitly specified in a new subparagraph of paragraph 21 of the Instrument, unless the closing subparagraph (i) of paragraph 21, which authorizes the Secretariat to "perform any other functions assigned to the Secretariat by the Council", is deemed sufficient to achieve the same result.

Providing the GEF Council with flexibility to invest GEF trust funds' resources in a manner different from those applying to other trust funds administered by the Bank

95. Recommended Action: Participants should recommend to the GEF Council to request the Bank, as GEF Trustee, to:

(a) modify its trust fund investment policy to allow a tailor-made investment policy for the GEF that would be endorsed by the GEF Council; and

(b) seek, as necessary, the approval of the Bank's Executive Directors of such policy.

Providing the GEF Council with the ability to hedge GEF trust funds against currency risk

96. Recommended Action: If it appears during the replenishment discussion that hedging is the best technical solution to better protect the GEF Trust Fund against currency risks, Participants should recommend to the GEF Council that it requests the World Bank to seek the approval of the Bank's Executive Directors to allow the Trustee to engage in currency hedging transactions. As noted in the joint legal analysis of the World Bank's Legal Vice Presidency and the GEF Secretariat, this would require amendments to Annex B of the GEF Instrument.

Recognizing the authority of the GEF Council to determine which rules apply to the GEF

97. Recommended Action: Participants should recommend to the GEF Council to review, in the coming year, the various Bank policies and rules whose current application to the GEF raises inefficiencies or other concerns, with a view to developing GEF alternatives to those rules, where appropriate, and to requesting the Bank to exempt the GEF from the application of such policies and rules.

Providing GEF funding directly to recipient countries instead of exclusively through the GEF Agencies, as now provided for in the GEF Instrument

98. Recommended Action: Participants should recommend to the GEF Council to allow the GEF to disburse funding to other entities than the Implementing and Executing Agencies. This would require several changes in the GEF Instrument, in particular in paragraphs 2, 12, 22, 23 and Annex D to the GEF Instrument.

Allowing the GEF to retain its own independent legal advisor

99. Recommended Action: Participants should recommend to the GEF Council to explore ways to provide the GEF with an independent legal advisor.

Special Role for UNEP in the GEF Partnership

100. UNEP is unique in many respects among the GEF agencies. Its special role in the UN family has enabled the international community to successfully undertake many important global initiatives on the environment. For example, it spearheaded the key multilateral environmental agreements (MEAs) that regulate how Governments deal with the challenging threats and

opportunities related to the global environment. The GEF serves as financial mechanism to conventions under some of these agreements.

101. One of UNEP's greatest achievements, the establishment of the IPCC, shows how important it was for UNEP to lead the effort to bring to bear science-based approaches to inform international decision making. Here UNEP's leadership set a new precedent in the history of the United Nations. The work of the IPCC has transformed and informed the debate on the most important environmental issue of our time: climate change.

102. Addressing repeated concerns over the many fragmentations in the architecture that governs the global environment, UNEP launched its International Environmental Governance process (IEG)[6]. Informed by the work of UNEP, especially its policy analyses, global assessment activities, studies on the work of the MEAs and their interlinkages, the IEG process has proposed a package of key recommendations that are being acted upon at the United Nations.

103. One such recommendation involves UNEP's work linking science to policy. It is this role, in particular, which makes UNEP's Governing Council/Global Ministerial Environment Forum (GC/GMEF) the platform within the United Nations where major issues critical to the state of the global environment are debated. The GC/GMEF has on many occasions reaffirmed UNEP's original mandate, and there continue to be calls for UNEP to give greater attention to scientific assessment, policy advice, early warning, further development of environmental law, and promotion of international cooperation and action at the global and regional levels. UNEP's scientific work is also contributing to enhance our understanding of ecosystems and preparedness for emerging environmental changes.

104. One of the best examples of UNEP's scientific outreach, the Millennium Ecosystem Assessment, brought together a range of actors and agencies to shed light on the capacity of natural systems to support humanity. It proved both innovative and far-sighted with its authoritative and credible findings.

105. Another key recommendation of the IEG process addresses strengthening and building synergies among the MEAs. Recent achievements of the MEAs, including more public awareness on issues such as biodiversity and climate change can be linked to this process. Success with MEAs has special implications for the GEF.

[6] Initiated at the 21st session of the UNEP Governing Council/Global Ministerial Environment Forum (GC/GMEF) agreed in February 2001, the international environmental governance process did a comprehensive policy oriented assessment of existing institutional weaknesses as well as future needs and options for strengthened international environmental governance, including the financing of UNEP. An intergovernmental group of Ministers (IGM), or their representatives, undertook the assessment through a set of thorough consultations. The Johannesburg Plan of Implementation, called for the full implementation the IEG recommendations that included strengthening the role and financial situation of UNEP, improve role of the environmental management group and coordination among MEAs and more focus on capacity building and technology support.

106. In 2007, UNEP embarked on a reform process to make better use of the existing structures and create a more effective, efficient and results based organization. It developed a nine-milestones Medium-term Strategy for 2010-2013[7].

107. The strategies fall into three major categories.[8] One element deals essentially with strengthening policy level engagements, especially coordination and institutional strengthening within the UN, whether they are to bring coherence within the UN system or to promote informed decision making. Another relates to management issues and the strengthening of UNEP, especially in its capacity building and technology support activities, its financial base and its result based approaches. The third, enhancing UNEP's science base, is potentially the one that will determine the most how effectively UNEP achieves its overall objectives, especially in the GEF.

