

The Global Environment Facility Galaxy: On Linkages among Institutions

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Introduction

The United Nations Conference on the Human Environment – Stockholm Conference of 1972 - broke new ground in calling for universal mobilisation aimed at protecting the environment. Twenty years later, the Rio Conference on Environment and Development marked an occasion to note the advances that had occurred during that time. It also represented a forum in which to take into account other challenging environmental issues that had emerged on the international agenda. This brought about a preoccupation with the protection of the global environment, and more specifically, with the impact of economic development on the atmosphere, climate and ecosystems. These are novel challenges given the magnitude of the risks involved, the complexity of the actions to be undertaken as well as the long-term necessity to act in order to attain objectives at an as yet undetermined point in the future.¹ Some strategies have been adopted, while questions surrounding the legitimacy of other strategies have remained. In the midst of this vast web of options, the mechanisms responsible for financing these strategies are of central importance. The source of

¹ This article is a revised and updated version of “Le Fonds pour l’environnement mondial: recherche et conquête de son identité”, *AFDI* 41 (1995), 612 et seq. With respect to global problems, *The Operational Manual of the World Bank*, 1984 defined them as “those which have considerable effects on a global level. They frequently consist of the most threatening and least apparent ecological problems, having the most long-term consequences.”

the financial resources necessary both to face new challenges and to put in place the technical assistance necessary for the implementation of adequate measures has progressively become an essential component of all conventional regimes and programs relating to environmental protection.

The financing of activities that have as their main aim the protection of the global environment deserves particular attention. The Global Environment Facility (GEF) was at the heart of the debates surrounding the preparation of the so-called Earth Summit, which was held in Rio in June 1992. Even though this financial mechanism was not created at the Rio Conference, this summit did lay the groundwork for the further development of this mechanism. Established in 1991 as a pilot project under the auspices of the World Bank, with the participation of UNDP and UNEP, the GEF was restructured in 1994 in response to demands for greater universality and transparency. It gave rise to new perspectives for institutional and operational cooperation between the United Nations and the Bretton Wood institutions.

With the creation of the GEF, the international community witnessed the emergence of an innovative formula for cooperation among international organizations (I.), with a singular institutional and legal structure (II.). Moreover, its establishment has created a fruitful dynamic for promoting respect for environmental law (III.).

I. A Formula for Cooperation Among International Organizations for Promoting Sustainable Development

The need to carry out activities on a global scale has created a demand for a mechanism that would facilitate the granting of financial assistance to developing countries (1.). The lessons learned from the pilot phase of the GEF, as well as the negotiations surrounding the preparation of the Rio Conference led to the restructuring of the GEF (2.).

1. The Establishment of the Global Environment Facility as a Pioneering Endeavour

The need to protect the global environment emerged on the international agenda during the 1980s. A political consensus was progressively forged around the dangers posed by the depletion of the ozone layer and the need to eliminate the production, consumption and emission of chlorofluoro-

carbons (CFCs). Issues such as global warming and the erosion of biological diversity, even though they had been sources of concern for the scientific community for a long time,² eventually started to gain political support at the end of the 1980s.

Various proposals, namely normative, institutional, economic and financial, were advanced to counter the types of environmental degradation mentioned above. While these proposals were not all without merit, it became evident that the implementation of a financial mechanism designed to assist the states most in need of aid in this area, was of pivotal importance. The Report of the Brundtland Commission echoed these sentiments when it recommended, in its conclusions, the establishment of a facility linked to the World Bank to finance environment protection activities.³ In the wake of this Report, various proposals were advanced. For example, the World Resources Institute proposed the creation of a fund for the global environment, which would finance those expenses incurred by the poorest countries and specifically designated for this objective.⁴ Several non-governmental organizations suggested the idea of exchanging debts in favour of environmental protection, commonly known as "debt-for-nature swaps".⁵ For its part, the World Bank advanced certain ideas designed to promote fairness in favour of borrowing states through the establishment of a financial mechanism able to respond to the challenges of protecting

² J. Grinevald, "L'effet de serre de la Biosphere — De la révolution thermo-industrielle à l'écologie globale", *Stratégies énergétiques, Biosphère et Société* 1 (1990), 9 et seq.; T. Hardin, "The Tragedy of the Commons", *Science* 1968, 1243 et seq.

³ World Commission on Environment and Development, *Our Common Future*, 1987, 338.

⁴ F. van Bohlius (ed.), *Natural Endowments: Financing Resource Conservation for Development*, 1989, 14.

⁵ See D. Asiedu-Akrofi, "Debt-for-Nature Swaps: Extending the Frontiers of Innovative Financing in Support of the Global Environment," *International Lawyer* 25 (1991), 557 et seq. Such technique is still seen as a strategic one for promoting environment protection. As an example, the U.S. President signed during Summer 1998 the Tropical Forest Conservation Act which authorizes US\$ 325 million over three years to cancel the debts of certain biologically rich countries in exchange for their channelling matching amounts of local currency into rainforest-protection trust funds. The bill, which builds on the "debt-for-nature" swaps set up by the former Bush administration for Latin America and the Caribbean, extends such swaps to Asian and African countries, see *National Journal's Greenwire — The Environmental News Daily*, Prez Signs Debt-For-Nature Bill, July 30, 1998.

the global environment by providing additional funding. The Prime Minister of India, for his part, advocated, during the 1989 Summit of the Non-Aligned countries, the creation of a Planet Protection Fund under the aegis of the United Nations.⁶ However, it was a French initiative that had a definitive impact in leading to the creation of the GEF. In 1989, during the annual meetings of the Board of Governors of the World Bank, the French Prime Minister proposed the establishment of a fund of voluntary grants devoted to the global environment. He also committed France to a contribution of 900 million French francs over a three-year period.⁷ At the same session, the Federal Republic of Germany pledged its support for this initiative as well.⁸ These proposals led to the creation of the GEF.

When the Executive Directors of the World Bank (also referred to as the Board) adopted Resolution No.91-5 in 1991 relating to the creation of the GEF,⁹ it, in effect, decided on the establishment of two funds: the GEF and the Ozone Projects Trust Fund. The latter was funded through the Multilateral Fund which had been established within the framework of the Montreal Protocol on Substances that Deplete the Ozone Layer (see below). In Resolution No. 91-5, the Board also envisaged the possible subsequent creation of other funds designed to protect the environment. The adoption of this resolution represented an important step for the Bank in showing its willingness to get involved in the promotion of solidarity mechanisms calling for innovative initiatives and activities in the environmental area.

Already in 1990, the Contracting Parties to the Montreal Protocol had agreed to create a temporary fund designed to cover the incremental costs incurred by the developing countries in their attempts to curb CFC emissions.¹⁰ This fund, the Multilateral Fund, was established in 1991 and be-

⁶ For a more detailed examination of these ideas and of the establishment and development of the pilot phase of the GEF, see H. Sjöberg, "From Idea to Reality: The Creation of the Global Environment Facility," *GEF Working Paper No. 10* (1994), especially 5 and 19.

⁷ *1989 Annual Meetings of the Board of Governors, Summary Proceedings 1989*, 79. It was proposed that this fund be endowed with an amount up to 1 billion SDR.

⁸ *Ibid.*, 81-82.

⁹ Text in: ILM 30 (1991), 1735 et seq.

¹⁰ Amendment to the Montreal Protocol on Substances that Deplete the Ozone Layer, article 10, *International Environmental Law — Multilateral Agreements*, 985:22/B/12; *Report of the Second Meeting of the Parties to the Montreal Protocol on Substances that Deplete the Ozone Layer*, 27-29 June 1990 —

came permanent in 1992.¹¹ One of the characteristics of this fund is that it is applicable within a particular legal framework, which is the Montreal Protocol, which shapes the way the Fund is used. This feature was later also shared by the GEF.

The Bank, in its capacity as implementing agency created its own fund, the Ozone Projects Trust Fund, with funding provided by the Multilateral Fund. In July 1991, the Executive Committee of the Montreal Protocol, which is responsible for administering the Multilateral Fund, reached an agreement with the World Bank.¹² This agreement was in some ways a precursor to the arrangements contained in the financial mechanisms set out in the Framework Convention on Climate Change and the Convention on Biological Diversity, as it stipulated that the resources in the Ozone Projects Trust Fund were to be administered by the World Bank according to the policies adopted by the Executive Committee of the Montreal Protocol.

