Environmental Financing: Function and Coherence of Financial Mechanisms in International Environmental Agreements*

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I. Introduction: The Development of Financial Mechanisms

1. Objectives of the Study

Financial mechanisms must be considered as the greatest challenges of worldwide comprehensive protection of the environment.[1] The importance of environmental funding within the framework of international environmental agreements is reflected by the frequent decisions of treaty organs, in which they constantly develop and improve their formal financial arrangements. The main questions guiding this study and, consequently, constituting the background against which the discussion of issues and the conclusions must be viewed are the following: "Which elements does environmental financial assistance include?", "What functions are attributed to environmental financial mechanisms?", and "How can treaty-specific mechanisms and "green" development aid be brought into coherence?"

This article focuses on the body of international institutional and substantive law concerning financial assistance, mainly within the scope

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1 W. Franz, "Appendix: The Scope of Global Environmental Financing – Cases in Context", in: R.O. Keohane/ M.A. Levy (eds), *Institutions for Environmental Aid*, 1996, 367 et seq.

of international environmental agreements. In this respect the functions of financial mechanisms, their institutional setting and operation will be compared and evaluated. Since the coherence of financial mechanisms is a crucial factor for their effectiveness, special attention will be given to the issue to what extent different mechanisms overlap or collide with one another or with "green" aid. In this context the extent to which overseas development assistance (ODA) is subject to compliance with international environmental law is a closely related aspect.[2] In accordance with the guiding issues of this study, the considerations how different instruments and financial institutions might form a coherent and viable framework for funding of environmental objectives and how the role of overseas development aid should be defined in long-term environmental financing, are focused on.

2. Historical Overview

The relationship between the protection of the environment and the promotion of development has been subject to discussions and negotiations of the international community for the last thirty years and, yet, remains controversial.

One aspect of the development of environmental financial assistance must be seen in the gradual "greening" of general development aid and the respective allocating institutions. While traditionally overseas development assistance has at its core the provision of financial resources directed at the alleviation of poverty by development, the consideration of environmental objectives within development aid goes back to the late 1980s. At that time public awareness rose, when it became apparent that projects funded by development aid had most severe negative effects on the environment. First attempts of the IBRD, commonly known as the World Bank, to introduce environmentally sound policies as a reply to growing criticism were accused of superficial "green painting".[3] Despite a growing number of more comprehensive approaches to ecologically sustainable development assistance by the World Bank and other institutions, as exemplified for example by the

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2 P. Sands, *Principles of International Environmental Law*, Vol. I, 1995, 727.

3 J. Werksman, "Greening Bretton Woods", in: P. Sands (ed.), *Greening International Law*, 1993, 65 et seq.

Lomé-Conventions[4] and the latest Cotonou-Convention[5] agreed upon between the European Community and the African, Caribbean and Pacific states, the greening of development aid is an ongoing process that has not yet come to a satisfying conclusion.

Concerning the other main tier of environmental funding, the provision of treaty-specific resources for environmental purposes,[6] the most significant development has taken place over the last decade of the 20th century. Although different forms of financial tools can also be found in environmental instruments preceding the 1992 UN Conference on Environment and Development (UNCED), the discussion at the time of the Earth Summit reached a turning point concerning various aspects related to environmental financial assistance.

One of the key concepts emerging during the Rio Conference refers to capacity building in the form of financial and technology transfers, environmental education and training as well as the transfer of human, legislative or administrative capabilities.[7] Capacity building, is by its very nature, closely related to modern forms of financial assistance, since the developing countries' lack of capacity for environmental activities can only be met by commitments of the industrialised world to transfer resources. To promote the establishment of the necessary resources for capacity building the — non-binding — Rio Declaration commits the signatories to provide for new and additional financial resources as well as technical and technological assistance for developing countries.

Another related outcome of the Rio process that has changed the approach to the provision of financial resources dedicated to environmental protection is the principle of common but differentiated respon-

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4 See for example the ACP-States – European Economic Community: Fourth Lomé Convention, *ILM* 29 (1990), 783 et seq.

5 Partnership Agreement between the members of the ACP Group of states and the European Community and its Member States 2000 (Cotonou-Convention), accessible at: <http://europa.eu.int/comm/development/cotonou/agreement_en.htm>, last visited 31 December 2001.

6 While all financial transfers are based upon bi- or multilateral agreements, the term "treaty-specific" relates to multilateral environmental agreements that establish financial mechanisms *inter alia* to promote their objectives.

7 R. Wolfrum, "Means of Ensuring Compliance with and Enforcement of International Environmental Law", *RdC* 271 (1998), 7 et seq., (117); see also para. 37.1. of Agenda 21 for a definition of capacity building.

sibilities.[8] According to this principle the developed states are now under an obligation to recognise the consequences of their contribution to present environmental degradation. The acknowledgement of specific responsibility is a major underlying principle of the industrialised worlds' recent commitment to financial transfers earmarked for sustainable development and environmental capacity building.

While it is in this context usually understood that the UNCED also marks a recent development from voluntary commitment towards compulsory contributions, it must be noted that the first funding mechanism in an international agreement, the World Heritage Fund under the 1972 UNESCO Convention Concerning the Protection of the World Cultural and Natural Heritage (World Heritage Convention),[9] already establishes a mixed system of compulsory and voluntary contributions (article 15 para. 3 lit. (a)). Yet one must recognise that its characteristics, such as the possibility to opt out of obligatory contributions,[10] are distinct from more recent financial mechanisms. Some advanced treaty-specific mechanisms concluded during the Rio process go as far as to specifically oblige developed States parties to an agreement to provide for financial, technical and technological resources for developing States parties, linking this obligation to the compliance by the recipients in a *quid-pro-quo* relationship.[11] In fact, the linkage of environmental obligations to the provision of financial assistance from developed countries is one of the major features in the development of modern international legal techniques in treaties.[12]

As a final observation concerning the underlying philosophies of the financial mechanisms' development, special attention must be given to a shift of paradigms in the field of enforcement of international law. Envi-

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8 See principle 7, Declaration of the UNCED (Rio de Janeiro), *ILM* 31 (1992), 874 et seq.: "[...] In view of the different contributions to global environmental degradation, states have common but differentiated responsibilities. The developed countries acknowledge the responsibility that they bear in the international pursuit of sustainable development in view of the pressures their societies place on the global environment and of the technologies and financial resources they command."

9 *ILM* 11 (1972), 1358 et seq.

10 Article 16 para. 2 World Heritage Convention.

11 See e.g. article 20 para. 4 Convention on Biological Diversity, *ILM* 31 (1992), 818 et seq. *Quid-pro-quo* provisions to some extent repeal the common opinion that there are hardly any reciprocal obligations in international environmental law.

12 Sands, see note 2, 12.

ronmental law has recognised the unfeasibility of enforcement by confrontational means in relation to states lacking capability to comply with obligations. Consequently, rather recently, a non-confrontational economic approach based upon compliance assistance and control has evolved that has contributed to the modern focus on systematic financial and technological transfers.

To conclude this overview it must be noted that, from a historical point of view, it is difficult to observe clearly distinct steps of development leading to modern forms of financial mechanisms in environmental agreements. Since different forms of treaty-specific mechanisms as well as "green" overseas development assistance coexist, the development has, in evolutionary terms, not been linear but a diversification of varieties. Although there are tendencies towards certain functions and means in environmental treaties, there is still no instrument that exemplifies "the modern financial mechanism". Despite the basic underlying considerations of modern financial mechanisms that emerged as a result of the Rio process, financing agreements are still concluded in various forms reacting to the specific functions, needs and the political situation. However, taking into account a changed space- and time-frame regarding their aims, objectives and tools,[13] modern environmental agreements generally envisage a balance of environmental protection, economic and social development that should, particularly, be induced by their provisions on financial mechanisms.

II. Potential Objectives of Financial Mechanisms

Particularly in regard to the potential functions performed by financial mechanisms, this article discusses a variety of different linked, but also potentially diverging, expectations that can be attributed to financial assistance in the environmental context. While none of these aspects can be considered to claim exclusive predominance, a thorough analysis of the potential objectives is valuable to gain profound understanding of the interrelations of financial assistance mechanisms and to be able to give recommendations for their future development.

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13 P. Sand, "Trusts for the Earth: New International Financial Mechanisms for Sustainable Development", in: W. Lang (ed.), *Sustainable Development and International Law*, 1995, 167 et seq.

1. Compliance Assistance: Incentives for Environmental Protection

One of the main general functions of financial mechanisms and technical assistance provided by environmental agreements is implementation and compliance assistance to developing States parties. Compliance assistance has the broader motive of promoting global environmental protection by establishing incentives, i.e. market based economic instruments, for sustainable behaviour concerning the issue addressed by the respective agreement. While technical assistance is an explicit or implicit aim of many — not only environmental — agreements, the explicit purpose of enabling and ensuring compliance is mainly a characteristic of environmental treaties.[14]

Financial aid is only one aspect of compliance assistance and control[15] and is an integral part of the broader issue of capacity building. While capacity building is crucial to ensure compliance with an agreement, this approach requires that a state has already become a party to the agreement. Equally important is the need for capacity building to enable a state to enter an environmental regime, before mechanisms of compliance assistance can be initiated. Already the first steps of formal implementation require capacity to build institutions, establish and adopt regulations and to provide for the necessary financial and human resources to establish national plans and measures.[16] A comprehensive approach to capacity building concerning implementation and compliance assistance also involves the strengthening of the non-governmental sector.[17] In fact, the involvement of the private sector is of specific importance,[18] since incentives in environmental law rely heavily on the economic decision of the private individual within the framework pro-

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14 See A. Handler Chayes/ A. Chayes, *The New Sovereignty*, 1995, 197 et seq.

15 On the variety of compliance and enforcement mechanisms see Wolfrum, see note 7, 7 et seq.

16 See I. Shihata, "Implementation, Enforcement, and Compliance with International Environmental Agreements", *Geo. Int'l Envtl L. Rev.* 9 (1996), 37 et seq., (43 et seq.).

17 L. Gündling, "Compliance Assistance in International Environmental Law: Capacity-Building Through Financial and Technology Transfer", *ZaöRV* 56 (1996), 796 et seq., (800).

18 See M. Bothe, "The Evaluation of Enforcement Mechanisms in International Environmental Law", in: R. Wolfrum (ed.), *Enforcing Environmental Standards: Economic Mechanisms as Viable Means?*, 1996, 13 et seq., (18).

vided by the state, thus shifting the focus of environmental regulation further away from state administration.

The usage of incentives as a means of implementation and compliance assistance has increased over the last decade as a consequence of the shift from confrontation and enforcement towards conciliation and assistance.[19] Sanctions, i.e. the "stick" in the "sticks and carrots" metaphor, are still generally perceived as viable and necessary mechanisms of enforcement of law. Yet in environmental law on the international, regional[20] and national level, the "carrot" has proved very effective. Economic incentives as opposed to sanctions can be better adapted to the specific needs and capabilities of the non-compliant state, promoting compliance, while observing economic rationales like cost-effectiveness, efficiency and the issue of externalities.[21] While on the national level incentives are often used to protect the environment beyond legal (minimum) standards, on the international level the incentive is to join a legal regime without having to bear the full financial burden.

In the international context, confrontational means such as trade sanctions or withdrawal of privileges[22] can force developing states out of an agreement. Modern non-compliance procedures are forward- rather than backward-looking,[23] trying to prevent breaches of the agreement instead of punishing the non-compliant party. This approach gains particular weight when taking into account that confrontational measures can only be effective if states do not grant political priority to the aims addressed by the agreement, i.e. lack of will or diligence instead of lack of resources.

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19 An example for this development is found within the regime on ozone depletion, where the COP shifted the focus from trade restrictions to assistance, see J. Werksman, "Trade Sanctions under the Montreal Protocol", *RECIEL* 1 (1992), 69 et seq.

20 In particular the EC promotes a shift from command and control instruments towards economic instruments, see J. Scott, *EC Environmental Law*, 1998, Chapters 2–3.

21 On the economic background for incentives see S. Schuppert, "Economic Incentives as Control Measures", in: F. Morrison/ R. Wolfrum (eds), *International, Regional and National Environmental Law*, 2000, 861 et seq.

22 See E. Brown Weiss, "Understanding Compliance with International Environmental Agreements", *University of Richmond Law Review* 32 (1999), 1555 et seq., (1584 et seq.), for a discussion of different coercive measures.

23 G. Handl, "Compliance Control Mechanisms and International Environmental Obligations", *Tul. J. Int'l & Comp. L.* 5 (1997), 29 et seq., (34).

This consideration can be further exemplified regarding the free-riders problem. Free-riders are those states standing outside a regime benefiting from its achievements without contributing to the costs. One must, however, differentiate between deliberate free-riders, i.e. those that might be "persuaded" by sanctions to join and contribute to the costs, and involuntary free-riders that, although not unwilling to join, lack the capacity to contribute. One of the lessons learnt in environmental law is that among the primary reasons for non-compliance is the incapacity of states to meet commitments.[24] Actual unwillingness to comply with an agreement is considered rare, since generally states do not become parties to agreements they have no desire to comply with. However, recent studies contradict an assumption that usually states comply with international law.[25] When focussing on states considered to lack diligence, one must also take into account that many developing states face much more basic and fundamental (environmental) problems than the developed world.[26]

Although the discussed rationale for incentives promotes the shift towards non-confrontational means of enforcement, this must not lead to the conclusion that pressure should be avoided in all cases, e.g. in those rare cases where States parties, despite financial assistance, remain non-compliant. The challenge is rather to establish a system that offers "nuanced measures"[27] and hence solutions for different actors and degrees of diligence, supplementing confrontational means of enforcement with assistance for those many countries in need of capacity building.

While the preceding considerations have focussed on compliance assistance for substantial obligations, concerning the complex processes of compliance control, usually involving several institutions, activities and actors on different levels, [28] the need for financial aid to developing

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24 The other two reasons being the incertitude of standards and the inflexibility of treaties in the face of changing circumstances, see P. Sand, "Institution-Building to Assist Compliance with International Environmental Law: Perspectives", *ZaöRV* 56 (1996), 774 et seq., (775), with further references.