UNEP's role in GEF

108. UNEP played a catalytic role in the successful establishment of the GEF. It became, alongside the World Bank, and UNDP, one of the three Implementing Agencies of the Facility.

109. The GEF Instrument, in spelling out the areas of particular emphasis[9] for each of the GEF Implementing Agencies, describes UNEP's role as follows:

> "UNEP will play the primary role in catalyzing the development of scientific and technical analysis and in advancing environmental management in GEF-financed projects. UNEP will provide guidance on relating the GEF-financed activities to global, regional, and national environmental assessment, policy frameworks and plans, and to international environmental agreements. UNEP will also be responsible for establishing and supporting the Scientific and Technical Advisory Panel (STAP) as an advisory body to the GEF."

110. The past replenishment cycles of the GEF have all reflected UNEP's contribution alongside the other Implementing Agencies. Unlike previous ones, the strategic approach to GEF-5 stands out in that it is aiming to achieve transformational impacts. In this context, it is essential that UNEP's central and prominent role as the key partner that links scientific and technical analysis to activities of the GEF across the entire partnership be reasserted and fully

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[7] (1) Enhancing the role of the GC/GMEF as the UN high level environment policy forum, (2) Further embracing UNEP's role as the environment programme of the United Nations, (3) Enhancing UNEP's capacity to deliver the Bali Strategic Plan on Technology Support and Capacity Building, (4) Enhancing UNEP's science base, (5) Making full use of the United Environmental Management Group (EMG), (6) Promoting greater coherence between the work of UNEP and UNEP MEA secretariats, (7) Strengthening the financial situation of UNEP, (8) Becoming a more results based organisation, (9) Moving towards a strategic presence model

[8] <u>A - Coordination and Institutional strengthening within the UN</u>: [(1) Enhancing the role of the GC/GMEF as the UN high level environment policy forum, (2) Further embracing UNEP's role as the environment programme of the United Nations, (5) Taking full use of the United Environment Management Group (EMG), (6) Promoting greater coherence between the work of UNEP and UNEP MEA secretariats)]; <u>B – Management issues and stregnthening of UNEP</u>: [(3) Enhancing UNEP's capascity to deliver the Bali Strategic Plan on Technology Support and Capacity Building, (7) Strengthening the financial situation of UNEP, (8) Becoming a more results based organisation, (9) Moving towards a strategic presence model]; and <u>C – Science to policy support</u>: [(4) Enhancing UNEP's science base]

[9] GEF Instrument, Annex D, para. 11

operationalized. The GEF partnership will benefit greatly starting in this cycle with a strategy for UNEP that is well-aligned to that of the GEF in a manner that provides for UNEP to fulfill its mandate effectively as envisaged in the GEF Instrument. UNEP's medium term strategy for 2010-2013 provides a golden opportunity to make this happen. It is a perfectly fit for what is needed.

111. The GEF-5 approach would consist of building on UNEP's activities and strengthening its strategic focus that links science to policy. It would deepen UNEP's previous portfolios in the areas where it has clear comparative advantage, especially relating to enabling activities and the development of actions plans and studies that focus on helping countries fulfill their convention obligations. This approach would also help UNEP maintain emphasis on global and regional environmental assessments (e.g., development of atlases on ecosystems, state of the global environment, international water, lakes, biodiversity, atmosphere, etc.), the identification of emerging environmental threats and formulation of appropriate policy responses.[10] These are key areas where achievements would be central to the success of GEF-5 and where no other agency is as qualified.

112. In GEF-5 also, there will be some essential core activities, particularly those related to the normative function, that are linked to global policy and outreach for which UNEP has a strong comparative advantage.

113. Having UNEP focus on its unique role within the GEF partnership would allow it to rise above the competition among agencies for on the ground types of activities that require strong in country implementation. In addition, UNEP's limited field operational capacity would become less of a drawback as the resource allocation system is potentially strengthened in GEF-5.

114. In view of the strategic goals of GEF-5 and the key considerations as outlined with respect to UNEP's contribution to it, it is proposed to give a special status to UNEP with the following broad areas of engagement.

115. <u>Global, regional, and sub-regional scientific and technical analysis and assessment of environmental issues and policy options</u>. UNEP will build on its rich history to advance implementation of environmental objectives, enhance global and regional environmental cooperation and continue to assist governments in obtaining environmental information for decision-making. It will further work on developing and applying national and international environmental law while bridging major groups and governments in policy development and implementation processes. Example of projects to emulate can include UNEP's past institutional strengthening activities, such as the establishment and reinforcement of clearing house mechanisms, capacity building, and the creation of networks. Development of strategies and action plans, national communications, promotion of compliance with MEAs and development of best practices and dissemination of lessons learnt could all be reinforced. Impacts studies and needs assessments projects that have been part of UNEP's previous portfolio should be included

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[10] As of April 2009, the GEF data base showed that a total of about 504 projects were implemented by UNEP. Most national projects (about 325) are enabling activities (reporting to conventions, studies, capacity building…). A good number are regional (93) and global (86) projects. Several projects have been undertaken on scientific assessment (about 70). UNEP has also implemented some projects that can be considered of investment and other on the ground types (132)

in this package. Special emphasis should be put on environmental assessments, modelling and development of early warning tools.