The concept of a trust fund was not foreign within the sphere of environmental protection. This kind of mechanism had been in existence before to finance particular activities carried out in accordance with international agreements. One can point to, for example, the fund put in place within the context of the Long-term Financing of the Co-operative Programme for Monitoring and Evaluation of the Long-range Transmission of Air Pollution in Europe,¹³ as well as the World Heritage Fund created under the auspices of UNESCO within the framework of the 1972 Convention for the Protection of the World Cultural and Natural Heritage (World Heritage Convention). In addition, one can identify other such examples like the Environmental Fund, managed by UNEP¹⁴ as well as the financial mechanisms established by various foundations and associations

UNEP/ OzL. Pro. 2/3, Decision II/8. On this regime, see J.M. Patlis, "The Multilateral Fund of the Montreal Protocol: A Prototype for Financial Mechanisms in Protecting the Global Environment", *Cornell Int'l L.J.* 25 (1992), 181 et seq.

- ¹¹ *Report of the Fourth Meeting of the Parties to the Montreal Protocol on Substances that Deplete the Ozone Layer*, UNEP/OzL.Pro.4/15 Annex IX. The proposals aimed at integrating this fund with the GEF were never realized, which leaves the former fully autonomous.
- ¹² Agreement was reached between the Executive Committee and the World Bank in September, 1991, SecM91-1154, 6 September 1991.
- ¹³ See the 1984 Protocol to the Convention on Long-Range Transboundary Air Pollution, adopted under the aegis of the EEC/UN.
- ¹⁴ Established following the Stockholm Conference by virtue of A/RES/2997 (XXVII) of 15 December 1972.

that are active in the area of environmental protection, such as the World Wide Fund for Nature (WWF Fund).

The GEF was established at the World Bank and drew upon the experience of this institution in administering such mechanisms. Even though the constituent charter of the Bank does not expressly provide for the trust fund technique,¹⁵ this institution has, by virtue of the doctrine of implicit powers, exercised the functions of trustee and has assumed the fiduciary responsibilities connected thereto.¹⁶ Its experience as trustee therefore was considered as offering all of the guarantees required to administer a mechanism of international solidarity and for which the sums deposited shared little in common with those of already established environmental funds in other arenas.¹⁷ Furthermore, the World Bank's activities had increasingly, since the beginning of the 1980's, focused on the protection of the environment.¹⁸ Particular attention was given to the prevention of

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- ¹⁵ On the notion of a trust and on the difficulty of identifying an adequate definition of this concept that is common to both common and civil law, namely due to the differences in the concept of property and ownership, see D.W.M. Waters, "The Institution of the Trust in Civil and Common Law", *RdC* 253 (1995), 25 et seq., (117). For a definition of the characteristics of a trust, see article 2 of The Hague Convention on the Law applicable to Trusts and their Recognition, *Hague Conference on Private International Law, Acts and Documents, 1984, Proceedings of the 15th Session*, Volume II, Trusts — Applicable Law and Recognition, 1985. See also J. Gold, "Trust Funds in International Law: The Contribution of the International Monetary Fund to a Code of Principles", *AJIL* 72 (1978), 856 et seq.
- ¹⁶ On the requirement that these trust funds, which are generally endowed by multiple donors, conform to the purposes of the organization, and for the practice of the World Bank in administering trust funds, see I.F.I. Shihata, H. Abushakra, H.-J. Gruss, "Legal Aspects of the World Bank's Assistance to the West Bank and the Gaza Strip", *The Palestine Yearbook of International Law* VII (1992/1994), 36 et seq.
- ¹⁷ The amounts of these funds vary according to the activities to be pursued. As for the UNEP Environment Fund, the amount is very low in light of the need for protection of the global environment. See P. Sand, *Trusts for the Earth: New Financial Mechanisms for International Environmental Protection*, 10th Josephine Onoh Memorial Lecture, 1994; P. Sand, "The Potential Impact of the Global Environment Facility in the World Bank, UNDP and UNEP", in: R. Wolfrum *Enforcing Environmental Standards: Economic Mechanisms as Viable Means?*, *Beiträge zum ausländischen öffentlichen Recht und Völkerrecht* 125 (1996), 479 et seq., (487–490).
- ¹⁸ See I.F.I. Shihata, "The World Bank and the Environment — A Legal Perspective", in: A. Parra, F. Tschofen (eds), *The World Bank in a Changing World*,

ecological damage arising out of the Bank's activities in the area of economic development. In addition, the Bank's portfolio progressively contained projects, which had as their primary aim the protection of the environment. In all of these aforementioned cases, the Bank developed strategies designed to combat local and transboundary degradation.

The GEF was established for a pilot phase of three years.¹⁹ The funds could be applied to finance environmental protection activities in four main areas: 1.) global warming and attempts to reduce greenhouse gas emissions, 2.) protection of biological diversity, 3.) protection of international waters and 4.) protection of the ozone layer. The funds would be used to cover the incremental costs incurred through activities in these areas, that is the costs exceeding the measures adopted pursuant to national environmental protection policies and conducted in the absence of global environment concerns.²⁰

Thirty states, including 19 member countries of the OECD and 11 developing countries, committed themselves to contributions surpassing 800 million US\$. These contributions conferred upon these states the status of a Participating State. Moreover, it was also expected that this fund would be financed through co-financing operations for specific projects. The Bank acted as the trustee of the funds and was bound to the particular fiduciary responsibilities provided for by Resolution No. 91-5, referred to above. In October 1991, agreement was reached between UNDP, UNEP and the World Bank in order to formalize arrangements in the area of operational cooperation among them.²¹ This agreement detailed the responsibilities of each of the three implementing agencies. They were expected to collaborate in accordance with their respective comparative advantage.

Selected Essays, 1991, 135 et seq.; *Id.*, "The World Bank and the Environment: Legal Instruments for Achieving Environmental Objectives", *The World Bank in a Changing World*, Volume II, 1995, 183 et seq.

¹⁹ On this mechanism, see Shihata, "The World Bank and the Environment — A Legal Perspective", see note 18, 168 et seq.; W.P. Ofosu-Amaah, C.Di Leva, R. Osterwaldt, "World Bank", *Yearbook of International Environmental Law* 2 (1991), 403 et seq., (407).

²⁰ On the issue of incremental costs, see The World Bank (ed.), *Development and the Environment*, World Development Report 1992, 170 et seq.

²¹ See Annex C of Resolution No. 91-5, see note 9.

The work program proposed by the Bank and UNDP was reviewed by the other implementing agencies and by the countries participating²² in this financial mechanism. These organizations and countries benefited from the assistance of a Scientific and Technical Advisory Panel (STAP) established by UNEP. The beneficiaries of the assistance were the developing countries that fulfilled the conditions required for borrowing from the Bank and for receiving technical assistance from the UNDP. They did not have to satisfy the conditions of a Participating State. By virtue of a special programme administered by the UNDP, non-governmental organizations (NGOs) could also benefit from grants. In addition, during the course of the preparation of the projects, the NGOs and the local populations would have to be consulted on the feasibility of the activities to be undertaken.

The multilateral mechanism of the GEF was in its pilot phase from July 1991 until July 1994. During this period, 115 projects in 63 countries were approved, representing an estimated value of 730 million US\$. An examination of these projects suggests that the main preoccupation of the Fund was the reduction of the greenhouse effect and the protection of biodiversity, as more than three-quarters of the funds were directed towards reversing global warming and the depletion of biological diversity. It is noteworthy however that these issues retained their position of importance even after the restructuring of the Fund.

The innovative character of the GEF lies not only in its approach to the protection of the global environment, but also in the structure of the mechanism and its functions, which emphasize cooperation within the United Nations System, between the World Bank and institutions such as the UNEP and the UNDP. This type of collaboration provided is a newly created mechanism, and more particularly, its successor in 1994, with a unique institutional structure within the international order. As will be seen, this profile sheds light on new perspectives for drawing relationships among international organizations.