25 See Brown Weiss, see note 22, 1559 et seq.

26 Gündling, see note 17, 797.

27 Brown Weiss, see note 22, 1589.

28 Regarding the different institutions and their functions see W. Lang, "Compliance Control in International Environmental Law: Institutional Necessities", *ZaöRV* 56 (1996), 685 et seq., (687 et seq.).

countries is equally relevant. Most new environmental agreements provide for monitoring and reporting requirements to supervise implementation and compliance. In fact, monitoring is crucial to assess whether a state is complying substantially with the commitments as opposed to mere formal compliance, i.e. the establishment of only the legal requirements.[29] While no or weak implementation by ineffective legislation can lead to weak compliance, strong legislation can be equally ineffective, if not enforced.[30] Again, compliance with control obligations that are essential to achieve an effective international system of environmental protection depends upon institutional and human resources and puts additional pressure on developing countries' budgets, particularly in the face of a growing number of environmental treaties.[31] Yet not only the multitude of agreements adopted over the last decades, but especially the more and more detailed regulations and the growing technical sophistication make it impossible for developing countries to implement and comply with all requirements without additional assistance.

2. The Compensatory Elements of Financial Assistance

Concerning a compensatory function of financial mechanisms two elements, the compensation for the over-exploitation of natural resources by the industrialised world on the one hand and the compensation for internationally agreed restrictions that interfere with developmental aims on the other, can be distinguished. The two main questions attached to a compensatory objective are: "For which costs are developing countries compensated?" and "Why are they compensated for these costs?" The first question relates to the issue of incremental costs, while the second leads to the discussion of the principle of common but differentiated responsibilities.

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29 For good definitions of "compliance", "implementation" and "enforcement", see Shihata, see note 16, 37.

30 H.K. Jacobson/ E. Brown Weiss, "Strengthening Compliance with International Environmental Accords", in: P.F. Diehl (ed.), *The Politics of Global Governance*, 305 et seq., (306).

31 The World Heritage Fund for example also provides for assistance to comply with the duty to submit periodic reports on the status of World Heritage sites.

Simplified, incremental costs are understood to be those extra costs that arise from the implementation and compliance with an agreement. Once an agreement is being implemented, the costs arising from restrictions or the adaptation to new technologies create difficulties for many countries lacking expertise as well as financial and technological resources. To make the issue of compensation for incremental costs more difficult, there is no commonly recognised interpretation as to which particular extra costs can be referred to as "incremental costs"; a failure that becomes especially apparent in the relationship between the Global Environment Facility (GEF) and environmental conventions, because the GEF's and the respective COP's opinions might differ. With regard to the Framework Convention on Climate Change (FCCC)[32] the GEF has, for example, defined incremental costs as the difference between the full cost of the measures taken and the sum of the costs of the least expensive way to deliver an equivalent economic benefit plus the short-term benefits to the local economy that would result from the proposed measure.[33]

To control the extent of costs which developing countries might claim to be incremental costs eligible for compensation, conventions relate to the "agreed" incremental costs. However, exactly such an agreement is often lacking for those treaties using the expression. Consequently, the issue of incremental costs is still one of the central difficulties when dealing with financial mechanisms and the first introductory question remains to some extent unanswered.

The second question why financial mechanisms *inter alia* intend to compensate for costs is easier to address. Based upon the broader principle of equity in general international law,[34] the principle of common but differentiate responsibilities finds its primary manifestation in the provisions on financial resources in environmental agreements.[35] Its second part, the differentiation of responsibilities, is the main underlying principle for a compensatory element within mechanisms for trans-

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32 *ILM* 31 (1992), 849 et seq.

33 GEF, Working Paper 4, *Implementing the FCCC, Incremental Costs and the Role of the GEF* (1993), 31.

34 See P. Sands, "International Law in the Field of Sustainable Development: Emerging Legal Principles", in: Lang, see note 13, 53 et seq., (63).

35 J. Werksman, "Consolidating Governance of the Global Commons: Insights from the GEF", *Yearbook of International Environmental Law* 6 (1995), 27 et seq., (47).

fer of financial and technological resources.[36] While the principle acknowledges that responsibilities for the environment and its safeguarding must be shared by all states, it also refers to the industrialised world as the main cause of present environmental damage, resulting in a differentiated i.e. greater responsibility. One main expression of this increased responsibility is the establishment of mechanisms for compensation for those restrictions imposed on developing states that are a result of environmental degradation caused by developed nations.

The industrialised world has gained its economic development from unrestricted exploitation of natural resources and pollution of the environment. It can, neither from an ethical nor a political point of view, deprive the developing world of the same chances to development. Compensation as conditionality for compliance with environmental agreements by developing states is a mechanism that prevents the so-called "eco-imperialism".

In fact, as far as restrictions dictated to developing countries today shall help reduce damaging effects of developed countries' legacies, equity requires that any commitment will be met by compensation. The regime on the protection of the ozone layer is a good example. For the reason of their long-term destructive capacity those ozone depleting substances destroying the ozone layer today, have been emitted during the economic boom in industrialised countries in the last decades. The financial arrangements under the regime take account of that situation. In the field of pollution and its effects, for example emissions of ozone depleting substances or greenhouse gases, the element of responsibility also corresponds to the polluter-pays-principle.

While recent agreements explicitly take account of common but differentiated responsibilities, even older agreements already take into consideration different degrees of capability to comply with commitments. Phrases such as "according to their scientific, technical and economic capabilities"[37] refer to developing countries without explicitly mentioning them. The general acknowledgement of limited capabilities

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36 Common but differentiated responsibilities are also understood to be an important underlying principle of compliance assistance, however, Gündling, see note 17, 801 et seq. perceives assistance to be an alternative to the application of the principle. Yet, this consideration shows the close linkage between different functions attributed to financial mechanisms.

37 See for example article 2 of the Convention for the Protection of Marine Pollution by Dumping from Ships and Aircrafts, London Dumping Convention of 1972, *ILM* 11 (1972), 1294 et seq.

of certain states does, however, not assign responsibilities. Although the principle of common but differentiated responsibilities has its roots in the basic understanding of different capabilities and needs, its substantial statement refers to the distinct degree of responsibility.[38] Consequently the principle goes much further than the references to limited capabilities and cannot be considered to find an expression therein.[39] Only in so far as agreements prior to UNCED have established incentives and subsidies for some of the incremental costs, one might speak of a crystallisation of these provisions in the present principle of common but differentiated responsibilities.[40]

3. Financial Mechanisms as a Supplement to Development Aid

While the institutional interrelations of financial mechanisms and "green" development aid and a comparison regarding their main functions and structures are subject to in depth discussion below, the following paragraphs specifically relate to the question of whether it is one potential objective of financial mechanisms to interact with development aid. Concerning the potential objective that financial mechanisms might supplement development aid, different aspects, the strengthening of development aid and the establishment of conditionalities, must be distinguished.

Concerning the strengthening of development aid, the theoretical ideal and the factual situation differ. Theoretically, if those resources allocated to financial mechanisms fulfilled the commitment of new and additional resources, resources for environmental protection are not "subtracted" from development aid. In combination with a strategy of cooperation between both tiers of funding, pressure on overseas development assistance to provide for specific environmental resources could

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38 As a result the constantly repeated use of the phrase "possible and appropriate" or "in accordance with its capabilities", e.g. in article 20 para. 1, the Convention on Biological Diversity, refers to different economic capabilities only, whereas the more specific provisions on incremental costs, technology transfer and benefit sharing reflect the common but differentiated responsibilities.

39 Differently N. Michels, *Umweltschutz und Entwicklungspolitik*, 1999, 65, who considers the references to limited capabilities to be an expression of common but differentiated responsibilities.

40 Sands, see note 2, 51.

be eased, because the additional resources would perform that function. In fact, however, that expectation has not yet been met by the contributions of the donor states to the different means of environmental mechanisms on the one hand and development assistance on the other. Despite the commitment to additional resources, the increase of the financial burden by obligatory contribution to ecofunds has been accompanied by a fall of financial aid in the ODA context.[41] The target for overseas development assistance as reaffirmed by Agenda 21 to be 0.7% of the gross national product is still not met by the majority of donor states.

To link development assistance more closely to the compliance with international environmental standards, another potential objective relating to a supplementation of development aid by financial mechanisms concerns the establishment of conditionalities. To strengthen the overall coherence of environmental funding and to promote developing countries' compliance with environmental standards, one model could be to link the eligibility for development aid to the status as a compliant States party to an environmental agreement. To avoid unduly pressure, the implementation and compliance with the respective convention must be supported by the treaty-specific financial mechanism. Hence, theoretically, a three step procedure could be established: to obtain developmental assistance a state would have to become a States party to an agreement, its compliance with the treaty would be assisted by the financial mechanism and the final status of a compliant party would result in the eligibility for development assistance. While this model might be viable to more effectively achieve international environmental aims, it is politically unfeasible. The prevailing view in the developing world strongly rejects the establishment of conditionalities in the described manner. This opinion can be based upon the claim to an alleged — customary — right to development that is irreconcilable with such conditionalities and the need to defend the developing world against any form of eco-imperialism. The reproach of eco-imperialism is particularly likely in a scenario that links two originally unrelated subjects, i.e. compliance with an agreement and eligibility for development assistance, to force developing states to adhere to Northern environmental standards.

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41 R. Lake, "Finance for the Global Environment: the Effectiveness of the GEF as the Financial Mechanism to the Convention on Biological Diversity", *RECIEL* 7 (1998), 68 et seq., with reference to an OECD report notes that ODA dropped by US$ 8 billion between 1991 and 1996.

To a limited extent a comparable approach is provided for by the specific eligibility criteria of the GEF as the financial mechanism to the Convention on Biological Diversity [42] and the FCCC. Only States parties to the agreements qualify for GEF funding in the respective focal area and, in a further step, then qualify for World Bank co-financing arrangements.[43] In the first step of this scenario the issue is different, because the status as a States party is made a conditionality to qualify for funding under the financial mechanisms of that very treaty.

Financial incentives to grant global environmental issues a higher political priority, even if the transfer is dependent upon the ratification of the respective agreement, must not be regarded as interfering either with a potential right to development or with the principle of state sovereignty, since in the absence of sanctions, states are free to make use of the incentives and broaden their agenda. In particular, the ratification of an agreement as a condition of access to funding is legitimate to safeguard that resources are allocated and used in accordance with the agreed objectives of the instrument in question.[44] The same refers to the withdrawal of access to funding,[45] once a viable compliance assistance scheme has been initiated but has not led to the desired results. This is legitimate even if such a procedure ultimately leads to the exclusion of a party to the regime, since there is no necessity to use scarce financial resources on states that document their unwillingness to comply in the face of financial assistance.

The second step, however, the World Bank co-financing arrangements in the field of biodiversity of climate change clearly make "green" development aid dependent upon the status as a States party. However, since ordinary World Bank loans can also be obtained for biodiversity projects from non-States parties, these states are not excluded from overseas development aid. While States parties might be privileged concerning development aid for biodiversity and climate change, there are no strict conditionalities as theoretically envisaged.

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42 See note 11.

43 Co-financing means the linkage of regular World Bank loans to GEF loans.

44 Gündling, see note 17, 808.

45 See for example the non-compliance procedure of the Montreal Protocol.

III. Treaty-specific Funding Mechanisms

Following the discussion on the more generalised issue of potential objectives in Section II, a key aspect of the succeeding considerations is the question why a financial mechanism has or has not been established in a certain form. This is particularly relevant as the new global conventions and many other multilateral agreements have the same States parties and are dominated by identical global actors, yet the mechanisms, their institutional settings and special functions differ considerably. There is, for example, at first sight, no apparent reason why the States parties to the Convention on Biological Diversity opted for the GEF, whereas more or less the same states decided on IFAD as the mechanism for the Convention to Combat Desertification in Countries Experiencing Serious Drought and/or Desertification (CCD)[46] and on voluntary commitments to a Technical Trust Fund administered by UNEP for the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal.[47] The same applies to a current development within the regime on the prevention of climate change.

To compare, distinguish and evaluate treaty-specific ecofunds[48] or funding mechanisms the main characteristics to be taken into account are the institutional setting and structure, the distinction between voluntary and mandatory contributions to the fund and the means and criteria of allocation of resources. The mechanisms discussed and compared in this section represent a selection of the most important and most distinct instruments in regard to their characteristics.

1. Institutional Setting, Operation and Specific Functions

The provision of financial resources via funds is one possible and often used tool establishing or being part of an agreement's financial mechanism. As a general distinction States parties to a treaty can either estab-

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46 *ILM* 33 (1994), 1328 et seq.

47 *ILM* 28 (1989), 657 et seq.

48 The term "ecofund" does not indicate specific characteristics of the mechanism; P. Sand, "Carrots without Sticks? New Financial Mechanisms for Global Environmental Agreements", *Max Planck UNYB* 3 (1999), 363 et seq., (374 et seq.), however, perceives ecofunds as those that fulfil certain characteristics e.g. compulsory contributions.

lish new and independent funds or make use of existing institutions. The Convention on Biological Diversity and the FCCC, both chose the GEF as their main means of financing. However, since the GEF serves as a source of more general, though subject-specific, funding as well as being the financial mechanism for specific treaties and furthermore being closely tied to co-financing from the World Bank, it shall be dealt with separately.[49] Although the additional means of treaty-specific funding recently decided upon by the Conference of the Parties to the FCCC could be part of the category of independent small budget funds, it is likely that these new funds will also be operated by the GEF.[50]

a. Funds Initiated and/or Administered by UNEP

The UNEP Environment Fund has a functional link to environmental agreements only in so far as it finances the UNEP Governing Council in order to enable it to fulfil its policy guidance function, particularly, concerning new environmental initiatives within the UN framework. The situation is different for those funds established under the UNEP Convention Funds scheme.[51] The objective of that scheme is to provide assistance for the establishment of treaty specific mechanisms that do not debit UNEP's core financial resources, but the States parties to the respective agreement, only. As examples for financial mechanisms initiated under UNEP the CITES (Washington Convention on International Trade in Endangered Species of Wild Flora and Fauna) Trust Fund, the Funds under the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and the specific financial mechanism for the ECE Convention on Long-Range Transboundary Air Pollution[52] shall be given a closer look, since they reflect different scopes and objectives.