116. Initiatives of global significance and scope. GEF resources should equip UNEP to continue spearheading major initiatives to respond to emerging environmental issues. Undertaking such activities has the potential to guide and provide insights into appropriate actions by the international community, including the GEF. For exemple, part of GEF support to UNEP in GEF-5 could be tailored towards initiatives such as UNEP's Global Green New Deal. This bold proposal of UNEP aims to catalyse a change in the path of our current economic development toward a more sustainable model. The short term objective is to make a major contribution to reviving the world economy, saving and creating jobs, and protecting vulnerable groups and in the medium term to reduce carbon dependency and ecosystem degradation, putting economies on a path to clean and stable development. The medium to long term goal is to further sustainable and inclusive growth, achievement of the MDGs. Support to UNEP will help it do further work, including consultations and facilitation, further development of the initiative and communication to diverse stakeholders. Advice to Governments and in-depth studies on the status and prospects of key green sectors by major regions and country groupings will also have to be conducted. It may well be that the GEF would choose to support similar initiatives of UNEP during GEF-5.

117. Intergovernmental Platform on Biodiversity and Ecosystem Services (IPBES). It is internationally recognized that the IPCC has been responsible for both the resolution of important scientific questions related to the nature and extent of the global warming problem, as well as making those contributions permeate effectively the policy debate at the highest levels. However, the science-policy interface for biodiversity and ecosystem services is fragmented inside and outside of the CBD, impeding a similar incremental process like that of the IPCC, dedicated to this equally pressing global problem. Therefore, it is considered that policy making at all levels can be further strengthened if they are supported by credible, legitimate and salient emerging scientific findings and recommendations which are provided by an intergovernmental science-policy platform, building on the GEF-funded Millennium Ecosystem Assessment findings. To follow on this need, the last CBD COP agreed to explore the establishment of an intergovernmental platform on biodiversity and ecosystem services (IPBES). The twenty-fifth session of the UNEP Governing Council/Global Ministerial Environmental Forum adopted the decision 25/10 on the intergovernmental science-policy platform on biodiversity and ecosystem services, which accords UNEP the mandate to continue to facilitate future discussions on strengthening science-policy interfaces on biodiversity and ecosystem services. In GEF-5, supporting this emerging initiative could become a major contribution of UNEP, including the associated efforts that UNEP has began in GEF-4, such as the International Commission on Land Use Change and Ecosystems, which aims at bringing together parliamentarians around the plight of biodiversity and ecosystem services.

118. Tracking tools for identifying impacts of global actions. With GEF resources, UNEP could lead the development and implementation of a wide range of tracking tools that are currently lacking and desperately needed. For example, such instruments can track all kinds of financial mechanisms and flows that are being established in the frameworks of the MEAs, especially UNFCCC, to improve indicators on the health of the global environment and to capture other institutional and regulatory changes associated with how the world deals with the

issue of climate change. Other specific effort such as UNEP's successful work on the phasing out of ozone depleting substances and its work on energy efficiency and promotion of renewable energy would also be considered.

119. Management of STAP and enhancement of its work. In view of the scientific and technical nature of a great portion of its work, UNEP has contributed to the establishment of a number of scientific advisory groups of which it acts as convener, the most prominent being the IPCC. Others include the Ecosystem Conservation Group, the Joint Group of Experts on the Scientific Aspects of Marine Environment Protection and the United Nations Scientific Committee on the Effects of Atomic Radiation, the Technology and Economic Assessment Panel under the Montreal protocol. UNEP will use this leveraging power to strengthen the work of STAP with contribution from these groups.

120. Biosafety. The Cartagena Protocol on Biosafety seeks to protect biological diversity from the potential risks posed by living modified organisms resulting from modern biotechnology. GEF's strategy, closely aligned with UNEP's central role in assisting countries on this objective, is to build capacity to implement the CPB, and prioritizes the implementation of activities that are identified in country stock-taking analyses and in the COP guidance to the GEF, in particular the key elements in the Updated Action Plan for Building Capacities for the Effective Implementation of the CPB, agreed to at the third COP serving as the Meeting of the Parties to the CPB (COP-MOP-3). In GEF-5, UNEP could take on this theme on behalf of the GEF, as it has been hosting the Biosafety Clearinghouse process already.

121. Access to Genetic Resources and Benefit Sharing (ABS)**.** Implementation of the CBD's third objective on access to genetic resources and benefit sharing has been slowed by the lack of capacity of most key stakeholder groups. Of particular note is the difficulty in most countries to establish a common understanding between providers and users of genetic resources and the associated traditional knowledge of indigenous and local communities. It is expected that soon after the initiation of the GEF-5 cycle, the negotiations of the international regime will be completed, and the GEF will fully elucidate project support provided under this objective in consultation with the CBD Secretariat. Given its comparative advantage, UNEP could become the principal conduit for the GEF to fulfill its obligations with the CBD on its third major objective.

122. To embed within the GEF partnership an explicit recognition of its unique role, there could be an agreement at the replenishment on the principle for giving special consideration to UNEP. The position would enable it spearhead in a more strategic manner the development of scientific and technical analysis and in advancing environmental management in GEF-financed projects as called for by the GEF instrument. This would be reflected in the GEF-5 Programming for 2010-2014. The secretariat would work with UNEP on the basis of their medium term strategy.

123. UNEP would be required to submit a yearly program for the consideration of Council. Regular assessments of UNEP's work would be conducted to provide Council with an overview of how much progress is being made.

124. This proposal, if approved, will require some strategic decisions on how UNEP and GEF secretariat interact and how UNEP's overall work relates to that of the other agencies. The interagency framework may have to be technically strengthened. Similarly, such a role for UNEP would lead to filling some gaps that exist today in the availability of tools to inform and guide the rest of the world. Modalities will therefore have to be worked out to enable the results and findings of UNEP's scientific and technical work inform the rest of the GEF family and the wider community. Equally important will be effort to reflect UNEP's contribution to future strategic direction and approaches of the GEF.