2. The Establishment of the Restructured Global Environment Facility: Room for Institutional Creativity

As of April 1992, the states participating in the GEF agreed to undertake a revision of this mechanism, which, it will be recalled, was initially estab-

²² In order to have the status of a participant, the country was to make a contribution to the fund. For developing countries the minimum contribution was fixed at 4 million SDR.

lished for a three-year pilot phase.²³ The restructuring of the Fund was considered a key item in the preparations for the Rio Summit as well as in the course of the negotiations of the Framework Convention on Climate Change and the Convention on Biological Diversity. This mechanism, being the object of great interest among Rio Conference participants, would be reformed according to the criteria and principles advanced by many of its participants.

The Rio Conference on Environment and Development and the preparations leading up to it, served as the catalyst for a two-pronged phase of parallel negotiations that began in December 1992. One phase would focus on the restructuring of the Fund so as to render it a permanent entity, while the other would focus on the replenishment of its funds. The GEF thus gradually developed an identity, a development that responded to the grievances of those seeking to reform the fund. For developing countries, the principal concerns centered on, first, the principles of universality and transparency in the administration of the Fund, namely with respect to governance and the decision-making procedures, and, second, the accountability of the trustee (i.e. the World Bank) towards Participating States, whether they be donors or beneficiaries. These diverse negotiations also presented an opportunity to refine the profile of the GEF. In fact, one of the requests of the developing countries was that the resources allocated to this fund by developed countries be increased. Developing countries also requested that these funds be new funds, supplied over and above existing resources (i.e. bilateral and multilateral development assistance). Moreover, developing countries advocated the necessity to widen the scope of applicability of this mechanism so as to enable it to address a wider range of global environmental concerns, including financing the various measures contained in Agenda 21, the Program of action adopted at Rio.²⁴ The responses to these requests provided the opportunity in which the role and identity of the GEF could be more clearly identified within the multilateral and bilateral mechanisms that were expected to finance environmental protection activities. The negotiating process lasted two years and required seven meetings. It was concluded in March 1994 in Geneva and led to the adoption of the Instrument for the Establishment of the Re-

²³ An evaluation of the GEF was also undertaken; see the final report of this evaluation, *Report of the Independent Evaluation of the Global Environment Facility Pilot Phase*, UNEP/UNDP/World Bank, 23 November 1993.

²⁴ A/CONF.151/26. See G. Corcelle, "20 ans après Stockholm: La Conférence des Nations Unies de Rio de Janeiro sur l'environnement et le développement: point de départ ou aboutissement", *Revue du Marché Commun et de l'Union européenne* 365 (1993), 107 et seq., (114).

structured Global Environment Facility.²⁵ It should be noted that while matters relating to Agenda 21, such as land degradation for example, were included within the scope of application of the GEF, the GEF was designed to finance only the incremental costs related to global environmental protection.

The purpose and field of application of the GEF are set out in paras 2 and 3 of the Instrument as follows:

2. The GEF shall operate, on the basis of collaboration and partnership among the Implementing Agencies, as a mechanism for international cooperation for the purpose of providing new and additional grant and concessional funding to meet the agreed incremental costs of measures to achieve agreed global environmental benefits in the following focal areas:

- (a) Climate change;
- (b) Biological diversity;
- (c) International waters; and
- (d) Ozone layer depletion.

3. The agreed incremental costs of activities concerning land degradation, primarily desertification and deforestation, as they relate to the four focal areas shall be eligible for funding. The agreed incremental costs of other relevant activities under Agenda 21 that may be agreed by the Council shall also be eligible for funding insofar as they achieve global environmental benefits by protecting the global environment in the four focal areas.

These provisions merely reaffirm the principle of new and additional resources and the concept of incremental costs already governing the allocation of grants and concessional funding for the GEF in its pilot phase and the Ozone Projects Trust Fund. It should also be noted that these planned resources represent only a part of the totality of the financial measures to be undertaken by virtue of Agenda 21.²⁶ Negotiations surrounding the reconstitution of the Fund resulted in the accumulation of contributions

²⁵ For the text of the Instrument, see *ILM* 33 (1994), 1283 et seq.

²⁶ As noted by Corcelle, see note 24, 113. M. Strong, Secretary-General of the Rio Conference calculated that the cost of Agenda 21 will increase for the period between 1993 and 2000 to the sum of 600 billion US\$ per year. Of this 600 billion US\$ amount, most would come from national resources. However, about 125 billion US\$ will be issued from industrialized countries in the form of development assistance, an amount which represented about double the current level of Official Development Assistance (ODA).

exceeding 2 billion US\$ in the period between 1994 and 1998. With the restructuring and the replenishment of the Fund, the GEF was accepted as the (interim) financial mechanism for the Framework Convention on Climate Change and the Convention on Biological Diversity. As will be seen later, this link with the Rio Conventions is an important feature of the GEF. Replenished a second time in March 1998 at the level of US\$ 2.75 billion, the GEF was confirmed in its tasks of complementing and strengthening actions and funding for sustainable development at the local, national, and regional levels for protecting the global environment.²⁷

On the institutional level the establishment of the restructured GEF was the result of a joint action by the World Bank and the United Nations, represented by the UNDP and the UNEP. The GEF remained located within the World Bank, as it was during its pilot phase. Its autonomy and independence were however confirmed and strengthened. The instrument governing the restructuring of the GEF also called for, and clarified the coordination and allocation of roles between the organizations, whether they act as trustee and implementing agency for the World Bank, or as implementing agencies for the UNDP and the UNEP.²⁸

The Rio Conference was not very innovative on the institutional level although various proposals were made.²⁹ It mainly focused its attention on laying the groundwork for the creation of the Commission on Sustainable

²⁷ The contributions of the industrialized countries for the first replenishment (GEF-1) were based on the sharing formula adopted over the course of the 10th reconstitution of the resources of the International Development Association (IDA). Certain donors also made additional voluntary contributions. For the second replenishment, the basic shares were based on GEF-1 burden-sharing, but there were exceptions. The pledges for basic contributions for Germany, Italy, and the United States were all below their GEF-1 basic shares.

²⁸ For an analysis of the innovative aspects of the arrangement of the relations between these organizations within the United Nations, see S. Silard, "The Global Environment Facility: A New Development in International Law and Organization", *Geo. Wash. J. Int'l L. & Econ.* 28 (1994/95), 607 et seq., (645).

²⁹ See the proposals espoused over the course of the period preceding the Rio Conference, G. Palmer, "New Ways to Make International Environmental Law", *AJIL* 86 (1992), 259 et seq., (278-282); G. Plant, "Institutional and Legal Responses to Global Warming", in: R. Churchill, D. Freestone (eds) *International Law and Global Climate Change*, 1991, 178; J. Werksman, "Consolidating Governance of the Global Commons: Insights from the Global Environment Facility", *Yearbook of International Environmental Law* 6 (1995), 28 et seq., (33-39).

Development,³⁰ a subsidiary organ of ECOSOC. The mandate of this commission was to facilitate the coordination and integration within the United Nations of the goals of environmental protection and development in the search for sustainable development and the effective implementation of Agenda 21. In such a context, the restructuring of the GEF represented an additional and important institutional accomplishment of the Conference, although not a direct product of it.³¹ The GEF offers challenging perspectives for promoting international cooperation and has since gained recognition of its usefulness, even though work remains to be done in order to further integrate and mainstream global environment concerns within the activities of its implementing agencies.³²

II. The Singularity of the Global Environment Facility as an International Institution

A number of questions can be raised with respect to the identity of the GEF. The notions of mechanism, entity, agency, institution or international organization, which are used for qualifying the GEF, do not provide a precise definition of its status. A presentation of the conditions leading to its establishment (1.), as well as of its organizational structure and the division of responsibilities between the different partners (2.), provides some insight into the institutional make-up of the GEF and its functions.