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49 See below at IV.

50 As part of the adoption of the Bonn Agreements on the Implementation of the Buenos Aires Plan of Action, the Conference of the Parties to the FCCC decided to establish three new funds: a Special Climate Change Fund, a Least Developed Countries Fund and a Climate Change Adaptation Fund under the Kyoto Protocol, see Annex to Decision 5/CP.6, Doc. FCCC/CP/2001/5, 37 et seq.

51 The scheme hosts twelve funds for environmental agreements, for a list, see Sand, see note 13, 172 in note 33.

52 *ILM* 18 (1979), 1442 et seq. The Convention was not negotiated under the auspices of UNEP but received some financial assistance at the beginning

CITES, despite the clear need of many States parties to be assisted with the implementation of the convention and with the building of necessary capacity for enforcement, did not originally provide for financial arrangements.[53] The CITES Trust Fund provides financial support for the aims of the Convention, particularly, for its organs and partially for the COP.[54] As a result the fund mainly meets administrative costs. The incorporation of principles such as the one of common but differentiated responsibilities could, if CITES were negotiated today, open the way for reliable sources of financial and technology transfer, enabling developing countries to comply with the necessities to establish legislation and enforcement mechanisms to observe their obligations under the Convention.[55]

The financial instruments under the Basel Convention are more sophisticated than the usual UNEP trust funds that, as the example of CITES shows, are mainly established to settle bureaucratic costs. While the Basel Trust Fund indeed supports the ordinary expenditure of the Secretariat, the Convention established a second fund, the so-called Technical Cooperation Trust Fund. Its financial resources focus on capacity building and particularly implementation assistance by technical support. In the decision to establish financial arrangements the States parties explicitly emphasised the need

> "to support developing countries and other countries in need of technical assistance in the implementation"

of the convention.[56] An integral part of implementation assistance is for example the establishment of Regional Centres for Training and Technology Transfer in developing countries and those with economies in transition to promote sound management and safe disposal of hazardous wastes. The scope of the Technical Trust Fund has been further en-

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of its existence. After a phase-out of assistance the Convention established its own mechanism.

53 The financial amendments that have still not been accepted by all parties entered into force in 1987.

54 It shall be continued for another five years until the end of 2005, Terms of Reference for the Administration of the Trust Fund for CITES, Annex to the Draft Resolution of COP 11, Annex 6 of Doc. 11.10.3. (Rev. 1).

55 P. Birnie, "The Case of the Convention on Trade in Endangered Species", in: R. Wolfrum, see note 18, 233 et seq., (263).

56 Decision I/7 of COP 1, 1992, accessible at <http://www.basel.int/meetings/sbc/cop/cop-1.htm>, last visited 31 December 2001.

larged (on an interim basis) by decision V/32 of COP 5 in 1999.[57] According to that decision, the Technical Trust Fund will temporarily take over the functions of the former emergency fund to assist developing countries and countries with economies in transition in cases of incidents and liability.

The financial mechanism of the ECE Convention on Long-Range Transboundary Air Pollution is an example for objectives other than compliance or implementation assistance. The mechanism is not part of the UNEP Convention Funds scheme. The General Trust Fund established by the Protocol on Long-Term Financing of the Cooperative Programme for Monitoring and Evaluation of the Long-Range Transmission Air Pollutants in Europe (EMEP)[58] finances the gathering of data and monitoring of air pollution that serve as a scientific basis for activities under the convention. Lacking a donor-recipient relationship the scheme needs no balancing system, e.g. between developed countries and those ECE countries with an economy in transition. However, following a decision in 1997 the General Trust Fund can also be used to facilitate the participation of listed parties with economies in transition in the activities under the Executive Body and parties are invited to temporarily contribute to the Fund for this purpose.[59] This double objective of the Fund is clearly distinct from the compliance mechanisms of other environmental conventions.

b. Independent Small Budget Funds

While the institutional setting bears no exceptional features, the small budgets of the Ramsar Small Grants Fund (SGF) and the World Heritage Fund (WHF) make their roles a bit more specific, or rather limited, than general compliance assistance or compensation. The SGF was modelled after the equally small scale WHF. Both are targeted at the same funding categories.

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57 Report of COP 5, 57, <http://www.basel.int/COP5/cop5reportfinal.pdf>, last visited 31 December 2001.

58 Accessible via <http://www.unece.org/env/lrtap/protocol/84emep.htm>, last visited 31 December 2001.

59 Decision 1997/4, Annex VII to the Report of the Fifteenth Session of the Executive Body, <http://www.unece.org/env/lrtap/conv/report/eb53_a7.htm>, last visited 31 December 2001.

As a consequence of its limited financial capacity the SGF understands itself as having a catalytic role to enable countries to address relatively small-scale projects in order to make preparations to obtain funding for larger projects from other donors.[60] The compensation for the (agreed) incremental costs as envisaged under many new conventions is not an explicit undertaking of either the Ramsar Convention on Wetlands of International Importance, Especially as Waterfowl Habitat [61] or the World Heritage Convention and not possible with the limited financial means. Yet under the World Heritage Convention the compensatory element for national efforts in the interest of the world community is acknowledged. The WHF grants financial assistance to protect cultural or natural sites considered as being of outstanding international importance in accordance with the substantive rules of the World Heritage Convention.

According to the Operational Guidelines of the Ramsar Small Grants Fund the financing of projects that contribute to the implementation of the Convention's triennial Work Plan is only one of its objectives. Another important factor is the so-called "preparatory assistance" that is exceptionally granted to those non-contracting parties that have clearly signalled their intention to progress towards adhesion to the Convention. The inclusion of non-contracting parties in the financial mechanisms as an incentive to promote global participation in the conservation of wetlands is an innovative approach that reflects the modern ways to achieve compliance with environmental objectives. However, even the oldest environmental fund, the WHF, engages in preservation of sites on the one hand and identification of sites on the other hand. Assistance to the identification of sites, whether under the Ramsar Convention or the World Heritage Convention, is particularly important to expand participation and hence promote global benefits from the efforts undertaken within the realm of the agreement.

For the new FAO International Treaty on Plant Genetic Resources[62] no single financial mechanism has yet been chosen to perform the funding for the implementation and activities under the treaty. How-

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60 See Guidelines for the Operation of the Small Grants Fund for the Triennium 2000–2002, Introduction, <http://www.ramsar.org/key_sgf_guide.htm>, last visited 31 December 2001.

61 *ILM* 11 (1972), 969 et seq.

62 The treaty was adopted at the 31st Sess. of the FAO Conference on 3 November 2001 and can be accessed at <http://www.fao.org/ag/cgrfa/IU.htm>, last visited 31 December 2001.

ever, the mechanism *inter alia* envisaged by the treaty seems to be an independent budget fund rather than the linkage to an existing mechanism. The treaty relies on a strategy that uses bilateral, multilateral and other channels of financing.[63] The underlying approach at first sight seems comparable to that of the Convention to Combat Desertification with the difference that the latter has chosen a specific institution to host its Global Mechanism and to supervise and channel the funding of activities to combat desertification. The International Fund on Plant Genetic Resources that was agreed upon in a FAO Resolution in 1991[64] for Farmer's Rights is still not yet operable and is not mentioned by the treaty. According to article 18.4 lit. (c) of the FAO treaty, means of funding shall include a financial mechanism that can be established in accordance with article 19.3 lit. (f) of the treaty. This provision grants the competence to the Governing Body to establish a Trust Account for receiving and utilising financial resources dedicated to the implementation of the treaty. It remains to be seen when and how this mechanism will be set up.

c. Instruments Making Use of Existing Mechanisms

Particularly significant with a view to the coherence of an international framework for international environmental assistance are the structural links between organs of an agreement and those institutions used to host the agreement's financial mechanism that were established independently from the agreement. The linkage of the FCCC and the Convention on Biological Diversity to the GEF are not the only examples of this.

The Convention to Combat Desertification established its Global Mechanism by the approval of a Memoranda of Understanding (MoU) between the Conference of the Parties and the IFAD.[65] By doing so the

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63 In the introduction to one of the drafts of the treaty the GEF, the IFAD as well as NGO sources and country contributions were listed as potential resources, see Doc. CGRFA/CG-3/00/2, 4. However, none of these institutions is mentioned by the treaty as adopted on 3 November 2001.

64 FAO Resolution 3/91.

65 Decision 10/Cop.3, Doc. ICCD/COP(3)/20/Add.1, 37; the Memorandum of Understanding is contained in the Annex to this Decision, 38–42; the relationship between the mechanism and the fund is exemplified by the provision that the Global Mechanism will have a separate identity within the Fund while being an organic part of the structure, see provision II. A. of the Memorandum of Understanding.

Convention substantially links itself to a financial mechanism that was already engaged in the investment in areas prone to land degradation before the adoption of the Convention to Combat Desertification. Indeed the IFAD can be considered one of the main contributors to finance projects in the realm of the Convention to Combat Desertification.

The States parties did not opt for the GEF to house the Global Mechanism as had been envisaged, mainly because of the potential difficulties in regard to the necessary global benefits of projects eligible for GEF funding.[66] The Convention to Combat Desertification emphasises projects on a local and regional basis, particularly within the regional focal areas. The IFAD promotes the aims of the Convention to Combat Desertification by the commitment to address drought and desertification as a global problem with local solutions.[67]

The main distinction between ecofunds such as the Ramsar Small Grants Fund and the Global Mechanism is the fact that the latter is not a fund but an instrument to collect and disseminate information on potential sources of financing and the use of existing funds for the promotion of the convention's objectives. However, the mechanism is housed within a fund and contributions to the IFAD can be channelled specifically to the Global Mechanism for administrative and functional purposes.

d. The Montreal Protocol Multilateral Fund (MPMF)

The last fund to be discussed is an example of a particularly sophisticated arrangement. The MPMF was established by the London Amendments to the Montreal Protocol on Substances that Deplete the Ozone Layer[68] to provide for an incentive, additional to the ten years grace-period, for developing countries to implement and comply with efforts to reduce the emission of ozone depleting substances. The primary function of the MPMF being the meeting of the agreed incre-

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66 The GEF Executive Council considered the objectives of the Convention to Combat Desertification to be too broad for its scope, see M. Ehrmann, "Die Globale Umweltfazilität (GEF)", *ZaöRV* 57 (1997), 565 et seq., (594 et seq.); Werksman, see note 35, 62, describes the process as follows: "The negotiators of the UNCCD ... courted the GEF ... and were gently rejected."

67 See Doc. ICCD/COP(3)/12, 4.

68 *ILM* 26 (1987), 1550 et seq.

mental costs, the instrument goes further and also aims to assist with the identification of needs, the facilitation of technical cooperation, training and facilitation of multilateral, regional and bilateral cooperation (article 10 para. 3 lit. (b)). The facilitation of other means of cooperation resembles mechanisms such as the Global Mechanism under the Convention to Combat Desertification in that other means of financial resources are supported by the fund. However, under the MPMF the respective function is only secondary to the main objective to meet incremental costs, making the mechanism more far-reaching.

For developing countries, the institutional setting is of relevance to maintain a say in eligibility and allocation criteria and to prevent the introduction of further conditionalities by the industrialised donor states. The MPMF has been very important as a model for subsequently established funding mechanisms concerning structure and function. While the establishment of the MPMF was considered a victory for the developing countries, the structure reflects compromise.[69] While the Executive Committee equally represents developed and developing countries and the Secretariat is independent from the UNEP administration, the World Bank enjoys a dominant role among the four implementing agencies.[70] The World Bank is still considered an institution that is strongly dominated by the industrialised world.

As the parties were concerned about setting precedents for the provisions of financial resources,[71] particularly, in a North-South conflict situation, negotiations were not easy and the general agreement that additional financial assistance would be needed[72] was followed by particularly difficult negotiations of the details of a first mechanism.[73] The multistage process of establishment of the Protocol and the Fund led to some contradictions within the regime. The ten-year delay of the phase-

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69 E. DeSombre/ J. Kauffman, "The Montreal Protocol Multilateral Fund: Partial Success Story", in: Keohane/ Levy, note 1, 89 et seq., (98).

70 The other three agencies are UNEP, UNDP and UNIDO.

71 See for example the – unnecessary – provision in article 10 para. 10 of the Protocol that states that the financial mechanism is without prejudice to future environmental agreements.

72 A "synthesis report" communicated by the Technical and Economic Options Committee that confirmed the need of implementation assistance for developing countries was ratified at the 1st Mtg. of the parties in Helsinki in 1989.

73 For a description of the details of the negotiations see DeSombre/ Kauffman, see note 69, 96 et seq.

out obligations for developing countries is by no means tied to the entitlement to financial assistance for phase-out activities. As a consequence, the fund might provide resources for the upgrading of technology on one plant, while the emissions of listed substances might be increased at another plant without any breach of obligations under the protocol. Consequently, financial resources might not lead to a decrease and early phase-out of ozone depleting substances in developing countries. Industry support must also be considered a mixed blessing. While industry support was necessary to establish a viable compromise, one must not forget the gain for industry. The same actors that had marketed the listed substances now gain new markets in the developing world for their substitutes. It must be feared that, generally, industry support does not aim for the best environmental option.