Expanded Role of the GEF Secretariat

125. A restructured GEF would have a significant impact on both the volume and the type of work for the Secretariat, which already, under GEF-4, had to scale up its communication efforts and intensify its relationships with recipient countries as a result of the RAF and the focus on programmatic approaches. The Secretariat would continue to focus on providing a strategic and results framework while the GEF Agencies would develop and implement programs and projects.

126. The role of the Secretariat is expected to expand in line with the reform agenda outlined in this document and the programming approach outlined in GEF/R.5/14. The additional roles, at the minimum are:

(a) Engagement with recipient countries to prepare GEF National Plans;

(b) Management of the Country Support Program;

(c) Implementation of the RBM framework and establishing a rigorous portfolio monitoring system;

(d) Developing resource mobilization capacity to raise funding from a variety of sources, in collaboration with the Trustee;

(e) In-house legal capacity to receive advice not influenced by conflicts of interest as under the current arrangement.

127. An appropriate provision for the corporate budget is made in the *Draft GEF-5 Programming Document* in line with the above-mentioned directions.

Appendix 1: JOINT LEGAL NOTE BETWEEN THE WORLD BANK LEGAL VICE PRESIDENCY AND THE SECRETARIAT ON RESTRUCTURING OPTIONS FOR THE GEF

1. This note has been prepared jointly by the GEF Secretariat and the Bank's Legal Vice Presidency to analyze the legal feasibility of the following options for legal, institutional and governance reforms at the GEF:

(a) a primary role for the GEF Secretariat in resource mobilization;
(b) investment of GEF trust funds in a manner different from those applying to other trust funds administered by the Bank;
(c) hedging GEF trust funds against currency risk;
(d) exemption of the GEF from the application of specific Bank rules and policies; and
(e) providing GEF funding directly to recipient countries instead of doing so exclusively through the GEF Agencies, as now provided in the GEF Instrument.

2. The purpose of this note is limited in that it only analyzes the legal feasibility of such reforms and the legal steps that would be required to implement them, if such reforms are agreed to by the GEF Participants, the GEF Council, the Bank and other relevant entities. This note does not reflect any views on the desirability or appropriateness of such reforms, and the views expressed herein are subject to further consideration and approval, as necessary and appropriate, by the GEF Participants, the GEF Council, the Bank (the Management and, in some cases, the Executive Directors) and other relevant entities.

3. Such reforms would raise considerations under:

(i) the terms of the GEF Instrument (the Instrument);
(ii) the terms governing the Bank's role as Trustee of the GEF Trust Fund, which are set out primarily in Annex B to the Instrument; and
(iii) the Bank's administrative support arrangements currently in place for the GEF Secretariat, which are largely in the nature of accumulated Bank practice, and the Bank's policies and rules applicable to Bank staff and administration. (There is no written agreement or memorandum of understanding between the GEF Council and the Bank setting out the specific terms of such an arrangement.)

4. As a consequence, the feasibility and modalities for implementing such reforms may vary depending on whether the reforms would involve considerations under the GEF Instrument itself, Annex B of the Instrument or the Bank's administrative support arrangements for the GEF Secretariat. As discussed in this note, some reforms would require decisions only by the Bank. Others would require amendments to Annex B of the Instrument, while still others would require amendments to the Instrument itself. In addition, depending on the position of the Bank regarding such reforms and other considerations, the GEF Participants and other relevant entities may decide that the GEF should be reconstituted as an independent legal entity, either as an international organization affiliated with the Bank, as an international organization that is not affiliated with the Bank, or as an entity organized under the domestic law of a State. This note

also discusses the processes for establishing such an entity and its effects on the current GEF Instrument and related agreements.

5. Amendments to the Instrument require the approval by consensus by the GEF Assembly upon the recommendation of the GEF Council, after taking into account the views of the Implementing Agencies and the Trustee and also require adoption by the Implementing Agencies and the Trustee in accordance with their respective rules and procedural requirements (which, at the Bank, require the adoption of the amendment by the Executive Directors).[11] Amendments to Annex B require the approval of the Bank's Executive Directors, with the agreement of the GEF Council and the Implementing Agencies.[12]

6. This note will now discuss in detail the specific legal steps or procedures that would be needed to implement the reforms listed in paragraph 1.

(a) Resource Mobilization

7. The GEF Instrument provides that the Bank shall act as Trustee of the GEF Trust Fund, in accordance with Annex B to the Instrument, which sets forth the Trustee's role and fiduciary responsibilities.[13] Annex B to the Instrument states that the responsibilities of the Trustee include, among others, the "mobilization of resources for the Fund."[14] Although the Instrument vests this responsibility in the Trustee, the Instrument provides that the Trustee's responsibility for resource mobilization for GEF replenishment is to be initiated at the request of the GEF Council, which, in turn, is responsible for reviewing the availability of resources in the GEF Trust Fund and cooperating with the Trustee to mobilize resources.[15] The Instrument states that the GEF Secretariat is to "provide the Trustee with all relevant information to enable it to carry out its responsibilities."[16] In practice, replenishment meetings have been co-chaired by the GEF CEO and the Trustee, with the GEF Secretariat having responsibility for policy and programming matters and the Trustee for financial matters. In addition, beyond the functions specified in the Instrument, the Instrument authorizes the GEF Secretariat to perform any other functions assigned to it by the GEF Council.[17]