1. A Sui Generis International Constitutive Instrument

The conditions under which the GEF was adopted are indicative of the particular nature of the mechanism. It was fashioned within the context of the hitherto traditional practice of international meetings between representatives of states, interested international institutions as well as non-governmental organizations. However, its implementation was neither carried out by virtue of an interstate treaty nor as a result of an agreement between international organizations destined to create a new common in-

³⁰ Created by A/RES/47/191 of 22 December 1992; see P. Orliange, "La Commission du développement durable", *AFDI* 39 (1993), 820 et seq.

³¹ P. Sand, "UNCED and the Development of International Environmental Law", *Yearbook of International Environmental Law* 3 (1992), 3 et seq.

³² See G. Porter, R. Clemençon, W. Ofosu-Amaah and M. Philips, *The Study of GEF's Overall Performance*, 1998.

stitution with respect to which they could claim parenthood rights on an equal basis. These scenarios emerged during the course of negotiations, but were not retained.

Instead, the GEF was constituted on a particular legal basis. The 73 states attending the Geneva Meeting of March 1994 that successfully completed the negotiations, supported the adoption of the Instrument for the Establishment of the Restructured Global Environment Facility. They also agreed on the replenishment of the Fund, which was to receive more than 2 billion US\$. As a second stage, in accordance with the Instrument, the World Bank, the UNDP and the UNEP each adopted the Instrument by way of a resolution or a decision of their respective competent bodies and in accordance with their own rules of procedure and regulations.³³ It were therefore these three international organizations that created this financial mechanism, with the states having previously accepted its establishment. It should be noted that only the Bank as an international organization could create the GEF. UNDP and UNEP being Programmes of the United Nations did not have the formal jurisdictional power to create a new institution. The adoption by all three organizations of resolutions and decisions was however considered necessary to show their solidarity in the promotion of the objectives of the GEF.

The states' approval of the Instrument did not rise to the consequences provided for by the law of treaties in matters of "consent to be bound" nor those that traditionally have prevailed for constituting an international organization.³⁴ However, the states' approval was not without any legal value. Instead it constituted a preliminary condition to the decisions of the organizations creating and promoting the establishment of the GEF. The

³³ Resolutions Nos 94-2 and 94-3 of the Executive Directors dated 24 May 1994 and Resolution No. 487 of the Board of Governors of the World Bank adopted 7 July 1994; Decision of the Executive Board of the United Nations Development Program for and of the United Nations Population Fund, DP/1994/9, adopted 13 May 1994; Decision adopted by the Governing Council of the United Nations Environment Programme, SS.IV.1, adopted 18 June 1994. The mechanism entered into force 7 July 1994 and the new special Trust Fund became operational on 16 March 1995 (see para. 6 lit.(c) of Annex C of the Instrument).

³⁴ This is the case if we accept the definition of "international organization" stipulated in article 2 of the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations of 21 March 1986. It defines an international organization as an intergovernmental organization, i.e. created by states. Text of the Convention, P. Reuter, *Introduction to the Law of Treaties*, 1995, 244 et seq.

GEF was therefore constituted in two stages, which were necessarily linked to each other and which created legal effects.

The amendment and termination procedure confirms this analysis, since it too sets out a two-stage process.³⁵ The GEF organs (Assembly/Council) composed of representatives of states, must, first approve the amendment or the termination, as the case may be, in accordance with the criteria and procedures established for this process. Such decisions do not take effect until they have been approved by the competent international organizations.

This approval procedure must be distinguished from the one governing the decision conferring the status of member of the GEF. Para.7 of the Instrument stipulates that all member states of the United Nations or of its specialised agencies may become a participant in the GEF by depositing with the Secretariat an instrument of participation.³⁶ In the case of state contributing to the GEF Trust Fund, its instrument of commitment is deemed to serve as an instrument of participation.

The conditions for the establishment of the GEF are different from those governing the implementation of the GEF in its pilot phase, since, in that case the World Bank was the primary architect in its establishment. The World Bank then entered into an agreement with the UNEP and the UNDP for operational cooperation purposes. In this case, the three organizations participated in the establishment of the GEF — albeit differences in their legal standing — after having received the support of the states that participated in the negotiations. Moreover, one can consider that the decisions of the three organizations take the place of the agreement on operational cooperation, as the organizations have not yet confirmed their commitments flowing from the establishment of the GEF, by negotiating an arrangement in accordance with Annex D of the Instrument.

The conditions establishing the GEF have left their mark on the legal make-up of this entity. The GEF is not the result of an interstate agreement. This indicates that the states did not wish to confer upon the GEF a distinct legal personality with the capacity to enter into international agreements within its sphere of jurisdiction.³⁷ This issue is significant since the Instrument requires the Council of the GEF to examine and approve

³⁵ See para. 34 of the Instrument.

³⁶ This is done by filling out the form attached to Annex A of the Instrument. As of December 1998, the GEF included 165 Participating States.

³⁷ On the attributes attached to the quality of subjects of international law, see the Advisory Opinion of the ICJ-Reparation for Injuries Suffered in the Service of the United Nations, ICJ Report 1949, 174 et seq., (178-180).

the arrangements and agreements with the Conferences of the Parties to the Conventions on Climate Change and Biological Diversity.³⁸ However, the Instrument in its Annex B relating to the role and fiduciary responsibilities of the World Bank as trustee of the Trust Fund (see for further information under II.2.) of the GEF, stipulates that the Bank is responsible to formalize the arrangements and agreements concluded with the Conferences of the Parties.³⁹ This provision illustrates the distinct manner in which the conventional relations are managed. Even if it falls to the Bank to formally conclude the arrangements and agreements, since the GEF Council was not granted this power, this can only be carried out once the GEF Council (for the structure of the GEF see below under 2.) has had the opportunity to study and approve such arrangements and agreements. Once again, the two-step process is apparent, allowing Participating States to decide on the nature of the GEF's external relations, while acknowledging the World Bank's capacity to formalize these relations. The term "formalization" used by the Instrument merits, however, some clarification. The World Bank's power to formalize arrangements or agreements concluded with the Conferences of the Parties falls within the scope of its fiduciary responsibilities as a trustee. It should therefore be understood as conferring upon the Bank merely the authority to appreciate if these arrangements or agreements conform to its responsibilities as trustee.

A number of states, particularly industrialized countries, were wary of creating a new global organization that would be accompanied by a new global bureaucracy. The legal structure of this financial mechanism responds to this concern. It also reveals the influence of pragmatism in international relations, which encourages the creation of institutional mechanisms that benefit from a certain degree of international stature. It is within this context that one can best appreciate all of the particularities of the GEF. It is also noteworthy that the establishment of the GEF is not an isolated case within the international order. One can refer to cases where

³⁸ Paras 20 lit.(g) and 27 of the Instrument. See also article 11 para.3 of the Convention on Climate Change and article 21 para.1 of the Convention on Biological Diversity.

³⁹ Para.7 of Annex B reads as follows: "The Trustee may enter into arrangements and agreements with any national or international entity as may be needed in order to administer and manage financing for the purpose of, and on terms consistent with, the Instrument. Upon the request of the Council, the Trustee will, for the purposes of paragraph 27 of the Instrument, formalize the arrangements or agreements that have been considered and approved by the Council with the Conferences of the Parties of the conventions referred to in paragraph 6 of the Instrument".

new institutions were created resulting from the contribution of other international organizations without the intervention of states. One such example is the Joint Vienna Institute, created jointly by the IMF, the World Bank, the OECD, the European Bank for Reconstruction and Development and the Bank for International Settlements (BIS), located in Vienna.⁴⁰ One can also point to the recent transformation of an existing institution into a new organization, as was the case with the OSCE. The OSCE was granted numerous international attributes, without having been constituted by an intergovernmental agreement and without being formally granted international legal personality.⁴¹ This illustrates the great diversity that exists among the international institutions and organizations. The GATT, for example, operated for a long period of time as a *de facto* international organization⁴² before having its international status and legal personality sanctioned by an intergovernmental agreement.⁴³ Similar remarks can be made regarding the UNIDO, which was created in 1966 as a subsidiary organ of the UN General Assembly but subsequently became, in 1985, the 16th specialized agency within the UN System.⁴⁴

Even though the GEF lacks a distinct legal personality, it does nonetheless enjoy a large degree of functional autonomy, a point that is supported by an analysis of its structure and functions. As one commentator

⁴⁰ F. Rousseau, "Joint Vienna Institute — Brèves remarques relatives à la création de l'Institut commun de Vienne", *RGDIP* 99 (1995), 639 et seq.