2. The "Character" of Funds: Voluntary v. Mandatory Contributions

The issue of either voluntary donations or compulsory contributions to an agreement's financial mechanism has been used as one important parameter to characterise funds. However, due to the underlying political commitments and specific agreements in environmental treaties, the line is not that easy to draw. Furthermore, some funds use mixed systems of contributions. In the following, those funds the structure and function of which have been discussed above are examined with a view to the financial obligations States parties are committed to. The underlying rationale of specific provisions for voluntary or compulsory funding is the safeguarding of a reliable, regular and continuous replenishment of the financial mechanism. Without stability and reliability of financial resources the overall effectiveness of the agreement, as far as either the necessary administrative structures and/or compliance by developing States parties is concerned, would be significantly diminished.

The WHF's budget is raised by a combination of voluntary and compulsory contributions.[74] The non-voluntary contributions to the fund are prorated in accordance with the UNESCO contribution scale. The use of the UN contribution scale or the scale of one of the UN's specialised agencies is often used as a means of fixing the amount of

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74 Included in the category of voluntary contributions are funds-in-trust donated by states for specific objectives. Another source of income are the profits from sales of World Heritage publications.

funds, donors have to or are asked to deposit. Those States parties to the World Heritage Convention not bound by the compulsory contribution clause i.e. those having declared on ratification or accession not to be bound, are nevertheless expected to voluntarily contribute not only regularly, but also not less than the contributions that would have been due had they been bound (article 16 para. 4).

By tying the compulsory contributions to the MPMF to the UN Scale of Assessments, the mechanism not only reflects fairness in regard to financial capacity but in this respect, in fact, safeguards that the largest contributors to ozone depletion also make the largest financial contributions to assist developing countries reversing or at least limiting the damaging process. While, as the case of the MPMF exemplifies, it might be expected that those countries ranking highly on the UN Scale of Assessments are also primarily responsible for many cases of environmental degradation caused in the process of their advanced economic development, the Scale of Assessment cannot generally be used to identify global environmental culprits. Yet, in the case of the MPMF, the system actually takes account of the polluter-pays-principle and the common but differentiated responsibilities without explicitly mentioning the approaches in the agreement. In contrast to the FCCC and the Convention on Biological Diversity, the MPMF does not explicitly link the obligation to contribute to the fund to the substantial obligations of the developing countries to comply. Such a linkage, however, has been discussed controversially at the London meeting where the financial mechanism was introduced. Both groups, the developed and the developing countries, tried to establish and defend a linkage between their respective obligations and the ones of the other group. The developing states wanted to link their compliance with the agreement to the provision of sufficient financial resources, while the developed states argued that the obligation to provide for technology transfer is depended on the obligation of all parties to comply with the Protocol.[75] However, if the provision of financial resources was made dependent upon compliance and not *vice versa*, such an approach would neither take account of the common but differentiated responsibilities nor of the need for capacity building to achieve compliance. Consequently, it would be inconsistent with the modern considerations of international environmental law. In the case of the MPMF the duty to provide the specified

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75 P. Lawrence, "Technology Transfer Funds and the Law – Recent Amendments to the Montreal Protocol on Substances that Deplete the Ozone Layer", *JIEL* 4 (1992), 15 et seq., (19).

amount of financial resources, whether based upon a *quid-pro-quo* relationship or not, is a central focus of the agreement, since the effectiveness of the whole regime is dependent upon compliance of the developed states parties with the financial regulations.

The contributions to the UNEP Convention Funds are also based on the UN Scale of Assessment, yet the contributions are mainly perceived as voluntary. Under the Basel Convention the lack of compulsory contributions for capacity building seems unusual, when taking into account the strong commitments of developed states under the Basel Convention, e.g. the obligation to take back hazardous wastes that were exported unlawfully or where the movement cannot be completed in the envisaged manner and cannot be safely disposed of in the recipient country (arts 8 and 9). The developed world has used developing states as a cheap disposal opportunity for hazardous wastes for such a long period of time that the principle of common but differentiated responsibilities would justify the mandatory assistance for the establishment of institutions dealing with the transboundary movement of waste and safe waste disposal facilities in developing Member States.

One might perceive the description of the commitments to the UNEP Convention Funds as "voluntary" to be a mislabelling, since the contributions rely on agreed percentage shares following the Assessment Scale.[76] Parties are urged to adhere to the agreed shares, yet in many cases they "should" pay their contributions, hence implying a political instead of a legal obligation. However, on the international stage, and particularly within a treaty regime, consensual political commitments may easily gain the same weight as genuine legal obligations. In any case the labelling as voluntary contributions may be used to differentiate between States parties political decisions, on the one hand, and *quid-pro-quo* obligations that are part of the core provisions of a convention on the other.

The General Trust Fund provides for an example for a differentiation between mandatory and voluntary contributions within the same agreement for EMEP under the Convention on Long-Range Transboundary Air Pollution. Those States parties to the Protocol within the geographical scope of the evaluation centres[77] are obliged to contribute (article 3 para. 2), whereas signatories to the Protocol, even if they are not within the geographical scope, may make voluntary contributions (article 3 para. 3).

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76 Sand, see note 13, 174.

77 In 2001 there were 100 monitoring centres in 24 ECE countries.

The former FAO International Undertaking on Plant Genetic Resources from 1983 already reflected early recognition of the necessity to establish a firm financial basis taking account of developing States parties' needs for capacity building (article 8 para. 1). Under the new FAO Treaty on Plant Genetic Resources 2001, the effective implementation of developing states and parties with economies in transition is explicitly linked to the effective allocation of predictable and agreed financial resources (article 18.4 lit. (b)). This linkage follows the approach already taken by other global conventions mentioned above.

While it would be easy to conclude from the establishment of common but differentiated responsibilities and the examples given, that all recent agreements must tend to be committed to the linkage of obligations and a *quid-pro-quo* relationship between them, the Convention to Combat Desertification as one of the important recent global agreements, must be discussed as an exception to an alleged tendency. The Convention to Combat Desertification states in article 4 para. 3 under the general heading "general obligations", that all developing country parties are eligible for assistance in the implementation of the Convention. Developed states parties are obliged (they "undertake") to provide for substantial and reliable financial resources in accordance with article 20.[78] While one would assume and could argue that the obligations are linked, the Convention to Combat Desertification chooses a different wording, not saying that the full implementation of developing countries depend upon the fulfilment of financial obligations, but that implementation

> "will be greatly assisted by the fulfilment of ... obligations ... in particular those regarding financial resources and transfer of technologies"

(article 20 para. 7). This rather weak statement will make an acknowledgement of a clear linkage of duties more difficult. One potential explanation for the lack of linkage is the fact that the responsibilities of the industrialised world for desertification are perceived to be less clear than for example in the case of climate change.[79] The more regional

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[78] Comparable to the administrative costs met by most UNEP Convention Funds, contributions that are intended to enable the Global Mechanism to meet administrative and operational costs are voluntary.

[79] Although climate change and desertification are to some extent interdependent, desertification has a multitude of more regional and local causes that are hardly influenced by developed states, e.g. deforestation to collect firewood.

scope of the problem of desertification seems to be reflected in the lack of a clear linkage of obligations. The commitment of the Rio process incorporated by article 20 to provide for new and additional financial resources is as strong as in the Montreal Protocol, the Convention on Biological Diversity and the FCCC, while, despite a reference to "solidarity" a clear reference to common but differentiated responsibilities is lacking in the Convention to Combat Desertification.[80]

3. Access to Funding

Other than in cases of initial assistance to non-parties to accede to a treaty, treaty-specific funds are open to States parties only, whereas other mechanisms for example the GEF in the field of marine environmental protection allocate money to all applicants that prove a specific need for a certain environmental project. The differentiation between developing and developed countries in regard to eligibility is understandably stronger in those agreements that rely on differentiated responsibilities in regard to funding.

The Convention to Combat Desertification, although not establishing linked obligations, still makes clear that resources to be provided by the developed states and those funds and mechanisms explored by the Global Mechanism shall be channelled towards developing countries. In contrast to this structure any of the parties to the World Heritage Convention can request assistance for sites in the form of studies, expert advice, education and training of staff, the supply of equipment or loans and emergency financial aid. Although the aid is not limited to developing countries, in fact they will most often apply for assistance as they have an actual need for capacity building to protect a site. Any project is only eligible for funding if it comes within the following categories: preparatory assistance, technical cooperation, emergency assistance, training and promotional and educational assistance. The fund establishes an entitlement of the recipients to aid in return for the global benefits they generate by the protection of natural or cultural heritage.[81]

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80 The exact meaning of "solidarity" is subject to interpretation, yet it must be assumed that the consequences of a commitment to solidarity are not as far-reaching as the implication of the common but differentiated responsibilities.

81 Sand, see note 48, 367 with further reference.

A potential problem that became apparent over the last decade is the treatment of States parties with economies in transition towards a market economy. The MPMF does not generally include these countries within its definition of developing countries eligible for funding according to article 5 para. 1. Other conventions have specifically changed their financial mechanisms to include states with economies in transition. An example of the latter is the Ramsar Convention that decided in 1996 that states in transition shall be eligible for funding under the 1990 Fund. Eligibility for funding under the SGF is based upon the list of Aid Recipients established by the Development Assistance Committee of OECD, i.e. in fact all developing countries and — as already mentioned — countries in transition.

Another, more flexible approach was implied by the Basel Convention that, according to the decision to establish the Technical Trust Fund, makes eligible for funding "developing countries and other countries in need of technical assistance".[82] However, in the latest decision on the enlargement of the mechanism, funding is explicitly limited to developing countries and countries with economies in transition.[83]

4. Comparative Assessment

The process started by the MPMF, i.e. the symbolic victory of the developing State parties, can only be considered a partial success since the modalities and particularly the institutional structures and allocation procedures are strongly influenced by the industrialised states' position. The widely acknowledged success of the Montreal Multilateral Fund can to some extent be explained by its clear objectives and means to achieve its goals. The phasing-out of a limited number of listed substances for which chemical substitutes have already been developed is, despite the political difficulties all international agreements are faced with, relatively easy to achieve. Other funds are faced with far more complex situations that diminish their efforts and success.

The criticism that those funds the contributions to which are voluntary do not qualify as ecofunds or viable financial tools is not justified, if, although there is no legal obligation to provide for financial resources, one takes into account the adherence to political commitments

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82 Decision I/7, see note 56.

83 Decision V/32, see the Report of COP 5, see note 57.

and international political pressure. Sometimes the commitment is already provided for in the respective agreement like article 15 para. 5 of the World Heritage Convention that, as already mentioned, asks States parties not bound by the provision on compulsory contributions to nevertheless contribute regularly at least the amount based upon the UNESCO assessment scale.[84] Furthermore, even if contributions are mandatory, other than the threat to invalidate the agreement, there are no particularly viable enforcement mechanisms to make developed states comply with their financial obligations. In the case of *quid-pro-quo* mechanisms, however, the more obvious decline of the whole regime in the case of non-compliance with the financial obligations should be incentive enough for industrialised States parties to provide for the agreed resources. To maintain credibility and power in international environmental fora, developed states should generally be relatively eager to comply with political commitments to provide for funding, even if not legally bound.

Concerning the viability of the voluntary UNEP Funds, the Basel Convention shows that the UNEP Convention Funds scheme must not be reduced to a function of "earmarked funds" to meet administrative costs but bears the potential for a more sophisticated financial regime for capacity building and technology transfer to assist with the implementation of the agreement. Taking into account the consideration that the so-called "voluntary" contributions are, due to political agreement and pressure, reliable sources of funding, there is hardly any difference regarding function and scope between the Technical Trust Fund and, for example, the MPMF.

The differences between the mechanisms are to a significant extent a consequence of the different functions the instruments were designed to meet. Naturally, a fund that only aims to meet administrative costs is structured differently from a mechanism to channel resources or an instrument designed to meet the full incremental costs of implementation. Regarding the differences between ecofunds established for a specific treaty and mechanisms such as the Convention to Combat Desertification Global Mechanism that channels a variety of different funds and resources, both approaches have advantages and disadvantages. In fact, many of those treaties establishing a specific ecofund also urge their States parties to identify other sources of funding and engage in bi - and multilateral assistance independently from their obligation to contrib-

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84 The paragraph reads: "contributions ... shall be paid on a regular basis ..."; implying a duty to at least contribute regularly.

ute to the fund. Whereas a mechanism that tries to locate sources of funding might be very efficient because of the potential variety of multilateral and bilateral sources to be identified, a single treaty-specific ecofund might be easier to manage in that it would prevent duplication of efforts and the reliability of resources due to regular contributions by States parties. Although the recent Memorandum of Understanding between the Convention to Combat Desertification and the IFAD provides for cooperation between the Secretariat and the Global Mechanism to avoid duplication of efforts and ensure continuity and coherence of programmes,[85] the actual effectiveness of this provision cannot be evaluated yet. In any case, such structures seem more cumbersome than the direct supervision of a fund by the organs of an agreement.

IV. The Global Environment Facility

The struggle between developing and industrial states as to whether new funding mechanisms with their own institutional structure shall be established or whether the setting and assistance of the World Bank shall be sought for, has at present come to a relative hold. While many agreements have established independent funds, the GEF is an important example for the solution preferred by the developed countries that involves participation of the World Bank as well as UNDP and UNEP. Yet in contrast to the view that the GEF is primarily an instrument of the developed world, the linkage to and accountability of the GEF to the COP of the Convention on Biological Diversity and the FCCC respectively provides for specific control of developing States parties over the GEF regarding biodiversity and climate change, since guidance on these issues is given by organs in which developing states have the majority.

The GEF was established to assist developing countries with the protection of the global environment and the promotion of environmentally sound and sustainable economic development.[86] Like the MPMF, the GEF can be compared to a model of environmental subsidies that aims at internalising the external benefits of projects, new

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85 Provision IV. B. (2) of the Memorandum of Understanding.