8. Any decision to vest resource mobilization responsibilities solely or primarily in the GEF Secretariat would require amendments to the Instrument and Annex B. The Instrument itself would need to be amended by dropping all references to the Trustee's resource mobilization responsibilities from paragraphs 10 and 20(e) of the Instrument, and paragraph 4(a) of Annex B to the Instrument. The attribution of responsibility for resource mobilization could explicitly be

[11] Paragraph 34 of the Instrument.
[12] Annex B, paragraph 14.
[13] Paragraph 8 of the Instrument provides that the "new GEF Trust Fund shall be established, and the World Bank shall be invited to serve as the Trustee of the Fund . . . . In serving as the Trustee of the Fund, the World Bank shall serve in a fiduciary and administrative capacity, and shall be bound by its Articles of Agreement, by-laws, rules and decisions, as specified in Annex B."
[14] Annex B, paragraph 4(a).
[15] See paragraphs 10 and 20(e) of the Instrument.
[16] Paragraph 21(h) of the Instrument.
[17] Paragraph 21(i) of the Instrument.

specified in a new letter of paragraph 21 of the Instrument, unless the closing letter of paragraph 21, whereby the Secretariat performs "any other functions" assigned to it by the Council, is deemed sufficient to this effect.

(b) Investment of GEF Trust Funds

9. Annex B of the Instrument provides that the Bank, as GEF Trustee, is responsible for the "financial management of the Fund, including the investment of its liquid assets . . . ."[18] Annex B also provides that the "Trustee shall exercise the same care in the discharge of its functions under this Annex as it exercises with respect to its own affairs . . . ." and that the "Trustee shall apply such considerations of economy and efficiency as may be required for the investment and disbursement of funds from the GEF, consistent with the rules of the Trustee and the decisions of the Council." [19] Annex B provides further that "[p]ending transfers to the Implementing Agencies or an executing agency, the Trustee may invest the funds held in the Fund in such form as it may decide, including pooled investments . . . ."[20]

10. From a legal perspective, the Bank, as GEF Trustee, could establish separate guidelines and criteria for the investment of funds in the GEF Trust Fund. The Bank changed its investment policies for trust funds several years ago to establish two different investment pools. An additional pool was recently created to address the needs of the International Finance Facility for Immunisation. The assets of Bank-administered trust funds are usually invested in one of the two pools depending on the disbursement profile of the trust fund. Trust funds with shorter disbursement periods are invested in one pool (consisting mainly of shorter-term investments), while trust funds with longer disbursement profiles are invested in another pool (which includes longer-term investments) with the goal of generating increased returns. The Bank could modify its trust fund investment policy to set up an additional pool, tailored to the GEF, with such tailored investment policy being subject to endorsement by the GEF Council, taking into account the potential risks as well as potential benefits of such a policy. Such investment policy could provide that the GEF Council be more actively engaged in investment decisions, such as through the creation of an investment committee. Such a tailored investment policy would not require any amendment to the GEF Instrument or to Annex B to the Instrument. Depending on the nature and extent of any proposed changes in the investment guidelines, approval by the Bank's Executive Directors may be required, however, as the Bank's investment policies (for its own funds as well as trust funds) are approved by the Executive Directors.

(c) Hedging GEF Trust Funds against Currency Risk

11. The GEF is exposed to currency risk, given that contributions to the GEF are made over time by participants in various currencies while commitments and disbursements of funds from the GEF are made in US Dollars. There is no provision in the Instrument or Annex B that authorizes the Bank, as GEF Trustee, to engage in currency hedging transactions. The Bank is not currently authorized to enter into hedging transactions except with respect to (1) its own

[18] Annex B, paragraph 4(d).
[19] Annex B, paragraph 5.
[20] Annex B, paragraph 8.

operations, including equity, liability, and investment hedging, and (2) intermediation services for IDA, borrowing member countries, and two external clients (IFFIm and CCRIF). Since hedging transactions create balance sheet risk for the Bank, all such activities are subject to approval by the Executive Directors, either by category or on a case-by-case basis. Accordingly, for the Bank to take on a hedging intermediation function for the GEF, the Bank's Executive Directors would need to be satisfied that the resulting financial exposure to the Bank would be acceptable and approve the engagement. Issues such as the certainty and timeliness of the payments to be hedged and provisions for unwinding of derivatives transactions in the event of non-payment would be relevant for this analysis. For example, in the case of IFFIm, a AAA-rated institution, the underlying donor agreements constituted legally binding, unconditional, and irrevocable obligations to make grant payments on fixed dates, and expressly included indemnification provisions for any additional hedging-related costs in the event of payment delays. Hedging intermediation would thus require endorsement by the GEF Council, approval by the Bank's Executive Directors, and amendment to Annex B of the Instrument. There would be no need for changes to the GEF Instrument itself.

(d) Exemption from Specific Bank Rules and Policies

12. Under the GEF Instrument, the GEF Council and the GEF Secretariat have a number of prerogatives. For example, pursuant to paragraph 20, the Council's powers include directing the utilization of GEF funds; appointing the CEO, overseeing the work of the Secretariat, and assigning specific tasks and responsibilities to the Secretariat; reviewing and approving the administrative budget of the GEF; and exercising such other operational functions as may be appropriate to fulfill the purposes of the GEF. The GEF Instrument also provides that the GEF Secretariat "shall be supported administratively by the World Bank and shall operate in a functionally independent and effective manner."[21] All staff of the GEF Secretariat hold appointments to the staff of the Bank, and, to date, the Bank has not granted exceptions to the application of its Staff Manuals rules and Administrative Manual statements (AMSs).