⁴¹ M. Sapiro, "Changing the CSCE into the OSCE: Legal Aspects of a Political Transformation", *AJIL* 89 (1995), 631 et seq. On the use of the notion of "soft international organization", see L. Condorelli, "Diritto e non diritto nella CSCE", in: G. Barberini, N. Ronzitti (eds), *La nuova Europa della CSCE*, 1994. For an application of the theory of effectivity to the OSCE, see Ch. Bertrand, "La nature juridique de l'Organisation pour la sécurité et la coopération en Europe (OSCE)", *RGDIP* (1998), 364 et seq.

⁴² See the note of the Département Politique Fédéral Suisse of 1977 on the status of the GATT, *Annuaire Suisse de Droit International* 34 (1978), 49 et seq., (83–87); F. Roessler, "Law, De Facto Agreements and Declarations of Principles in International Economic Relations", *GYIL* 21 (1978), 27 et seq., (47–48).

⁴³ J. Jackson, "Observation sur les résultats du cycle de l'Uruguay", *RGDIP* 98 (1994), 675 et seq., (683).

⁴⁴ P. Bretton, "La Transformation de l'ONUDI en institution spécialisée", *AFDI* 25 (1979), 522 et seq., (567–578); H.G. Schermers, N.M. Blokker, *International Institutional Law*, 1995, 26.

has remarked, this is a significant point since such autonomy may be the guarantee of a future emancipation.⁴⁵

2. Governance Structure: A Quest for Universality and Transparency

The restructuring of the GEF offered some assurance to states and to other international actors that sought greater transparency in the functioning of the mechanism. They also wanted the GEF to be more universally representative and more democratic. The Preamble to the Instrument affirmed that the Facility was restructured "to ensure a governance that is transparent and democratic in nature (and) to promote universality in its participation."⁴⁶ These preoccupations are reflected in the structure of the mechanism, the decision-making process as well as the relations between this mechanism and the international institutions that assume the roles of trustee and implementing agencies.

The GEF is composed of an Assembly, a Council and a Secretariat and benefits from the advice of a Scientific and Technical Advisory Panel (STAP), administered by UNEP pursuant to the provisions of the Instrument.⁴⁶

The *Assembly* of the GEF consists of representatives of all Participating States.⁴⁷ While in 1991 all developing countries wishing to become Participating States were asked to make a financial contribution to the Fund, this requirement was abandoned in 1994. This decision was one of the responses to demands for universality. The Assembly meets once every three years and is primarily responsible for examining the policies and operations of the Fund. It met for the first time in New Delhi (India) in April

⁴⁵ According to the remarks of I.F.I. Shihata, *Opening Address*, Conference on Expert Monitoring of International Legal Norms (New York University School of Law, 2-4 February 1996), *The World Bank in a Changing World*, Volume III (forthcoming).

⁴⁶ Para. 24 of the Instrument reads as follows: "UNEP shall establish, in consultation with UNDP and the World Bank and on the basis of guidelines and criteria established by the Council, the Scientific and Technical Advisory Panel (STAP) as an advisory body to the Facility. UNEP shall provide the STAP's Secretariat and shall operate as the liaison between the Facility and the STAP".

⁴⁷ Paras 13 and 14 of the Instrument.

1998 and demonstrated the support, as well as the ownership which was consolidated over time, of all groups of states towards the GEF.⁴⁸

The *Council* is the main executive organ. Its composition is designed to reflect two preoccupations, one relating to representation of all participants in a balanced and equitable way, while the other takes into account the financing efforts made by contributors. Of the 32 members composing the Council, 18 are from beneficiary countries while 14 are from industrialized countries. Some groups however include both beneficiary and non-beneficiary countries. The sponsors of certain important funds can make up their own group.⁴⁹ The Council meets on a bi-annual basis.

The Council enjoys certain important prerogatives. It is responsible for adopting and evaluating the operational policies and the programmes of the GEF. It was also granted decision-making powers regarding the use of GEF resources.⁵⁰ The World Bank, the UNDP and the UNEP, in their capacities as implementing agencies, are accountable to the Council for their activities that are financed by the GEF.⁵¹ The Council is also charged with the task of approving the administrative budget. It benefits from the services of a functionally independent *Secretariat*,⁵² supported administratively by the World Bank. The Chief Executive Officer (CEO) of the GEF, whose candidacy is proposed by the three implementing agencies and who is appointed by the Council, is the head of the Secretariat. He is directly accountable to the GEF Council. Among the tasks of the CEO is the significant and strategically important role of co-presiding over Council meetings.⁵³

The decision-making process was an important point during the negotiations surrounding the restructuring of the Instrument. For the developing states, such a process was supposed to reflect the donor states' willingness to ensure that the GEF would be administered collectively by all members of the international community. It was to be an expression of the

⁴⁸ See The New Delhi Statement of the First GEF Assembly, *International Environment Reporter* 21 (1998), 396–397.

⁴⁹ Para. 16 of the Instrument. The 32 members are divided up in the following way: 16 members for the developing countries, 14 members for the developed countries and 2 members from the countries of Central and Eastern Europe and the former Soviet Union.

⁵⁰ Para. 20 lit.(e) of the Instrument.

⁵¹ Para. 22 of the Instrument.

⁵² Para. 21 of the Instrument.

⁵³ Para. 18 of the Instrument. Mohamed T. El-Ashry is the current Chief Executive Officer and Chairman of the GEF.

concern for universality, as expressed most notably in Agenda 21.⁵⁴ The main governing principle in the decision-making process is that of consensus within the Assembly and the Council. If "no consensus appears attainable"⁵⁵ at the Council, a formal vote will be taken. The voting procedure is governed by the principle of a double weighted majority, which requires a 60% majority of the total number of Participating States as well as a 60% majority of the total amount of contributions made to the Trust Fund of the GEF.⁵⁶ The adoption of this double weighted voting system, which is based on the states' economic power, on the one hand, and the method of one vote per state, on the other, responded to the concerns over universality expressed by the developing countries. It also responded to the expectations of the donor states by providing them with the possibility of a qualified majority vote.⁵⁷

The World Bank, the UNDP and the UNEP are important partners in carrying out the operations of the GEF. While these organizations share some common responsibilities, they also have some that are specific to each of them as well.⁵⁸ This reflects a desire to benefit from the strengths of each institution without having to create a new organization. In accordance with article 8/Annex B of the Instrument, and by virtue of Resolution No. 94-2 of its Executive Directors, the World Bank established a special *Trust Fund*. By so doing, the Bank assumed the role of trustee of the newly created fund. As an implementing agency, the Bank is also responsible for investment projects and mobilization of private sector re-

⁵⁴ J. Dernbach, "The Global Environment Facility: Financing the Treaty Obligations of Developing Countries", *Environmental Law Reporter* 23 (1993), 10124 et seq., (10129).

⁵⁵ Para. 25 lit.(b) of the Instrument.

⁵⁶ For more details concerning the conditions for the breakdown of the votes regarding the contributions made to the trust fund of the GEF and other associated practices, see para. 25 lit.(c)(iii) of the Instrument. This voting method is similar to the one put in place by the OPEC Fund for International Development. Its main proponent, I.F.I. Shihata, then Director General of the OPEC Fund, was Senior Vice-President and General Counsel of the World Bank at the time of establishment of the GEF. See I.F.I. Shihata et al. *The OPEC Fund for International Development: The Formative Years*, 1983, 31.

⁵⁷ This voting procedure is different than the one in place at the World Bank and at the IMF. The latter is based on the share of capital contributions to the organizations (a small equal number of votes is also allocated to each Member State, independently from its contribution to capital).