86 On the background see Werksman, see note 35, 48 et seq.; Sands, see note 2, 736 et seq.

pollution abatement technologies for example, into the national budget.[87]

While the majority of GEF resources are used to improve the recipients' compliance with treaty regimes they are bound by, some projects also aim at capacity building in developing countries to enable them to meet the standards for entering environmental regimes.[88] The more specific functions of the GEF are twofold. On the one hand it provides for a treaty-specific financial tool for the protection of biodiversity and the prevention of climate change and on the other hand it promotes activities in defined areas of global environmental concern, i.e. international waters and ozone depletion. While the GEF is not a specific financial tool for any agreement dealing with ozone depletion or international waters, the close cooperation with the respective treaties addressing these issues is an important feature of GEF funding activities. The resources for projects to reduce ozone depletion are administered by the Ozone Layer Trust Fund while the GEF Trust Fund finances the other three areas.

Grant criteria for access to resources from these funds include that funding cannot be obtained by other sources. This exemplifies the willingness to establish a source of new and additional financing for global environment projects that are not otherwise promoted. Access to funding is open to GEF members or, in relation to climate change and biodiversity, to those States parties eligible under the respective agreements. Since membership in the restructured GEF no longer depends on an initial contribution, wide participation and eligibility for funding is safeguarded. The World Bank co-finances a significant number of GEF projects, linking the mechanism closely to "green" development assistance.

From an institutional point of view, the pilot phase GEF must generally be regarded as the first formal mechanism of cooperation[89] and the first real partnership[90] between the Bretton-Woods Institutions and the UN in the field of environmental issues. The GEF remains an exceptional example of an innovative institutional setting and function. Its

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87 Schuppert, see note 21, 872.

88 Sand, see note 24, 784.

89 J. Alder/ D. Wilkinson, *Environmental Law & Ethics*, 1999, 81.

90 L. Boisson de Chazournes, "The Global Environment Facility Galaxy: On Linkages Among Institutions", *Max Planck UNYB* 3 (1999), 243 et seq., (273).

linkage of development assistance institutions and treaty specific objectives has significant coordinative potential if used accordingly.

1. The GEF's Structure as a Treaty-specific Tool

The relations of both conventions that currently use the GEF as their financial mechanism to the GEF have been subject to lengthy and difficult negotiations and even after the restructuring of the GEF the potential for conflict has by no means been abolished. The issue of financial resources and the respective guidance to the GEF by the Conferences of the Parties is always a sensitive issue. The most recent example for difficulties concerning this issue stems from the Conference of the Parties to the FCCC. The participating states, during their 6th Mtg. could not agree on an decision concerning guidance to the GEF and finally referred the decision to their 7th Mtg.

Both conventions, the FCCC and the Convention on Biological Diversity, recognised the particular need for a safeguard from the World Bank as the main implementing agency of the GEF that GEF-funded projects are in conformity with the policies and guidance that were established by the respective COP.[91] The provisions in the FCCC and the Convention on Biological Diversity regarding their respective financial mechanisms are almost identical.[92] Both require the accountability of the mechanism to the COP, which will also decide on the policies, programme priorities and eligibility criteria. However, the Convention on Biological Diversity requires the mechanism to "function under the authority and guidance of ... the Conference of the Parties", whereas reference to the authority of the COP is lacking in article 11 para. 1 FCCC. While legally binding relations, e.g. treaties, cannot be concluded with the GEF due to its lack of legal personality,[93] both conventions respectively agreed upon Memoranda of Understanding with the GEF to specify the relationship.

UNEP, as one of the implementing agencies is responsible for the environmental expertise and, particularly, for the project consistency

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91 C. Di Leva, "International Environmental Law and Development", *Geo. Int'l Envtl L. Rev.* 10 (1998), 501 et seq., (513).

92 See article 11 para. 1 FCCC and article 21 para. 1 Convention on Biological Diversity.

93 The legal status of the GEF has not been finally settled or defined, yet it is the common understanding that it lacks the ability to legally bind itself.

with existing environmental treaties. This is a difficult task, since the many existing treaties are not necessarily coherent with one another. This must lead to the conclusion that in general only obvious conflicts with the major environmental agreements can, in fact, be avoided.

2. The GEF and the Convention on Biological Diversity

Specifically for the Convention on Biological Diversity the linkage of obligations to implement the convention and financial resources is crucial, as many developing countries are particularly rich in biodiversity and this diversity is threatened by unsustainable development and poverty. With respect to biodiversity and especially rain forest biodiversity the different international perceptions and interests become well apparent. Whereas in the view of the developed world, rain forests are now regarded as globally valuable diversity hot spots,[94] the perception in the host countries is often that of a valuable source of development due to the interest of logging companies and large-scale cattle farmers.

The main difficulties that the Convention on Biological Diversity experiences in regard to its financial mechanism result from the limited mandate of the GEF and the somewhat more comprehensive objectives of the Convention on Biological Diversity. While the GEF is strictly limited to the financing of "incremental costs" for global environmental benefits, the decisions of the COP of the Convention on Biological Diversity reflect a broader approach. While biodiversity is considered a common concern of humankind, many projects to protect biodiversity, particularly when related to poverty eradication, agrobiodiversity or marine biodiversity and fisheries resources, can be considered to have primarily national or regional significance under the rules of the GEF. These implications lead to tensions between the institutions that sometimes seem irresolvable, despite the frequent communication between the GEF and the COP of the Convention on Biological Diversity on the issues. It seems that the COP has in practice adopted the view that all biodiversity projects should be eligible for funding by the GEF.[95] This approach is illustrated by Decision V/13 of COP 5[96] that gives

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94 A. D. Tarlock, "Exclusive Sovereignty Versus Sustainable Development of a Shared Resource: The Dilemma of Latin American Rainforest Management", *Texas Int'l L. J.* 32 (1997), 38 et seq., (39).

95 Lake, see note 41, 71.

96 Doc. UNEP/CBD/COP/5/23, 130 et seq.

further guidance to the GEF. The decision lists as projects that should be supported *inter alia*:

> "projects utilizing the ecosystem approach, without prejudice to differing national needs and priorities which may require the application of approaches such a single-species conservation programmes"

as well as programmes in the agrobiodiversity and coastal biological diversity sector. Whether the financing of respective projects in these areas has the required global dimension is questionable. Considering the importance of the addressed areas the necessary conclusion might be that the GEF is not a completely suitable mechanism for the ambitions of the Convention on Biological Diversity and that to efficiently fulfil its mandate the Convention on Biological Diversity needs a broader mechanism than the present GEF can offer. The fact that the GEF has also been appointed the financial mechanism for the implementation of the Cartagena Protocol on Biosafety[97] (article 28) will potentially add to the structural difficulties to address all issues emphasised by the COP within the GEF. So far the GEF has only offered to develop an initial strategy for assisting countries to prepare for the entry into force of the Cartagena Protocol.

One innovative GEF instrument, particularly in the field of biodiversity protection,[98] is the establishment of trust funds financed by the facility.[99] The constitution of trust funds, dedicated to specific projects or valuable areas of biodiversity, is also important when taking into consideration an element of long-term financial security. However, these funds must be subject to close supervision and must preferably be accountable to either the GEF or, even better, the COP to the Convention on Biological Diversity in order to fulfil their function and not to waste valuable resources.

3. The GEF and the Framework Convention on Climate Change

The Framework Convention on Climate Change in its article 3 para. 1 explicitly commits developed country parties to take the lead in com-

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97 *ILM* 39 (2000), 1027 et seq.

98 Lake, see note 41, 70.

99 See examples in Di Leva, see note 91, 517 et seq.

bating climate change as a consequence of their common but differentiated capacities and responsibilities. The principle is further reflected by article 4 on financial resources and technology transfer and explicitly referred to in the Kyoto Protocol to the FCCC[100] (article 10). The recent decision on a new fund for the least developed States parties, already mentioned above, is another example of the implementation of the principle. It must be expected that the new fund, like the other two new funds,[101] will also be administered by the GEF.

Like the Convention on Biological Diversity, the FCCC in article 4 para. 7, links the effective implementation of developing states' commitments to the developed countries' compliance with financial obligations and technology transfer, giving the financial obligations their specific conceptual strength. The need of developing countries to be assisted in the implementation of the convention is only one tier of the financial provisions' objectives, the other being aid to developing countries in adapting to a changed climate and its negative effects, should the efforts under the convention not or be able to prevent global warming.

While the relation between the GEF and the organs of the FCCC continue to be subject of discussion, the FCCC faces fewer difficulties than other conventions to put projects on the GEF's agenda, because of the clearer impact all energy usage has on global warming. Consequently, all energy saving or alternative energy projects should at least fulfil the criteria of contributing to global environmental protection. However, the difficulties to calculate incremental costs remain the same.[102] These difficulties are further aggravated, since the GEF has established its own interpretation of the term "incremental costs" that is not necessarily shared by the organs of the conventions it assists to implement. As a consequence, the discussions of the reports of the GEF to the Conferences of the Parties and the guidance by this organ to the GEF are always important issues at the regular meetings of States parties.

The use of the GEF is just one aspect of the financial mechanisms of the FCCC, the other being the joint implementation scheme and the clean development mechanism. The joint implementation of obligations is based upon the economic consideration of environmental achievements by cost-effective means.[103] It can also be argued that the concept

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100 *ILM* 37 (1998), 32 et seq.

101 A Special Climate Change Fund and the Kyoto Protocol Adaptation Fund.

102 See for example GEF, see note 33, 27.

103 Schuppert, see note 21, 883.

of joint implementation might encourage the transfer of financial resources and technology from OECD countries to the developing world and countries in transition.[104]

4. The GEF and the Convention to Combat Desertification

The emphasis on areas of global concern and global commons leads to the exclusion of projects aimed at the promotion of local or regional sustainability. Consequently, as already mentioned, the States parties to the Convention to Combat Desertification refrained from establishing the GEF as their financial mechanism, since desertification is often perceived to be of primarily regional rather than global significance and hence outside the narrow scope of the GEF. While it is true that the immediate impacts of draught and desertification affect the environment and population of a certain region, the process has significant global environmental effects as well, such as a contribution to climate change, loss of biodiversity and scarcity of freshwater resources. Even more significant are the potential indirect impacts on the environment that can be caused by large-scale migration of people to unaffected regions and the consequential stress imposed on these regions. Desertification leads to poverty and poverty is a major factor of environmental depletion, the results of which may not be restricted to the local level. Furthermore, considering the harmful effects armed conflicts persistently have on the environment another — more remote but not unlikely — disastrous impact linked to draught and desertification may result from conflicts over scarce water resources and fertile land. Global effects of desertification have so far only indirectly been addressed within the scope of the traditional GEF focal areas. It is questionable whether these indirect activities are as coordinated and coherent as in the case of closer scrutiny by the Convention to Combat Desertification organs.[105]

Despite the fact that the Convention to Combat Desertification has chosen the IFAD and not the GEF as the resource for the Convention's Global Mechanism, the agreement is also clearly linked to the GEF. A

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104 L. Boisson de Chazournes, "The United Nations Framework Convention on Climate Change: On the Road Towards Sustainable Development", in: Wolfrum, see note 18, 285 et seq., (299).

105 The plans to establish land degradation as a GEF focal area on its own are a result of the shortcomings of the current practice.

formal reference to the GEF is contained in article 20 para. 2 lit. (b) of the Convention. Furthermore, on an institutional basis the Convention to Combat Desertification and the GEF maintain close contacts, for example, by collaboration between both secretariats and the reciprocal representation at governing bodies and meetings.

This linkage has become even closer after the GEF decided in May 2001 to undertake the necessary means to designate a GEF focal area on land degradation.[106] Thereby the GEF also generally recognises potentially global effects of land degradation. The Conference of the Parties to the Convention to Combat Desertification has welcomed the decision to designate a fifth focal area concerning land degradation.[107] To establish land degradation as a GEF focal area requires the amendment of the Instrument for the Establishment of the Restructured GEF. Paragraph 2 of the Instrument lists the current four focal areas of the GEF, and this paragraph could be amended to include additional areas. Such a formal amendment as would be necessary could, however, take some time. The GEF Council envisages an amendment not before October 2002.

The GEF has repeatedly stated that those activities concerning land degradation that relate to the current GEF focal areas are eligible for funding.[108] While the most obvious linkages are projects that prevent or counterbalance a loss of biodiversity and release of carbons as a result of deforestation and desertification, a potential link can also be made in regard to water resources shared by more than one country, i.e. international waters, as one of the GEF focal areas, and their importance to combat desertification.[109] Support for efforts of the Convention to Combat Desertification could be enhanced if land degradation was designated a focal area on its own because there would be no need to prove a linkage to the other focal areas.

The interpretation of crucial expressions in the GEF terminology for example "incremental costs" and "global benefits" establishes difficulties even for those conventions using the GEF as their operational mechanism. Despite numerous communications on the topic it seems

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106 Doc. GEF/C.17/5.

107 Decision 9/COP 5, Doc. ICCD/COP (5)/11/Add. 1, 38.

108 Para. 3, Instrument for the Establishment of the Restructured GEF; see more specifically GEF, *A Framework of GEF Activities Concerning Land Degradation,* 1996.

109 This has been stressed by the Convention on Biological Diversity COP-3, see Doc. ICCD/COP(3)/9, 42.

that in the case of financing of projects initiated under the Convention to Combat Desertification, access to GEF resources has so far been more complicated due to the additional problem of showing a sufficient linkage between land degradation projects and focal areas.[110] Generally, although many projects against desertification are funded by the GEF, the diversity of institutions dealing with desertification from different points of view and the variety of tools of funding seem cumbersome and it is unlikely that collaboration on a secretariat basis can effectively control and prevent duplication of efforts and potential conflicts. Whether this situation will significantly change after the designation of land degradation as a fifth GEF focal area remains to be seen.

V. "Green" Development Aid

Those mechanisms that will be briefly discussed in the following section are not specifically linked to any environmental agreement, but are part of the general framework of financial aid for developing countries. Instead of providing for a functional framework of assistance within which the more specific environmental mechanisms can be established, all "green" development aid and environmental funding mechanisms coexist and overlap. Yet, to some extent the World Bank and UNDP as the implementing agencies for several treaty-specific instruments institutionally link different treaty-specific mechanisms and "green" aid.