13. The Staff Manual is derived from the Principles of Staff Employment adopted by the Executive Board. The Principles embody the general terms and conditions of employment with the Bank and its affiliates, and set out their duties and obligations and those of their staff members. The Staff Manual includes the Staff Rules that are promulgated by Management and that are applicable to all staff members of the World Bank Group. In addition to the Staff Manual, there exist Human Resources Policies and Practices, which serve to flesh out the Staff Rules but cannot derogate from them. The Administrative Manual, on the other hand, contains policies, procedures and standards concerning the overall management and administration of the World Bank Group. Particular units or departments within the Bank, usually GSD and ISG, are responsible for the content of individual AMSs.

14. Staff Manual principles and rules, like AMSs, apply to all staff members alike, and there is no precedent to creating different regimes of Staff Manual principles and rules or AMSs. Any variation in particular instances to accommodate GEF's concerns would require the agreement of

[21] Paragraph 21 of the Instrument.

the particular policy content owner within the Bank, on the premise that the GEF has made a compelling business case to justify its request for a variance.

(e) Direct Funding to Recipients

15. The Instrument does not allow direct funding to recipients. Under the Instrument, the Implementing Agencies perform a central role in the provision of GEF resources to recipients. The Instrument provides that the "GEF shall operate, on the basis of collaboration and partnership among the Implementing Agencies, as a mechanism for international cooperation for the purpose of providing new and additional grant and concessional funding to meet the agreed incremental costs of measures to achieve agreed global environmental benefits in [specified] focal areas."[22]

16. The Instrument further provides that the Implementing Agencies of the GEF, namely UNDP, UNEP and the Bank, are accountable to the GEF Council for their GEF-financed activities and for the implementation of the operational policies, strategies and decisions of the GEF Council within their respective areas of competence and in accordance with an interagency agreement to be concluded on the basis of the principles of cooperation set forth in Annex D to the Instrument.[23]

17. The Instrument does authorize the Implementing Agencies to make arrangements with other entities for GEF project preparation and execution: "The Implementing Agencies may make arrangements for GEF project preparation and execution by multilateral development banks, specialized agencies and programs of the United Nations, other international organizations, bilateral development agencies, national development institutions, non-governmental organizations, private sector entities and academic institutions, taking into account their comparative advantages in efficient and cost-effective project execution."[24]This provision does not, however, authorize the GEF itself, through the GEF Secretariat, to make arrangements with such other entities for GEF project preparation and execution, since the provision only authorizes the Implementing Agencies to make such arrangements.[25]

18. GEF resources are provided under a joint work program among the Implementing Agencies. The GEF Secretariat coordinates the preparation of and determines the content of such joint work program, which is subject to review and approval by the GEF Council.[26] Under

[22] Paragraph 2 of the Instrument.
[23] See paragraph 22 of the Instrument.
[24] Paragraph 28 of the Instrument.
[25] Under the expanded opportunities policy at the GEF, executing agencies now "make arrangements for GEF project preparation and execution by multilateral development banks, specialized agencies and programs of the United Nations, other international organizations, bilateral development agencies, national development institutions, non-governmental organizations, private sector entities and academic institutions." However, these executing agencies serve as an intermediary between the funder and the recipient, much as do the Implementing Agencies.
[26] See paragraphs 20(c) and 29 of the Instrument.

Annex B, the Trustee is authorized to provide transfers only to Implementing Agencies or executing agencies on the basis of the work program approved by Council.[27]

19. Amendments to the Instrument and to Annex B would be necessary to confer legal authority on the GEF, to be exercised through the GEF Secretariat, to provide funding directly to recipients instead of channeling the funds through the Implementing Agencies or the executing agencies.

20. If the Instrument were to be amended to authorize the GEF to provide funding directly to recipients, this new power could be operationalized in one of two ways:

(a) Without having to further amend the Instrument or restructure the GEF to endow the GEF with legal personality, the Council could, by a delegation of authority to the CEO, authorize the CEO to sign direct funding agreements on behalf of the GEF, and the Bank could provide a corresponding delegation of signature authority to the CEO.

(b) Another approach would be to amend the Instrument to endow the GEF, including the GEF Secretariat, with the legal capacity to sign legally binding contracts and agreements. This approach is favored by the GEF Secretariat because it would cover not only the direct funding agreements but also any other agreements and contracts that may need to be entered into by the GEF Secretariat in the exercise of its functional independence in the future.

21. Under either approach, it would be important to address satisfactorily the question of liability. Given that the GEF Secretariat is "functionally independent" of the Bank and that such funding would not be directed by the Bank, nor provided by the Bank acting in its capacity as Implementing Agency, there would not be a factual basis upon which to impute liability to the Bank itself in such cases. However, as the GEF Secretariat is housed within the Bank, one cannot exclude that either the GEF Participants individually or the Bank, or both, could be held liable for losses or damage resulting from the actions of the GEF Secretariat and the agreements entered into by the GEF Secretariat on behalf of the GEF.