⁵⁸ See Annex D of the Instrument, "Principles of Cooperation among the Implementing Agencies".

sources, while the UNDP has the primary role of ensuring the development and management of capacity building programs and technical assistance projects. For its part, the UNEP is responsible for overseeing the development of scientific and technical analysis as well as promoting environmental management protection consistent with the purpose of the GEF.

The Instrument stipulates that an agreement must be concluded between the three implementing organizations mentioned above. Such agreement was entered into in 1991 for the pilot phase of the GEF, but has not yet been negotiated since the GEF has been restructured. This seems to demonstrate that in the regular course of activities there is little need for formalism. Annex D to the Instrument also calls for the implementation of an "ongoing interagency process," carried out within the framework of an interagency committee. This institutional scheme has been put in place and has changed over time. It is now known as the GEF Operations Committee (GEFOP). In addition, such institutional concerns are, to a great extent taken into account in the daily administration of activities.

The procedure for requesting funds from the GEF is also indicative of the close relationships between institutions. States and other parties must submit their requests for grants to one of the implementing agencies. The other organisations are then informed of this request. The GEF Council approves the projects within the context of a work programme recommended by the CEO. Individual projects within the programme are developed and approved by each of the implementing agencies. The CEO then makes sure that each project conforms to the work program and ultimately endorses it before the final project approval by an implementing agency.

Within the framework of the GEF, there exists a clear desire to involve other partners, such as NGOs and local populations.⁵⁹ This participation manifests itself in different ways, not only in the operational area but also within the context of questions relating to policy and programs. NGOs have an observer status at Council meetings which is unique among financial institutions. They may also request funds directly from the implementing agencies if the government accepts the project in principle. There exists a special programme of microfinancing, administered by the UNDP,⁶⁰ for projects proposed by community groups and NGOs.

⁵⁹ Para. 28 of the Instrument also refers to the collaboration of multilateral development banks, development agencies, national institutions, private sector entities and academic institutions.

⁶⁰ Within the Small Grants Program (SGP), a ceiling of 50.000 US\$ is allocated for national projects and of 25.000 US\$ for regional projects.

Moreover, NGOs as well as other entities, public and private, may apply for medium-size projects, and may receive up to one million US\$ in GEF financing.

While the GEF Instrument only considers the World Bank, UNDP and UNEP as implementing agencies, it also allows for other bodies to be involved in operational activities through the implementing agencies. An open issue not yet resolved is the possibility for direct access of these other bodies to the GEF Council without the need to go through one of the implementing agencies. Should it be done in consultation with the World Bank, UNDP and UNEP, with a view to limiting this possibility to special cases or could it be left open to the decision of the GEF organs? These issues fall within the broader context of the allocation of responsibilities among institutions, especially when taking into account the comparative advantage of the three implementing agencies *vis-à-vis* other partners. These questions relate directly to the core function of the GEF, and particularly to its role as a catalyst for promoting innovative and far-reaching activities for promoting global environment concerns with all concerned partners.

The GEF mechanism must also be understood within the context of its link with the Convention on Climate Change and the Convention on Biological Diversity. These institutional and conventional relations add a new dimension to the dynamic since the Conferences of the Parties have some input into the use of GEF resources. This illustrates once again the innovative and original character of the GEF.

III. The GEF and the Rule of Law: A Fruitful and Dynamic Relationship

The Conventions on Climate Change and Biological Diversity each provide for the involvement of a financial mechanism responsible for compensating the incremental costs incurred through the adoption of measures pursuant to these instruments. The Conferences of the Parties have each recognized the GEF for assuming such a role. The conditions set out in the conventions, while favouring the restructuring of the Fund in 1994, have consolidated its stature on the international scene (1.). Moreover, the Framework Convention on Climate Change and the one on Biological Diversity provide the GEF with a legal framework within which it contributes to the promotion of the role of law (2.).

1. Relations among Institutions: Flexibility and Pragmatism

Each of the above mentioned conventions sets out the terms of reference for the financial mechanism and the instrumental role that it plays in the implementation of these conventions. The inclusion of these references is indicative of the negotiations, the compromises and the achievements that surrounded the adoption of these agreements. The GEF attracted considerable attention and its restructuring was aimed at satisfying the various demands for more universality and transparency. A review of the relevant conventional provisions reveals the transformation that the GEF experienced in its phase of restructuring. It also illustrates the importance of this mechanism to the implementation of the conventions, notably in the context of its relations with the bodies established by each convention.

The Convention on Climate Change stipulates in paras 1 and 2 of article 11 that:

1. A mechanism for the provision of financial resources on grant or concessional basis, including for the transfer of technology, is hereby defined. It shall function under the guidance of and be accountable to the Conference of the Parties, which shall decide on its policies, programme priorities and eligibility criteria related to this Convention. Its operation shall be entrusted to one or more existing international entities.
2. The financial mechanism shall have an equitable and balanced representation of all Parties within a transparent system of governance.

Article 21 para.3, of the same Convention reads:

3. The Global Environment Facility of the United Nations Development Programme, the United Nations Environment Programme and the International Bank for Reconstruction and Development shall be the international entity entrusted with the operations of the financial mechanism referred to in Article 11 on an interim basis. In this connection, the Global Environment Facility should be appropriately restructured and its membership made universal to enable it to fulfill the requirements of Article 11.

The Convention on Biological Diversity, in para. 1 of article 21, describes the financing mechanism as follows:

There shall be a mechanism for the provision of financial resources to developing country Parties for purposes of this Convention on a grant or concessional basis the essential elements of which are described in this Article. The mechanism shall function under the authority and guidance of, and be accountable to, the Conference of the Parties for

purposes of this Convention. The operations of the mechanism shall be carried out by such institutional structure as may be decided upon by the Conference of the Parties at its first meeting. For purpose of this Convention, the Conference of the Parties shall determine the policy, strategy, programme priorities and eligibility criteria relating to the access to and utilization of such resources. The contributions shall be such as to take into account the need for predictability, adequacy and timely flow of funds referred to in Article 20 in accordance with the amount of resources needed to be decided periodically by the Conference of the Parties and the importance of burden-sharing among the contributing Parties included in the list referred to in Article 20, paragraph 2. Voluntary contributions may also be made by the developed country Parties and by other countries and sources. The mechanism shall operate within a democratic and transparent system of governance.

Article 39 of the same Convention stipulates that:

Provided that it has been fully restructured in accordance with the requirements of Article 21, the Global Environment Facility of the United Nations Development Programme, the United Nations Environment Programme and the International Bank for Reconstruction and Development shall be the institutional structure referred to in Article 21 on an interim basis, for the period between the entry into force of this Convention and the first meeting of the Conference of the Parties or until the Conference of the Parties decides which institutional structure will be designated in accordance with Article 21.

The GEF acts as an entity responsible for ensuring the functioning of the financial mechanism, as stipulated by each of the conventions.⁶¹ As specified in para.6 of the Instrument, "the GEF shall function under the guidance of, and be accountable to, the Conferences of the Parties which shall decide on policies, program priorities and eligibility criteria for the purposes of the conventions."⁶² Within the scope of its functions, the Council of the GEF approves the work programme, which is composed of operational projects that apply the policies and criteria that were identified by the Conference of the Parties.⁶³

⁶¹ The Kyoto Protocol to the United Nations Framework Convention on Climate Change adopted in December 1997, endorses such a situation without referring explicitly to the GEF, FCC/CP/1997/7 Add. 1, article 11.

⁶² Commitment repeated in paras 15 and 26 of the Instrument.

⁶³ See the GEF Operational Strategy, 1996. This instrument was developed through consultations between the Secretariats of the GEF and of the imple-

In addition, as provided in the Instrument, the Conferences of the Parties and the Council of the GEF were supposed to negotiate arrangements or agreements ratifying the division of their responsibilities.⁶⁴ Given the particular legal nature of the GEF — as previously discussed — it is interesting to note that once again pragmatism triumphed over formalism. It was decided to adopt several *Memoranda of Understanding* to address the very issue of the allocation of responsibilities. The legal nature of these instruments was not further specified and these Memoranda were not signed by the Conferences of the Parties and the GEF Council but rather were adopted by them.⁶⁵ For its part, the GEF Council adopted these Memoranda, after consulting the World Bank. By so doing, the eventual problems of competence vis-à-vis the Bank that could have emerged have

menting agencies. The Secretariats of the Rio Conventions were also consulted so that the strategy incorporates the directives approved by the Conferences of the Parties.