The linkage of development and environmental protection on the one hand and poverty and degradation of the environment on the other might be considered as two sides of the same coin. However, while poverty clearly leads to environmental degradation, development must not necessarily lead to environmental protection.[111] In fact, only after growing criticism concerning the environmentally devastating effects of development projects financed bi- or multilaterally by industrialised states and the respective institutions,[112] the vast majority of develop-

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110 Doc. ICCD/COP(3)/9/Add.1, 6.

111 Still, free trade advocates emphasise the need of free trade to promote development, because, allegedly, development will necessarily be followed by growing environmental awareness and protection.

112 In 1992 the so called Wapenhans-Report, an internal World Bank Study, revealed a systematic failure with regard to monitoring the implementation of projects and supported criticism holding the World Bank responsible for needlessly contributing to environmental degradation and social problems;

ment projects were made subject to environmental impact assessment.[113]

Concerning the effect of "green" developmental strategies and tools, there is a clear difference between the environmental impact assessment of a primarily development project and the financing of substantial environmental projects, i.e. activities that specifically aim at environmental improvement or protection. This distinction is manifested by the general "greening" of the regular investment portfolio on the one hand, and the increase of the direction of funds towards specific environmental projects on the other. However, both aspects are equally relevant, since the positive effect of financial support for environmental projects can easily be wasted if the general aid is regardless of negative environmental impacts. Equally, the general "greening" of the portfolio does not safeguard the inclusion of specific environmental activities.

1. Multilateral Development Assistance

Development aid is delivered either bilaterally by the donor states or multilaterally via the respective institutions. As already mentioned, the commitment of potential donor states to increase ("green") overseas development aid, while at the same time providing for new and additional financial resources for the environment, has not yet been met. While one might argue that, although the contributions to development aid have dropped, the resources provided have been used in a more environmentally beneficial manner, firm evidence for this assumption is lacking.[114]

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see K. Horta, "The World Bank and the International Monetary Fund", in: J. Werksman (ed.), *Greening International Institutions*, 1998, 131 et seq., (132).

113 In particular the multilateral development banks and organisations have adopted guidelines to prevent significant environmental damage; see for example the World Bank Operational Manual, Vol. II "Project Requirements", Safeguard Policies, at <http://wbln0018.worldbank.org/Institutional/Manuals/OPManual.nsf>, last visited 31 December 2001; or the OECD Guidelines on Environment and Aid accessible at <http://www.oecd.org/dac/htm/pubs/p-envg.htm>, last visited 31 December 2001; on the Environmental Assessment policy and procedure of the World Bank, see Di Leva, see note 91, 521 et seq.

114 Lake, see note 41, 68.

a. The World Bank

The World Bank, according to the number of projects financed and the amount of resources available, is the most influential multilateral development agency in the world. The "greening" of its general agenda has been subject to continuous scrutiny and criticism. Those proposals that are supported as environmental projects either address pollution control in urban areas ("brown agenda") or concern natural resource management in mostly rural areas ("green agenda"). Yet the fact that a project involves the management of natural resources such as forestry, agriculture or fisheries does not necessarily allow the conclusion that it is also environmentally beneficial.[115] To name but one recent example, it is significant that in its Annual Report of 1999 the World Bank lists as an environmental project the improvement of livelihoods of rural communities in Lao People's Democratic Republic by the adoption of intensified agricultural practises, while at the same time many developed countries, for example within the Common Agricultural Policy of the EC, promote extensification of agriculture as part of environmental strategies. As a result the political "greening" process, despite elaborated rules and guidelines on impact assessment and environmental projects, has by no means come to an end.

The view, however, that the World Bank is still the global culprit that exclusively finances the devastation of the environment cannot be upheld in the light of its different environmental activities. While this statement does not imply that all activities and structures of the bank promote environmental improvement, one must not underestimate the central role the World Bank plays in an environmental context by its function as implementing agency of the MPMF and the GEF and the initiation of the Prototype Carbon Fund[116] or its trusteeship for the Rain Forest Trust Fund. In this respect the World Bank not only engages in general environmental protection but also promotes specifically the objectives of the global environmental conventions dealing with climate change, ozone depletion and biodiversity.

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115 Horta, see note 112, 135.

116 The Prototype Carbon Fund engages in the funding of projects that significantly reduce greenhouse gas emissions and hence could be registered to meet the targets of the Kyoto Protocol to the FCCC, see <http://www.prototypecarbonfund.org/about.cfm>, last visited 31 December 2001.

Insofar as the policies of the World Bank seem inconsistent, this reproach also applies to the international community at large that engages in a multitude of colliding or overlapping environmental agreements and activities. However, a further consolidation within developmental institutions as on the international level is clearly necessary.

b. Regional Multilateral Organisations

On a regional level, the OECD in particular is engaged in the promotion of environmental considerations within development aid. The organisation advises those of its Member States that are donors of development aid concerning the issues of impact assessment of development projects as well as environmental capacity building in the recipient country.

The regional and sub-regional development banks that also provide large-scale financial assistance to developing countries have meanwhile mostly "greened" their agendas and procedures to face the general criticism of funding of environmentally degrading projects. In this respect, again, the World Bank serves as a role model and regional bank policies are often formulated in accordance with the World Bank's policy guidelines. However, there remain differences between the regional development banks concerning the quality of environmental safeguards. The relatively recently established European Bank for Reconstruction and Development is the first multilateral development bank to include the requirement to

> "promote in the full range of its activities environmentally sound and sustainable development"

in its constitution (article 2 para. 1 subpara. (vii)). Generally, the same applies to the regional and sub-regional development banks that has been said in relation to the World Bank: while improvements towards an environmentally friendly agenda have been made, the "greening" of the portfolio is an ongoing process to be consolidated with environmental activities.

2. EC Resources for Environmental Funding

The EC has established sources of environmental funding that supplement the general programme of structural funds. The Financial Instrument for the Environment (LIFE), was established in 1992 and planned

for three years. It has subsequently been extended and has just recently entered into its third phase.[117] The financing of actions concerning regional or global environmental problems is provided for in exceptional circumstances only. The instrument focuses on the development and implementation of EC environmental policy and legislation within the territory of the EC Member States. However, since the EC more often becomes a party to global environmental agreements, the explicit financing of the implementation of these conventions on the EC level might become more likely.

In the context of assistance to capacity building for the promotion of environmental objectives within non EC countries, the LIFE III Regulation emphasises the need for technical assistance for administrative structures and capacities in those countries bordering the Mediterranean or Baltic Sea that have not yet concluded Association Agreements with the EC.[118] One of the criteria for funding is that projects must be in the interest of the EC. This requirement is fulfilled when the project contributes to the implementation of regional and international agreements (article 5 para. 5 lit. (a)). A function that resembles even more a treaty-specific element, limited, however, to EC Member States and accession candidates, is the contribution to the implementation of the Directive on the Conservation of Wild Birds[119] and the Directive on the Conservation of Natural Habitats of Wild Fauna and Flora[120] under LIFE-nature (article 3).

With the conclusions of the Lomé-Conventions and the latest Cotonou-Convention the EC has further incorporated environmental objectives within the provision of development aid.[121] Environmental protection is one goal amongst many other development aims. However, the agreements are examples of the further "greening" of development aid structures on all levels and clearly show the capacity to achieve further binding environmental regulations within the realm of development. In particular the rules on the transboundary shipment of

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117 Regulation 1655/2000, *Official Journal* L192, 28 July 2000, 1.

118 LIFE-third Countries, article 5.

119 Directive 79/409/EEC, as last amended *Official Journal* L223, 13 August 1997, 9.

120 Directive 92/43/EEC, 21 May 1992, as last amended *Official Journal* L305, 8 November 1997, 42.

121 On the development and content of EC overseas assistance see B. Martenczuk, "From Lomé to Cotonou: The ACP-EC Partnership Agreement in a legal perspective", European Foreign Affairs Review 5 (2000), 461 et seq.

waste in the fourth Lomé-Convention are good examples to this extent, since the comprehensive regulations on the prohibition of waste exports from the EC to the developing partner states are environmentally far-reaching.

The recent Cotonou-Convention, however, while emphasising environmentally sound development throughout its provisions, is more general than the Lomé-Conventions in its environmental provisions and does not provide for any explicit regulations on environmental problems.[122] This might be a result of the explicitly trade centred objectives of the new arrangements. The new Convention is designed to establish a trading system between the two groups that is compatible with the WTO rules.

The management of the majority of the EC's external assistance programmes has recently been restructured, that is unified in a single institution. Since 1 January 2001 the Europe Aid Cooperation Office has been responsible for the management of assistance projects from their identification phase to their evaluation. The Directorate F is responsible for innovation and thematic operations, including human rights, NGO co-financing and the environment. As part of the reform, aid delivery procedures shall be standardised and transparency increased. Such aims, if properly implemented, can also enhance a reliable consideration of environmental aspects when allocating aid to specific projects. This is particularly relevant because the Europe Aid Cooperation Office manages the largest international assistance budget in the world, being responsible for approximately 10 per cent of all official Development Assistance world-wide.[123]

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[122] Article 32 of the Convention sets out guidance for the cooperation on environmental protection and sustainable utilisation and management of natural resources. While it stresses some environmental problems e.g. desertification that are particularly relevant for the ACP partner states, it does not set out concrete strategies for their solution. Article 49 relates to trade and environment but, again, only very generally mentions a desired mutual enforcement of trade and environment that is by no means clear in practice.

[123] Press release, 21 December 2000, <http://europa.eu.int/comm/europeaid/news/20001221_en.htm>, last visited 31 December 2001.

VI. The Private Sector: Debt-for-Nature Swaps and "Green" Business

A form of environmental financing that is neither related to a specific environmental agreement nor to the traditional overseas development assistance concerns the role of private sector financing. Mechanisms like NGO initiated dept-for-nature swaps are one tier of such a practice, "green" business by companies making money while conserving and sustainably using the environment are another tier. Since these elements of international environmental financing are relatively distinct from those aspects of public international environmental law discussed throughout this article, they shall only briefly be highlighted to complete the picture of environmental financing in general.

1. Debt-for-Nature Swaps

One of the international mechanisms for the preservation of the environment is the exchange of the external debt of a country for local currency instruments that support a specific environmental project.[124] The mechanism of debt-for-nature swaps links two otherwise unrelated issues: the debts of developing countries from grants given by different actors for a multitude of developmental aims and the need for financial assistance concerning environmental protection in these countries. Actually, both issues are insofar linked in a vicious circle[125] as the necessity to pay back debts continuously leads to environmentally disastrous decisions concerning industrial and other projects, whereas the parallel degradation of natural resources increases poverty and calls for additional debts.

In the context of this study debt-for-nature swaps shall only briefly be mentioned. So far, the Multilateral Development Banks refuse to directly engage in debt-for-nature activities, while indirectly supporting

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[124] G. Gómez Minujín, "Debt-for-Nature Swaps – A Financial Mechanism to Reduce Debt and Preserve the Environment", *Env. Policy & Law* 21 (1991), 146 et seq.

[125] J. Heep, "From Private to Public: Giving Effect to the "Dept" Component in Debt-for-Nature Swaps", in: Morrison/ Wolfrum, see note 21, 909 et seq., (913).

the concept by respective advice to developing countries.[126] Consequently, debt-for-nature swaps are agreed upon on a mainly bilateral basis involving NGO actors. This mechanism can neither be considered to form part of the framework of multilateral "green" development aid nor of the international environmental efforts in the form of agreements. The objectives of certain treaties can, however, clearly be promoted by dept-for-nature activities, for example by invoking biodiversity related rain forest projects.[127] Nevertheless, although the capacity building within the country is significant and, particularly, in regard to rain forests projects debt-for-nature swaps seem to be viable tools of biodiversity protection, the Convention on Biological Diversity does not explicitly mention this mechanism. An explicit link to international debts made for developmental activities might be considered to be out of the scope of the Convention on Biological Diversity, while at the same time the activities to find other channels and sources on the bi- and multilateral level for financial resources does not exclude such mechanisms either.

2. "Green" Investments

In particular in regard to biodiversity conservation and use of biological resources, private investment strategies have been developed that allow companies to pursue their economic aims, while promoting environmental conservation. The background for the necessity of private sector environmental financing is the fact that there is not enough public sector money available to efficiently conserve environmental resources.[128]

Despite the fact that a growing number of companies adopt internal strategies for ecologically sustainable practice, general codes of conduct have not yet been established. The decision of a company to adopt sustainable strategies and to invest in environmentally friendly practices is guided by markets, concerns for cost savings, partnerships and corpo-

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126 C. Jakobeit, "Nonstate Actors Leading the Way: Debt-for-Nature Swaps", in: Keohane/ Levy, see note 1, 127 et seq., (141).

127 In fact, most of the Latin America swaps rewarded the recipients for conservation measures to safeguard rain forests and biodiversity, see Jakobeit, see note 126, 127.

128 See M.C. Rubino, "Biodiversity Finance", *Int'l Aff.* 76 (2000), 223 et seq., (224).

rate responsibilities as well as by government signals.[129] However, recently certain environmental strategies have tried to more actively engage private companies, e.g. in pollution control and, particularly, climate change prevention.[130] Such linkages must necessarily be further developed to create a comprehensive and coherent financing system for environmental purposes.

VII. Common Features and Differences: A Comparison of Ecofunds and "Green" Development Aid

Overseas development assistance, even if earmarked for environmental purposes, is to be regarded as distinct from the resources of the GEF and even more clearly distinct from treaty-specific ecofunds. Overseas development assistance is sometimes used as a term for all financial transfers from developed to developing countries whether in ecofunds, by the GEF or other mechanisms.[131] This view is not convincing when taking into consideration background and distinct functions of the different tools. By the emphasis on new and additional resources, the UNCED to some extent promoted a differentiation between general "green" development aid and more specific funding mechanisms. The distinction between general development aid and the new resources for sustainable development is a result of the developing countries' concern that otherwise general development aid might be "diluted" and tied to specific environmental targets without increasing the overall financial capacity of the recipients.[132]

The question whether there are differences between overseas development assistance and specific environmental mechanisms concerning an obligation to provide for these resources and a corresponding entitlement to receive financial aid under one or the other mechanism is

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[129] Such government signals can either be sanctions or incentives in the form of regulations, taxation or subsidies; on the different elements see also Rubino, see above, 226.