22. While it would not be possible to protect either the Bank or the GEF Participants fully from third party liability (for example, from a claim by an individual that he suffered damage or injuries as a result of activities financed by the GEF), it would be possible to mitigate this risk by including appropriate limitation of liability and indemnification provisions in the Instrument and any agreements entered into by the GEF Secretariat. For example, the Instrument could be amended to provide that neither the GEF Participants nor the Bank would have any liability under any agreements entered into by the GEF Secretariat and that any recourse under those agreements would be limited to the funding available in the GEF Trust Fund. The agreements entered into by the GEF Secretariat could include similar provisions. The Instrument could also be amended to provide that GEF Participants and the Bank would be entitled to indemnification from the GEF Trust Fund for any losses and expenses incurred by them with respect to agreements entered into by the GEF Secretariat.

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[27] See paragraphs 6 and 8 of Annex B.

RESTRUCTURING THE GEF AS A SEPARATE LEGAL ENTITY

23. If the above reforms cannot be addressed satisfactorily by changes to Bank rules applicable to the GEF or the GEF Secretariat, and changes to the GEF Instrument, an alternative option would be for the GEF to be re-constituted and established as a separate legal entity, in which case the GEF could then operate in accordance with its new governing instrument and with its own staff members in accordance with its own policies and procedures. Under this option, the World Bank could also continue to provide administrative support to the GEF Secretariat and function as the Trustee.

24. For the GEF to acquire legal personality, the GEF could be established either as (i) an international organization or (ii) a legal entity under laws of a host State. If the GEF were to be established as an international organization, it could be established either as an affiliate of the Bank (similar to IFC or MIGA) or as a separate unaffiliated institution.

International Organization

25. The term international organization as used here means an organization established by a treaty or other instrument governed by international law and possessing its own international legal personality. Each one of the Bank and the other affiliates forming part of the World Bank Group (IDA, IFC, MIGA and ICSID) is an international organization.

26. The process to confer international legal personality on the GEF would need to be considered in detail, which is beyond the scope of this note. However, it can already be stated that the process would largely be similar whether the GEF were to be established as an international organization affiliated with the Bank, or as an unaffiliated international organization. In principle, creating the GEF as an international organization would require the termination of the current Instrument and the preparation of a new constituent instrument for the GEF. This preparation could be done in more than one way. A negotiating conference of interested countries and/or international organizations could be convened and attended by plenipotentiaries with the power to negotiate the instrument. Alternatively, the Bank could take the lead in preparing the instrument (in consultation with interested parties), and then the Board of Governors could invite eligible countries to become parties to the newly established organization. The latter approach was followed in the adoption of the instruments establishing IDA, IFC, ICSID and MIGA.[28]

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[28] In the case of MIGA, for example, almost three years elapsed between the starting of the work that would lead to the adoption of the Convention and the drafting of the documentation for its operations. In fact: the President's memorandum informing the Executive Directors that Bank staff would prepare a paper outlining the main features of a possible multilateral investment insurance scheme was circulated in January 1984; the draft MIGA Convention was drafted in the summer 1984; the campaign connected with the creation of MIGA was launched in the fall 1984; a year later, in September 1985, the Executive Directors approved the draft MIGA Convention and transmitted it to the Board of Governors; a month later, in October 1985, the Board of Governors opened the MIGA Convention for

27. The new constituent instrument would be expected to deal with matters including the purposes of the GEF, membership in the GEF, organization and management, status, privileges and immunities and requirements for entry into force, but could in many ways mirror the existing instrument. If the new organization were to be an affiliate of the World Bank Group, precise decisions would obviously have to be made regarding its linkage with the Bank.

Legal Entity under Laws of Host State

28. It would also be possible to establish the GEF as a legal entity under the laws of a host state and for the host state (and possibly other states) to agree to confer privileges and immunities on that entity and its staff. This is the approach that has been followed, for example, by the Global Fund for AIDS, Tuberculosis and Malaria, which was established as a Swiss foundation.[29] It is conceivable that the GEF could be established as a non-profit corporation under the laws of a state **(**e.g., Delaware**)** in the United States or the District of Columbia and for the United States to recognize the GEF as a public international organization, at least for domestic purposes. Alternatively, a two-step process could be envisioned whereby the GEF is first organized as a domestic legal entity and then is converted into an international organization. The following sections describe these options, using the examples of the Global Fund and the Global Development Network.

29. The Global Fund to Fight AIDS, Tuberculosis and Malaria (the "Global Fund") is an example of a funding entity that is organized as a Swiss foundation. The Global Fund is a foundation organized under the laws of Switzerland by Deed of Incorporation and By-laws, with its principal office in Geneva. The Global Fund is governed by a Foundation Board which, among other duties, sets the Fund's policies and strategies, operational guidelines, work plans and budgets for the Fund's Secretariat; makes funding decisions; and validates eligibility criteria for projects.[30]

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signature; and, a year later, in September 1986, a committee of representatives of the signatory states met to prepare draft by-laws, rules and regulations required to initiate MIGA's operations.

[29] Swiss foundations are regulated under the Swiss Civil Code (Articles 80-89 of the Swiss Civil Code). The foundation is the traditional legal form for charitable institutions in Switzerland. A foundation is essentially an incorporated pool of assets which are to be used in accordance with the wishes of the founder. The wishes of the founder can be altered in only certain limited circumstances. Swiss foundations have only beneficiaries, no members. The affairs of a foundation are administered by a board of directors which may delegate its functions to others. Swiss foundations are subject to government supervision. If GEF were to become a Swiss association, such supervision would likely be undertaken by Switzerland's federal authorities. Distinct from the foundation, the Swiss association (governed by Articles 60-79 of the Swiss Civil Code, as a legal form that can be used for activities as diverse as the organization of political parties, special interest and charitable purposes) has members and is governed through meetings of the members and the board of directors. Overall, the association structure is more flexible that the foundation structure. Unlike foundations, associations are not subject to government supervision. The International Committee of the Red Cross is one example of an organization formally set up as a Swiss association.