⁶⁴ The division of responsibilities is provided for in both the Instrument and in the Conventions. Thus para.3 of article 11 of the Convention on Climate Change specifies that:

The Conference of the Parties and the entity or entities entrusted with the operation of the financial mechanism shall agree upon arrangements to give effect to the above paragraphs, which shall include the following: (a) Modalities to ensure that the funded projects to address climate change are in conformity with the policies, programme priorities and eligibility criteria established by the Conference of the Parties; (b) Modalities by which a particular funding decision may be reconsidered in light of these policies, programme priorities and eligibility criteria; (c) Provision by entity or entities of regular reports to the Conference of the Parties on its funding operations, which is consistent with the requirements for accountability set out in paragraph 1 above; and (d) Determination in a predictable and identifiable manner of the amount of funding necessary and available for implementation of this Convention and the conditions under which that amount shall be periodically reviewed.

⁶⁵ The Memorandum negotiated by the Conference of the Parties to the Convention on Climate Change and the Council of the GEF was adopted in July 1996. It includes an Annex adopted in December 1997, which resolves the issue of determining the funds that are necessary and available for article 12 of the Convention on Climate Change. Regarding the relationship between the Conference of the Parties of the Convention on Biological Diversity and the Council of the GEF, a Memorandum was adopted in April 1997, see GEF/R2/Inf. 4, April 15, 1997. See Annex.

thus been avoided.⁶⁶ On the other hand, the competence of the Conferences of the Parties did not become an issue. An opinion of the Legal Counsel of the United Nations, had stated that the Conferences of the Parties are endowed with the requisite juridical capacity to enter into agreements.⁶⁷ This point highlights the variety of the legal situations to be encountered when assessing the nature of the relationships among institutions. The issue of representation of the GEF and the Conventions on Climate Change and Biological Diversity at each other's meetings is also characterized by this same degree of flexibility, as each party has been granted observer status. This flexibility is also evident with respect to the type of documentation that must be provided by the GEF Council, such as the Annual Report⁶⁸ as well as other documents describing the scope of the GEF's activities.⁶⁹

The crucial question, of course, centres around the determination of the funds necessary for the GEF to effectively fulfill its purposes. The two replenishments have shown that the issue has so far been resolved in a pragmatic way, relying on dialogue and consultations between the World Bank as the trustee, the GEF Secretariat and the donors. The same spirit prevails for the allocation of resources between the different focal areas of the GEF. Dialogue and consultations are the ways to identify priorities and clarify how funds are to be divided. It should, however, be noted that these

⁶⁶ See above; The World Bank as trustee of the Special Trust Fund of the GEF is responsible for formalizing arrangements or agreements concluded with the Conferences of the Parties (Para. 7 of Annex B of the Instrument).

⁶⁷ Memorandum of 23 August 1994 presented to the Executive Secretary of the Convention on Climate Change by Mr. Hans Corell, Under Secretary-General for Legal Affairs, The Legal Counsel, A/AC.237/41, 1994.

⁶⁸ By virtue of para. 31 of the Instrument which states that the Annual Report "shall be prepared by the Secretariat and circulated to all Participants. It shall contain information on the activities carried out under the GEF, including a list of project ideas submitted for consideration and a review of the project activities funded by the Facility and their outcomes. The report shall contain all the information necessary to meet the principles of accountability and transparency that shall characterize the Facility as well as the requirements arising from the reporting arrangements agreed with each Conference of the Parties to the conventions referred to in paragraph 6. The report shall be conveyed to each of these Conferences of the Parties, the United Nations Commission on Sustainable Development, and any other international organization deemed appropriate by the Council".

⁶⁹ See *Appendix to Chairs' Joint Summary*, GEF Council Meeting, 2-4 April 1996.

processes take place against a political context, in which each of the Conferences of the Parties may have its own vision of the needed agenda for protecting the global environment. In the end, what is at stake is the credibility of the GEF as an institution with a specified mandate and limited resources.

2. Legality, Legitimacy and the Protection of the Global Environment: Elements of a Regime

The legal framework within which the GEF carries out its activities is composed of various legal instruments. They include its constitutive instrument, the resolutions and decisions of the international organizations that established the GEF, as well as the international conventions designed to protect the global environment. It is important to analyze the role played by the latter, and more particularly the Framework Convention on Climate Change and the Convention on Biological Diversity. The relations between the GEF and the Rio Conventions are, in fact, evidence of an institutional dynamic that favours the promotion and respect of the rule of law. They provide new parameters of legality against which financial activities are conducted.

First, international environmental conventions play a critical role for defining the rules and criteria for GEF funding. The activities of the financial mechanism are carried out in conjunction with the bodies established by each of the conventions. In addition, the conventions set out the eligibility criteria for the allocation of grants and concessional funding by the GEF which are reserved exclusively for the parties to the conventions.⁷⁰ Moreover, the Conference of the Parties of the conventions decide on the policy and program priorities and the GEF Council acts in conformity with them.⁷¹

The relations between the GEF and the Montreal Protocol on Substances that Deplete the Ozone Layer are similar to those between the GEF and the Rio Conventions. The GEF funding is directed to projects that must meet the same criteria as those adopted for projects financed by the Multilateral Fund of the Montreal Protocol. This means that the resources allocated by the GEF must conform to the criteria and policies

⁷⁰ See para.9 of the Instrument. This technique certainly favoured the great number of ratifications of each of the conventions. Over 170 states are parties to them.

⁷¹ See paras 15 and 26 of the Instrument.

adopted by the Executive Committee of the Montreal Protocol. In addition they have to be compatible with the GEF Operational Strategy. As can be noted, it is necessary for the GEF activities to be based within the multilateral legal framework in place for protecting the ozone layer.

In the future, the GEF may also elicit demands coming from other conventional fora. One can point to, for example, the Convention to Combat Desertification in those Countries Experiencing Serious Drought and/or Desertification adopted in the 1994 or the forthcoming Convention on Persistent Organic Pollutants (POPs).

The case of international waters is distinctive as, at the moment, there is no international agreement constituting a framework within which actions are undertaken and eligibility criteria are designed. Reference, however, is made to existing regional and universal instruments for projects dealing with the marine environment (e.g., the IMO Conventions). In these circumstances, the rule of law is perceived as a legitimizing factor which offers prospects of stability and good performance for the activities to be financed.

A general tendency is emerging in the area of biological diversity towards more coordination and avoidance of duplication among the major conventions. It was notably induced by requests made for allowing the conventions already in force at the time of the Rio Conference to benefit from the funding by the GEF. Negotiation of Memoranda among the Secretariats of the Conventions is aimed at strengthening coordination.⁷² Such a process should be endorsed by the executive bodies of the nature conservation conventions and by the Parties of the Convention on Biological Diversity, as the latter plays an anchor role, to allow for funding from the GEF.

By placing the financial and technical activities to be undertaken within conventional legal frameworks, the global environmental conventions provide a framework within which to assess the legitimacy of the actions undertaken by the GEF implementing agencies.⁷³ One can thus see the development of a new practice in assessing the legality of the acts of international organizations and the agreements that they conclude. The constitutive agreement of each of these institutions remains a cornerstone for such

⁷² See, for example, the Memorandum concluded in 1996 between the Secretariats of the Convention on Biological Diversity and the Convention on Wetlands of International Importance, especially as Waterfowl Habitat, C. de Klemm, "Voyage à l'intérieur des conventions de protection de la nature", in: M.Prieur, *Mankind and the Environment, Hommage à A. Kiss*, 1998, 650.