[130] See for example the strategy of the Prototype Carbon Fund, see note 116.

[131] See S. Johnston, "Financial Aid, Biodiversity and International Law", in: M. Bowman/ C. Redgwell, *International Law and the Conservation of Biological Diversity*, 1996, 271 et seq., (280 et seq.).

[132] DeSombre/ Kauffman, see note 69, 96.

difficult to evaluate.[133] Particularly the discussion whether there is a right to development and whether such right includes — under customary law — the legal entitlement to financial aid has not come to a result that the North and the South could agree upon. While a right to development might be an emerging principle of international law, this does not necessarily create specific financial obligations or entitlement in the realm of overseas development assistance.

Concerning treaty-specific mechanisms, while there might be legal obligations in the international agreements to provide for funding, there is neither entitlement to a certain amount of resources nor is there agreement on the incremental costs due to the difficult definition of the term and the actual assessment of costs. Generally, obligations under international treaty law must not have specified corresponding rights by other participants. As far as authors speak of the general entitlement of recipients for compensation of efforts,[134] whether there is a specific legal entitlement is a case for the respective dispute settlement procedure and cannot be generally assumed. The same applies to a notion that the transfer of financial resources is, due to the principle of common but differentiated responsibilities, no longer based upon the developing states' "needs" but upon "entitlement". Such an entitlement could be understood in an, albeit strong, political sense of meaning unless incorporated in binding environmental agreements. Only in the latter case and particularly if the obligations of the developing countries are made dependent upon the fulfilment of the financial obligations, can legal entitlement to financial aid as such be construed, however subject to the limitations mentioned above concerning amount and interpretation of "incremental costs". Where the obligation to provide for new and additional resources is not complemented by specific provisions on financial mechanisms, as in the non-binding documents of the Rio Declaration and the Agenda 21 for example, the commitment seems too vague to be considered part of customary international law, even if a right to development or even development aid was recognised as such. Even if, during the last ten years, the concept had been filled with life in international conventions, all mechanisms are too considerably differ-

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133 Johnston, see note 131, 274, comes to the conclusion that there is no obligation to provide for ODA, but since Johnston considers all environmental financial mechanisms to be part of development aid, the reasoning in this paper must be more differentiated, even if potentially coming to the same conclusion in the end.

134 Sand, see note 48.

ent to establish a common denominator that could be considered a rule of customary law. Because of the difficulties to establish entitlement to either development aid or resources in treaty-specific mechanisms, the potential rights of the recipients are no viable criteria to clearly distinguish both tiers of "green funding".

Whereas one might want to draw a line between "green" development aid and treaty specific funding mechanism with regard to the characterisation of the contributions as either voluntary or mandatory,[135] one enters once again into the same discussion as above. Assuming, in accordance with the view of the donor states, that development assistance was voluntary, it is still distinct from treaty-specific mechanism, despite the voluntary nature of many of them. Development aid, despite guidelines on impact assessment and other environmental aspects, does not generally aim at specific environmental objectives. Even if specific environmental projects are funded and agreements are taken into account, there are no indications for a comprehensive approach to the issue. A convention, however, establishes aims and strategies to achieve its objectives within an institutional framework. Any contributions to achieve the implementation of the agreement and compliance therewith are channelled and can be expected to form part of a relatively coherent strategy that is supervised by organs of the treaty. The commitments of the States parties to achieve the objectives of the agreement and to contribute to the financing, although sometimes voluntary from a legal perspective, are distinct from a rather incoherent and, arguably, charitable notion.

While the question whether a right to development (assistance) exists, is subject to controversy, the original underlying reasons for the establishment of the instruments of development assistance and treaty-specific funding can more easily be distinguished. Development aid is traditionally based upon a charitable approach that takes account of an ethical consideration to share wealth with the poor, whereas, as discussed above, the underlying concept of shared but differentiated responsibilities that is the basis for many treaty-specific funds goes further than an altruistic motion. This distinction is particularly important in regard to the objectives promoted. Overseas development assistance aims primarily at elevating poverty; an aim, which is originally not linked to environmental conservation considerations. The environmental responsibilities acknowledged by environmental agreements, however, try *inter alia* to compensate developing countries for neces-

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135 Sand, ibid., 374.

sary restrictions to prevent repetition of those developmental mistakes that have led to environmental devastation during the development phase of the industrialised world. Consequently, regarding the underlying considerations the potential for the inclusion of environmental safeguards is notably different.

In addition to the comparisons concerning an entitlement to resources and the nature of the contributions, the respective functions of "green" aid on the one hand and treaty-specific financial mechanisms on the other must be closely examined. While the latter, despite the variety of potential prospects, mainly promote compliance to achieve specific objectives or compensate for restrictions, the "green" element that was introduced into development assistance largely aims at preventing or minimising environmental damage related to the development project in question. Only within the second tier of "green" development aid, the funding of specific environmental projects, the focus is shifted away from the minimisation of damage towards more substantial environmental protection. It is arguable whether, in contrast to treaty-specific environmental mechanisms, the developmental element within such assistance is more emphasised than within the notion of sustainable development referred to by environmental treaties. It might be that the aim to reduce poverty is leading, shifting the weight even within environmental projects further to the developmental side of sustainable development than to environmental and social sustainability. However, concerning the financing of environmental projects both concepts come very close to one another. This is particularly so, where development aid takes into account the objectives of a particular agreement. Yet, in regard to considerations on coherence and strategy of the approach towards environmental objectives the same considerations that were discussed above must apply.

In regard to a balancing of powers between developed and developing countries, institutional structures and negotiations have experienced a shift towards the developing countries, at least as far as environmental agreements are concerned. In particular, in the case of funding mechanisms of treaty regimes, the developing States parties have a strong position that further differentiates these mechanisms from "green" development aid. Whereas the position of the developed countries practically remains the same in the case of both development aid and treaty-specific mechanisms,[136] the position of the developing world is consid-

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[136] That is, despite some pressure to conclude financial agreements due to their differentiated responsibilities.

erably stronger in relation to environmental treaties than to overseas development aid. By blocking negotiations, by non-implementation or non-compliance developing countries' alliances have the power to endanger the success and generally undermine the efforts of the whole process concerning an international environmental issue.

It follows from these considerations that the same aspects that led to the shift from confrontational means to assistance, i.e. the prevention of pollution havens and involuntary free-riders, now give the developing countries' position the necessary weight to bargain for financial assistance and link their obligations to the provision of resources. While *quid-pro-quo* linkages cannot be understood in a strict reciprocal way that would give a single state the right to non-compliance, should sufficient financial resources not be provided, the developing State parties could collectively challenge the treaty regimes should general failures of finance and technology transfer occur.[137] This feature strengthens the concept of the financial mechanisms significantly, if compared to development assistance.

Furthermore, in the case of treaty-specific instruments, despite the difficulties to agree on technical and institutional details, a general compromise is likely to be achieved considering that the outcome resembles a win-win situation: the developing countries gain extra funding for sustainable development and all parties gain a more viable system to protect environmental features of international importance for present and future generations. The underlying notion that all states benefit from environmental protection applies in principle also to "green" development aid. However, since a comprehensive approach it lacking and many projects address local developmental issues, the effect is not altogether comparable to the financing of agreed international activities concerning the most pressing global issues.

If the efficacy of an instrument was merely based upon it's capacity, "green" development aid allocated under the procedures of the multilateral development banks would have to be more effective than ecofunds such as the Small Grants Fund with their comparably minuscule budgets. Financial capacity is crucial to the effective promotion of certain environmental aims. However, a small budget may create particularly effective projects due to the criteria for eligibility and project assessment. The risk with big development aid organisations is that, although the budget is immense, the overall global benefits might be reduced by unconcerted action, i.e. the benefits achieved with one envi-

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[137] Boisson de Chazournes, see note 104, 299.

ronmental project might be cancelled out by major environmental impacts resulting from other development activities financed under another aspect of development aid. Treaty-specific aid in this respect might come to more effective results, however, concerning the respective area of activity only. Again, the efficacy of these results might also be diminished in their overall benefits, if other, colliding, environmental objectives are financed by another mechanism without coordination and consolidation between the two.

An instrument like LIFE that promotes European environmental policies, including the implementation of regional and international agreements, within and to some extent outside the EC Member States, does not find an equivalent on the global level and can neither be compared to treaty-specific elements nor to "green" development aid. The success of the mechanism must be linked to the viable political and legal framework established by the EC. This setting within which the instrument works is only partially transferable to the international level, where structures are different, consensus more difficult to achieve and consolidation of different means of environmental funding has so far only found one significant example in the GEF and the respective cofinancing arrangements of the World Bank.

VIII. Interlinkages: Promotion of Environmental Protection or Conflict?

A variety of different ecofunds raise the issue of operational inefficiency and contribute to the "treaty congestion" syndrome.[138] Generally speaking, aid projects, whether they are based upon a treaty specific mechanism or "green" development aid, might appear effective when viewed in isolation, but lose this quality when other mechanisms in related sectors duplicate or collide with their efforts.[139] In a system of multiple international institutions, agreements, and cooperative structures linkages between environmental agreements and, particularly, between their financial tools are a necessity. Depending on the degree and specific design of linkages, they might either be a chance towards more coherence and coordination or lead to chaotic cross-relations, obstructing a streamlined framework of effective environmental protec-

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138 Sand, see note 13, 182.

139 B. Connolly, "Increments for the Earth: the Politics of Environmental Aid", in: Keohane/ Levy, see note 1, 327 et seq., (328).

tion. While one must hope for the former, this section critically discusses the extent to which the current interrelations reflect the latter scenario.

If funding activities overlap and efforts are doubled, resources are wasted that could be saved by the coordination of activities. The need for consolidation is even more apparent, if conflicting aims are promoted. A collision of interest is especially likely to occur between assistance for environmental protection and development aid. If one organisation provides financial resources, e.g. for habitat protection, and the other assists in industrial development in the same region, environmental efforts are wasted. But also within the environmental sector a collision of interests that *inter alia* becomes apparent in the financing of conflicting activities can occur. Somehow, despite the recognition of treaty congestion, the international community is less aware of the issue of colliding environmental objectives than of clashes between environment and trade or environment and development, although the parallel promotion of colliding environmental goals can as well lead to further environmental degradation. While at present the functions and institutional structures of overseas development aid and different treaty-specific mechanisms are far from forming a coherent system of funding for global environmental purposes, this opinion must not lead to the conclusion that linkages are unsuitable to streamline the framework. Much depends upon the institutional setting and the safeguards implemented to avoid double efforts or conflicts between different mechanisms. Institutions like the GEF that link financial mechanisms of different treaties with development assistance can serve as a viable catalyst for enhanced coherence.[140]

1. The Linkage of "Green" Aid and the GEF via the World Bank

If an institution such as the World Bank is involved in the financing of "green" development projects as well as in the funding of projects via the GEF, one might expect enhanced coherence between the two instruments. In the past, however, the linkage between the GEF and the World Bank's development projects had not been characterised by particular coherence, such as projects that have been on the bank's envi-

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[140] On the function of the GEF as a coordinating factor in international environmental law see Boisson de Chazournes, see note 90, 243 et seq.

ronmental agenda, despite their primarily economic character, e.g. industrial fishing, while at the same time the GEF has funded biodiversity projects to counterbalance intensive fishing in the very same region.[141] The same scenario is likely to occur in respect to large-scale forestry or agricultural projects and biodiversity. An internalisation of costs of World Bank projects could under these circumstances not be guaranteed. Such process would not only undermine the polluter-pays-principle, since externalities would be paid for by another fund, but would also conflict with the concept of sustainable development, since social and environmental costs and benefits must be taken into account on a long term basis. Much will depend on the internal structures and guidelines of the World Bank to prevent such conflicts. If the relationship between the GEF and development assistance via the World Bank is regulated insofar as to safeguard environmental efficacy, the linkage can bear significant benefits for the financing of environmental protection.

Before the restructuring, the GEF was originally expected to supplement regular World Bank loans by financing the incremental costs of environmentally sound development projects.[142] Now the World Bank often co-finances GEF loans, linking general as well as treaty-specific projects to general development aid. This signifies that the role of the World Bank is considerably stronger under the GEF than under any other of the ecofunds. However, in many cases, the co-financing arrangements are the only possible way to initiate environmental projects eligible for GEF funding. Since the GEF only finances the incremental costs, the supplementary World Bank loan enables the recipient to cover the non-incremental, i.e. the basic costs, of the project.[143] It follows that, despite all remaining criticism, the role of the World Bank, as the financial initiator and potential streamliner of environmental activities must not be underestimated.

2. The Linkage of Treaties by Shared Funds

If different agreements share the same funding mechanism, as in the case of the Convention on Biological Diversity and the FCCC, it can

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141 See Horta on the Lake Malawi projects, see note 112, 135.

142 UNEP/UNDP/World Bank, *Report of the Independent Evaluation of the Global Environment Facility Pilot Phase* 1993, para. 3.31.

143 World Bank, *Mainstreaming the Environment*, 1995, 69 et seq.

occur that the same fund promotes colliding aims, provided that the respective treaties have diverging objectives. The avoidance of these collisions must be one of the primary aims of a financial institution that assists different conventions and promotes different environmental goals. The incorporation of a common institutional element that not only links but also coordinates efforts under environmental treaties is an element of the necessary consolidation of environmental agreements with a view to combat collision and overlapping responsibilities concerning the phenomenon of treaty "congestion".[144]

At present, the GEF is the only financial mechanism that was structured since its creation to be used by more than one environmental agreement. Other instruments, like the IFAD, existed before being asked to host an environmental financial mechanism. The IFAD, however, does not link different environmental agreements. The situation concerning the IFAD is also different, because the Global Mechanism is a channelling instrument and does not fund projects by its own resources. Consequently, the scenario of funding for different agreements and colliding aims from the same resources cannot occur in this case.