[30] The Foundation Board consists of 20 voting members and four non-voting members. The voting members include seven representatives from developing countries, eight representatives from donors and five representatives from civil society and the private sector. The non-voting members are representatives from the World Health Organization, UNAIDS, the Bank (as trustee for the Global Fund) and a Swiss citizen.

30. The Global Fund Secretariat is responsible for managing the day-to-day operations of the Global Fund. Among other duties, the Secretariat organizes the review of grant applications and executes grant agreements with recipients of funding from the Global Fund. The Global Fund is only a financing instrument, not an implementing entity. In each country where the Global Fund provides financing, a Country Coordinating Mechanism ("CCM") is responsible for submitting proposals to the Global Fund. Proposals are then reviewed by a Technical Review Panel, which is an independent team of experts appointed by the Foundation Board.

31. The CCM proposes one or more Principal Recipients ("PR") at the country level to be legally responsible for program results and financial accountability for the use of funds by sub-recipients. The Global Fund enters into grant agreements with the PRs. Before disbursing funds, the Global Fund assesses that the proposed PR's implementation arrangements fulfill certain minimum requirements. As the Global Fund does not have a presence outside of Geneva, it contracts with local fund agents which (i) assess that the proposed PR has the capacity to assume financial and programmatic accountability for the grant funds; and (ii) provide independent oversight and verification of program progress and financial accountability throughout the grant period.

32. The Bank is the trustee for the Global Fund. As such it receives contributions from donors, invests the contributions pending disbursement and disburses funds to grant recipients at the direction of the Global Fund. The Bank's role as trustee is limited. In particular, the Bank has no involvement in the supervision of the use of the funds by grant recipients.

33. There is a headquarters agreement between the Global Fund and Switzerland pursuant to which Switzerland recognized the international juridical personality and legal capacity in Switzerland of the Global Fund. That agreement also provides certain privileges and immunities in Switzerland for the Global Fund, its directors and its staff, including certain immunities from search and seizure, legal process and taxation. The Global Fund has also been granted privileges and immunities in the United States pursuant to the International Organizations Immunities Act.

34. The Global Fund generally does not enjoy privileges and immunities in the countries where the proceeds of its funding are used. If the GEF were to follow this model, this could have implications for the GEF if it were to adopt a different operating structure from the Global Fund (especially if it were to provide funding other than grants or wished to have its own staff actively involved in monitoring funding in recipient countries.)

35. Another option that GEF may consider in choosing to become an independent legal entity is the creation of the GEF as a U.S. non-profit corporation incorporated in one of the states (e.g., in D.C. or Delaware). Once incorporated (usually in the form of a corporation, trust or an association), the non-profit may have a Board of Directors and the usual officers of a company, namely, a President, Secretary, Treasurer and staff.

36 Another example of an initiative which has made the transition to become an international organization is the Global Development Network ("GDN"). GDN works with developing country researchers and policy research institutes to support the generation and

sharing of world-class policy-relevant research on development, helping to strengthen capacity in the process.

37. GDN was initially founded in 1997 as a network of researchers and policy institutes. In the beginning GDN was housed as a unit within the Bank. In March 2001, GDN moved out of the Bank and was established as a non-profit corporation, officially called the Global Development Network Inc. ("GDN Inc"), incorporated in Delaware.

38. As a non-profit corporation, GDN Inc has its own By-laws which provide for two classes of membership, including paying persons and organizations. GDN Inc has a Board of Directors, a President, Secretary and Treasurer. The latter three officers are responsible for managing the day-to-day affairs of GDN Inc. GDN Inc has the status of a 501(c)(3) entity,[31] meaning that it is tax exempt as a charitable and educational organization. GDN Inc also has the status of a Section 509(a)(1) public charity, reflecting its intention to solicit funds from a broad base of public sources, including predominantly (foreign) governments.

39. In 2005, at its Sixth Annual Global Conference held in Senegal, five countries Egypt, India, Italy, Sri Lanka and Senegal - signed a Charter initiating the process for GDN to become a public international organization.[32] GDN's purposes are similar to the purposes of GDN Inc., namely to support policy-oriented research in the social sciences in order to promote economic development through collaboration between research institutions. GDN's Charter entered into force on February 25, 2008. It has been signed by seven states, of which three have ratified the Charter. In 2005, GDN moved its headquarters to New Delhi, India. A headquarters agreement was subsequently signed in 2008 between GDN and the Indian Government.

40. As a public international organization, GDN consists of an Assembly, a Board of Directors, a President and staff. The Assembly consists of UN member states and other public international organizations. The Board of Directors has responsibility for managing and directing GDN's overall operations. The President is the chief operating officer of the GDN and supervises staff and day-to-day matters.

Effect on Current Instrument

41. Regardless of the legal form of a restructured GEF, the establishment of the GEF as a separate legal entity would have an impact on the current structure of the GEF. For example, as was noted earlier, the GEF Instrument would likely need to be terminated, or at least substantially revised, at the time the new legal entity is established. The GEF Trust Fund would likely also need to be terminated and a new trust fund established. Legal arrangements would need to be concluded for the transfer of the existing assets of the GEF Trust Fund to the new trust fund.

[31] Section references are to the U.S. Internal Revenue Code of 1986, as amended.
[32] At this stage, GDN has retained the existence of GDN Inc. as its Washington presence.