It is questionable if coordination is easier to achieve when several agreements share a financial mechanism. While such a structure definitely saves administrative resources, it depends on the institutional relation to the treaties in question, whether coordination between the involved agreements is promoted and whether the shared fund indeed becomes a central, streamlined tool for different environmental conventions. The chance for multilateral consolidation, however, clearly exists. This is particularly so in regard to an exchange of funding information.

If treaties or other institutions aim to collect information on funding concerning particular issues, those institutions that host financial mechanisms for different instruments can provide a valuable source of information.[145] It is more viable to gather data and — as a second step — develop strategies for the streamlining of funding, if only a limited number of actors are involved. Those institutions potentially administering a variety of funds would also be assumed to have the necessary administrative and functional capacity to engage in an exchange of information and a streamlining of their activities. In the case of the Con-

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144 Werksman, see note 35, 47.

145 The Convention on Biological Diversity has just requested its Executive General to develop a database on biodiversity-related funding and to make it available via the Clearing House Mechanism, see Decision V/11, UNEP/CBD/COP/5/23, 124 et seq.

vention on Biological Diversity the Conference of the Parties has invited the GEF to assist with the organisation of a workshop on biodiversity financing. This workshop shall also serve as a means to explore the GEF potential to act as a catalyst concerning biodiversity funding.

In general, multilateral consolidation by only a certain number of financial institutions might be more efficient than bilateral means of coordination of different funds, e.g. by Memoranda of Understanding, since those only clarify the relationship between two agreements, whereas a multilateral institution could consolidate a variety of objectives. Consolidation efforts in the case of the GEF, as it is structured at the moment, must be initiated by the respective agreements, since the GEF is subject to their guidance. Generally, within the context of the GEF it must be UNEP's function as one of the operating agencies to ensure project consistency also with other existing environmental treaties established or operating under the auspices of UNEP.

3. Linkages Between Institutions Dealing with the Same Subject Area: GEF and Montreal Protocol

As opposed to the linkage of treaties by the use of the same financial mechanism, linkages between different financial tools by funding of activities in the same sector increase the potential for conflict and, at the same time, the need for coordination of measures between the institutions. The activities of the MPMF and the funding of projects by the GEF concerning ozone depletion as well as climate change are good examples for a viable cooperation between institutions.

Generally, the MPMF is independent from any other fund and activities directed towards financial assistance to safe the ozone layer. As a consequence of this independence MPMF resources can neither be linked to any other funds for ozone layer protection by the World Bank nor can the donating countries fulfil their commitments by providing resources to other ozone layer funds.[146] Generally, the possibility to fulfil commitments by providing resources to other mechanisms or through bilateral channels can threaten the effectiveness and credibility of systems for financial and technology transfers, because of their potential negative implications for the necessary transparency.

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[146] They can, however, be credited up to 20 per cent of their assessment, if they engage in bilateral assistance for the phase-out of ozone depleting substances.

The funding of activities to combat ozone depletion is one of the explicit focal areas of the GEF. In the absence of a formal link between the GEF and the Protocol there has, however, been an exchange of letters of cooperation leading to the following policy: those countries not eligible for funding under the MPMF, i.e. those countries with economies in transition, such as Russia, that do not come under article 5 para. 1 of the Protocol, can qualify for GEF funding provided that they are parties to the Montreal Protocol.[147]

Cooperation seems to work out insofar as the Conference of the Parties to the Montreal Protocol has in some cases explicitly recommended financial assistance by the GEF and other bodies. However, if the Montreal Protocol to a larger extent relied on confrontational sanctions, a theoretical conflict could become apparent. What if the States parties to the Montreal Protocol deny assistance to a non-compliant member as a means of confrontational enforcement and subsequently the GEF, which is not part of the Non-Compliance Procedure under the Protocol, undermines this approach by providing for the necessary resources? There are no viable means that the States parties of the MPMF could prevent this situation. This potential conflict is not as hypothetical as one might think. One should assume, when considering that GEF funding promotes compliance of the formerly non-compliant state, that this aim is generally in the interest of the other States parties to the agreement. However, in the case of GEF grants to the non-compliant Russia and other states with economies in transition to enable them to meet their obligations under the Protocol, developing countries were urged to put projects on hold, fearing that these countries could quickly exhaust GEF financial resources, while failing to contribute to the Protocol's resources earmarked for developing countries.[148] The 7th Mtg. of the parties to the Montreal Protocol even recommended that international assistance to Russia should be considered under special conditions and threatened trade sanctions, as loosely worded and vague as they were, to enforce Russia's compliance.[149]

The main linkage between the GEF and the MPMF is, again, the World Bank. As already discussed above, cooperation should be more

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147 On the case of Russia's non-compliance and the eligibility for funding see J. Werksman, "Compliance and Transition: Russia's Non-Compliance Tests the Ozone Regime", *ZaöRV* 65 (1996), 750 et seq., (756 et seq.).

148 Werksman, see above, 770.

149 See Decision VII/18, accessible at <http://www.unep.org/ozone/7mpviefn.htm>, last visited 31 December 2001.

likely and potentially better coordinated, if the same implementing agency is, at least partially, responsible for different mechanisms dealing with the same subject matter. One example for a cooperation project originally initiated by the Executive Committee of the MPMF is a phase-out project in Thailand that utilises resources from the MPMF and the GEF and includes other World Bank Group institutions in the process.[150] The particular consolidation aspects of such projects currently undertaken that make them unique in their potential for future consolidation efforts, relates to the fact that chiller replacement projects combine the objectives to prevent ozone depletion while at the same time trying to prevent climate change. The GEF is not engaged under its ozone depletion focal area, but under the auspices of the Kyoto Protocol on Climate Change. The benefit of using two separate but institutionally linked global environmental financial mechanisms,[151] apart from the actual reduction of ozone depleting substances, is to demonstrate the feasibility of cooperation between the major funding organisations with a view to further expand consolidation of different treaty regimes. The GEF can and should play a leading role in this context.

IX. Conclusion: Lessons Learnt for the Future

As an introduction to these conclusive remarks the difficulties to give clear and brief answers to those three questions guiding this study shall be summarised. While treaty-specific mechanisms on the one hand and "green" development aid on the other hand establish the main elements of environmental financial assistance, due to the interlinkages between both aspects the issue is too complex to list comprehensively all aspects related to the issue. The potential and actual functions of financial mechanisms, again, differ so much from one another that a categorisation is difficult, despite the fact, that compliance assistance and compensation for incremental costs are considered the most relevant objectives in this respect. Basically the same applies also to the question concerning a coherent framework of environmental financial assistance. While

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[150] Recently the Thailand Building Chiller Replacement Project has been approved by the World Bank on 21 June 2001 (project ID P069027). For more information see World Bank Project Appraisal Document, Report No. 21348-TH, and the Project Information Document, Report PID9888.

[151] Additionally the World Bank might appear as a lender after the second phase of implementation.

the need for consolidation is obvious, there is no apparent solution that takes into account all different elements and functions. The following conclusions take the opportunity to tie together the different subjects discussed throughout the study and to speculate on possible directions for the future development of financial mechanisms.

The parallel establishment of obligations to contribute to more and more environmental financial mechanisms is likely to lead to growing resistance on the contributors' side. One result is the decrease of overseas development assistance, although developed states committed themselves to provide resources that are new and additional to (increasing) development aid. The consolidation of financial efforts might relieve some financial burdens on donor states and counterbalance the growing reluctance to contribute to environmental funds that are not engaging in concerted actions.

Concerning the relationship between development aid and ecofunds the question is not whether either or the other approach is more feasible, but how both can effectively complement one another. If treaty-specific funds with their rather limited budgets would be used to compensate for the implementation of the respective agreement, this would meet the call for new and additional financial resources and pay respect to the common but differentiated responsibilities. In this context the promotion of participation, a tool used by the GEF as well as some of the treaty specific small-scale funds, is a particularly viable mechanism to bind a large part of the international community to environmental objectives and standards. At the same time, general capacity building by the World Bank could build the general foundation of environmentally and socially sustainable development upon which more specific projects by different donors (including the private sector) could be based, in accordance and cooperation with those institutions that deal with the respective subject matter. The process of co-financing as practised in relation to the GEF is a potentially viable means of consolidation and dedication of financial resources to environmental projects. In the case of co-financing, particularly for biodiversity and climate change, the allocation procedure of the bank is supplemented by the criteria of the GEF and the guidance of the respective Conference of the Parties. This might be safeguard enough to emphasise the environmental aspects of the project. In regard to regular financing of development projects, further reform to establish structures that emphasise environmental activities and avoid negative effects are necessary to establish a concerted framework in which development aid and specific environmental projects work together. Despite all criticism, it seems that the World Bank is

working towards that direction, at least as far as the official policies and strategies are concerned. The further "greening" and, most important, the implementation and monitoring of compliance with these "greened" policies must be focussed upon in the future.

Not only because of the number of beneficiary projects actually dedicated to environmental problems, the World Bank, due to its central role within the GEF, the MPMF and other mechanisms, must be regarded as one of the most important players in current and future large-scale environmental financing. Its resources and experience with international funding will continue to be of central importance for future environmental funding, whether by "greened" development assistance or by treaty-specific mechanisms or the GEF. Joint efforts that bring together the MPMF and the GEF in the area of climate change are most important steps for future consolidation involving the World Bank. While the linkage of ozone depletion and climate change is obvious due to the fact that some substitutes for ozone depleting substances are greenhouse gases, the cooperative structure can and must be transferred to other areas of international environmental protection.

However, despite all necessary consolidation efforts, there is no such thing as an optimal financial framework to meet environmental objectives: the current fragmented approach still leads to duplication and conflict of efforts, whereas a potential consolidated system might lead to conflicts between a quasi independent facility and the aims and perspectives of States parties to a specific agreement and other global actors. In the latter case, again, effectiveness would be diminished. The theoretically easiest solution, a global institution like a "world environment organisation" that not only substantially consolidates agreements but also finances the respective activities necessary to promote worldwide environmental improvement in accordance with environmental agreements, is utopia. All proposals to establish such an organisation or a sort of "environment security council" will meet the States' concerns to be obliged to transfer more sovereignty to such an organisation than they are willing to do. Consequently, although some authors and NGOs at times bring up the consideration, attempts to establish a global environmental organisation have never seriously been discussed on the intergovernmental level. Despite the fact that the transfer of sovereignty in the name of environmental goals is already taking place and that a further rethinking of the whole concept of state sovereignty is likely to take place in the nearer future, it is too early for such an obvious step.

Instead, the approach of the GEF to consolidate different environmental agreements via their financial mechanisms could be further strengthened and remodelled to point in the same direction as a global environmental organisation. Since many more conventions than the Convention on Biological Diversity and the FCCC, such as the Convention to Combat Desertification, CITES, the Montreal Protocol and the Regional Seas Conventions operate within the current four focal areas of the GEF, maybe a once again restructured GEF might be capable to make the first step to, at least in regard to financing, consolidate action of a variety of treaties. This would, consequently, contribute to a coherent framework of environmental protection, which is much needed at present and for the future. While the GEF has a limited approach to environmental financing, the principal potential to provide resources for a growing number of environmental areas and for a broader scope might be there. If the GEF would take over the financial mechanisms of those agreements that are currently being financed by independent funds, it would restock its resources, while the parties could save administrative costs, profit from the potentially better consolidated structures and the World Bank co-financing arrangements. It would, however, be problematic to define the structures of guidance and accountability of the GEF to the treaties' institutions and the relation of the different agreements to one another.

An option to face reluctance by states to contribute to ecofunds, in accordance with the polluter pays principle, would be the establishment of funds that are financed by the relevant industries. At present, the responsibility of industry is mainly limited to cases of liability, e.g. for oil spills. International environmental law must now more than ever be focused upon prevention and precaution. The threat of liability can be considered an incentive, albeit a negative one, yet after all a liability fund only tries to minimise existing damage. A fund carried by industry to finance the development and transfer of clean technologies to prevent pollution, enables the international community to achieve political aims and certain countries to meet their agreed obligations is one viable tool to be further developed in the future. Again, consolidation is the key word. The factual linkage of environmental problems and effects can lead to more effective use of technology, once recognised. Yet, only the acknowledgement of actual potential for conflict can help to avoid unfeasible options within a consolidated framework.

A strengthened private and NGO sector could also lead to the promotion of mechanisms like debt-for-nature swaps, breaking the circle of debts leading to environmental degradation that has to be levied by

further (environmental) funding. It must be one focus of a consolidated international environmental framework to include and benefit from mechanisms that, while based primarily in the private sector, target global environmental objectives. At the same time, swap mechanisms on a public scale involving multilateral development banks should be envisioned to be incorporated in the respective framework, because they have particular potential to break the debt-destruction circle,[152] hence further supplementing international financial efforts to safe the global environment.

Despite potential advantages or disadvantages discussed throughout this article, all instruments, treaty-specific mechanisms, development aid by different actors and tools like the GEF have their specific function and right to exist within the overall framework of international assistance, as incoherent as such a framework may be at present. However, the struggle to find a balance between development and environmental protection has not come to an end and is reflected by the different approaches of the respective instruments. While both elements, development and environment, are equally important and closely linked, it must be questioned whether an effective consolidation is possible in the near future due to the distinctive objectives and underlying considerations. Too manifest are the difficulties that concerted financing for environmental objectives is faced with today to achieve a quick and comprehensive solution that takes account of the need of all different actors, while at the same time providing for a sensible balancing of development and specific environmental protection. However, since the international community has recognised the need for better consolidation of efforts, a step-by-step development of a more comprehensive framework and better cooperation between development organisations and institutions for specific environmental financing, along the lines drawn in this article, is not only necessary but might also be expected in the future.

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[152] Heep, see note 125, 932.