⁷³ See paras 15 and 26 of the Instrument.

assessment. However, international environmental conventions set additional standards against which the legitimacy and legality of their activities have to be evaluated. The first institutional and conventional steps accomplished in the area of the protection of the global environment illustrate the fact that, ultimately, the actions undertaken by international organizations should be compatible with the object and purpose of these conventions.⁷⁴

Second, GEF funding, being generally considered as an incentive to comply with international environmental commitments, may also be used as tool to exercise pressure on states in cases of non-compliance. It can be used as a stick for encouraging a country to comply with its commitments. This can be achieved by resorting to legal remedies as provided for in the contractual relationships between the implementing agencies and the beneficiaries, such as, for example, the suspension of a grant.⁷⁵ It is a rather extreme measure, rarely resorted to in practice. It was, nevertheless, exercised once when the Secretariat of the GEF decided in January 1997, in concurrence with the World Bank Management, to suspend the right of the Republic of Congo to make withdrawals from a GEF grant.⁷⁶ In July 1997, the suspension was lifted as the Republic of Congo satisfied the conditions as stated in the grant agreement.

Another situation is when the GEF funding is provided for helping a country to come into compliance.⁷⁷ The GEF financial assistance granted to the Russian Federation under a recommendation by the Montreal Protocol Implementation Committee and adopted in December 1995 by the 7th Meeting of the Parties to the Montreal Protocol, provides a good example of such situation. The Russian Federation had not been able to meet its phase-out obligations as required by the Montreal Protocol and had fallen behind its contribution to the Multilateral Fund. A ban on Russian exports in ozone-depleting substances (ODS) was imposed, together with

⁷⁴ See Sand, "The Potential Impact of the Global Environment Facility...", see note 17, 496. See also the commitment first made by the Bank in 1984 and then reiterated, which reads as follows: "The Bank will not finance projects that contravene any international environmental agreement to which the member country concerned is a party", OMS 2.36 on Environmental Aspects of Bank Work, 1984.

⁷⁵ See, e.g. the General Conditions Applicable to Loan and Guarantee Agreements concluded with the World Bank, article 6.02 of 1 January 1985.

⁷⁶ Suspension of Disbursements, Congo-Wildlands Protection and Management Project (GEF Grant 28622 COB).

⁷⁷ See, GEF Operational Strategy, 1996, Chapter 5, 48-49.

a call for financial assistance. The GEF financing was aimed at enabling the Russian Federation to come into compliance with its financial and substantive obligations under the Protocol. Following the Decision of the Implementation Committee of the Montreal Protocol, which recommended that "(a) the GEF Council and other aid agencies should consider favourably additional steps to expedite financial assistance for projects proposed for approval within their work programmes; (b) further projects should be considered in the light of further clarifications and information to be provided by the Russian Federation to the Implementation Committee,"⁷⁸ the GEF Council proceeded accordingly while requiring that the GEF Chief Executive Officer should only endorse the project (i.e. the Russian Phaseout of Ozone Depleting Substances II Project) after it had "received confirmation from the Ozone Secretariat that it has received satisfactory responses to the queries posed by the Implementation Committee of the Montreal Protocol to the Russian Federation."⁷⁹ GEF financing was used as an incentive and contributed to the resolution of the issue through the Montreal Protocol Non-Compliance procedure. This highlights the importance of mutually – supportive strategies, financial and legal, even though there is no formal link among them.

Lastly, it is noteworthy to mention the interplay of the GEF with the principles of international environmental law. They have influenced the establishment and subsequent consolidation of the GEF. For its part, the financial mechanism has contributed to the further development and recognition of these international environmental law principles. In conjunction with the negotiations of Agenda 21, the Conventions on Climate Change and Biological Diversity and the Declaration on Environment and Development, the restructuring process of the GEF enabled the states, international organizations and other relevant actors to identify with greater clarity the legal principles governing environmental activities and their content.

It should come as no surprise then that like all institutions devoted to promoting and protecting the environment, the creation of the GEF and

⁷⁸ Report of the Implementation Committee under Non-Compliance Procedures for the Montreal Protocol on the Work of its 13th Mtg., UNEP/Oz.L. Pro./ImpCom/13/3, para. 19 of 28 March 1996.

⁷⁹ Appendix to the Chairs Joint Summary, GEF Council Meeting of 2–4 April 1996; see J. Werksman, "Compliance and Transition: Russia's Non-Compliance Tests the Ozone Regime", *ZaöRV* 56 (1996), 750 et seq.

its functioning was based on these principles.⁸⁰ The parties focused, in particular, on certain fundamental principles, such as those relating to prevention and to the obligation not to cause damage to other states or areas beyond the limits of national jurisdiction. They also gave their support to emerging legal principles that serve as the basis for states' attempts to develop policies relating to sustainable development, such as the principles of common but differentiated responsibilities and the principles of precaution and public participation. Such principles have subsequently acquired wider recognition in the international legal order.

These principles offer an opportunity to get an understanding of the intrinsic nature of the GEF. Funded in large part by northern countries, its activities are designed to promote the protection of the global environment in southern countries as well as in countries experiencing a period of economic transition (as in central and eastern European countries and in the former Soviet Union). However, it is the international community in its entirety which benefits from these deeds. What is clear from this analysis is the interdependence that exists among partners and activities at the global level. Indeed, developing countries have identified the provision of financial resources by developed countries as a necessary condition to the former countries' conventional commitments in the area of global environmental protection. As a matter of fact, their respect for the conventions depends "on the effective implementation by developed country Parties of their commitments ... related to financial resources and transfer of technology."⁸¹

IV. Conclusions

There are numerous attractive qualifications available for those seeking to describe the GEF: innovative financial mechanism, particular institution endowed with guarantees of great autonomy, if not independence, a pio-

⁸⁰ On the role of emerging principles in the area of environmental protection see P. Sands, "International Law in the Field of Sustainable Development: Emerging Legal Principles", in: W. Lang (ed.), *Sustainable Development and International Law*, 1995, 53 et seq.; D. Bodansky, "Customary (and not so Customary) International Environmental Law", *Indiana Journal of Global Legal Studies* 35 (1995), 105 et seq.

⁸¹ Article 4 para.7 of the Convention on Climate Change. See also article 20 para.4 of the Convention on Biological Diversity and article 5 para.5 of the Montreal Protocol on Substances that Deplete the Ozone Layer.

neer entity designed to ensure the implementation of international environmental conventions. It is important to underline the importance and scope of its program of action, designed to achieve global environmental benefits, thereby promoting sustainable development.⁸² Undoubtedly, the GEF is a useful mechanism and an important tool for promoting respect for the rule of law in this area. However, the GEF cannot, by itself, ensure the protection of the global environment. Instead, it functions as a facility, that is to say a catalyst for triggering joint and parallel actions to be undertaken by all the concerned partners, states, international and non-governmental organizations as well as the private sector and local populations in order to shape a durable and viable world.⁸³

A point of interest is the fact that the establishment of the GEF is based on a joint initiative conducted by several institutions of the UN System. Moreover, it is the first real partnership between the World Bank and the United Nations. Relying on the notion of comparative advantage, the World Bank, UNDP and UNEP identified new ways of collaborating while sharing different responsibilities and benefiting from each others' experience.⁸⁴ An important feature of this mechanism is the fact that while not being a new international organization, the GEF has nevertheless its independent governance structure and its own secretariat. The latter is an important leeway and plays a crucial role for ensuring that global environment concerns penetrate the activities of the implementing agencies. Such type of cooperative scheme goes a step further than the holding of regular meetings and the issuance of joint declarations between institutions. In addition, an organized approach of a GEF-type, based on the exchange of information, flexibility, institutional checks and balances and an independent secretariat, helps to eliminate unnecessary duplication and to strengthen coordination.

Another advantage of a GEF-type structure is that it shows how the UN System can adapt itself in order to face new challenges, while making use of existing institutions. Flexibility and pragmatism were important tools for setting the policy and legal profile of the institution, providing it with independence, but not with a fully-fledged international legal person-

⁸² See Programme for the Further Implementation of Agenda 21, adopted by the Special Session of the UN General Assembly, 23–27 June 1997.

⁸³ See Silard, see note 28, 634.

⁸⁴ As an example, the involvement of the World Bank in this architectural arrangement permits the others to benefit from the experience of the financial institution in matters relating to the management and execution of investment projects.

ality. This formula created new partnership activities between the World Bank and the United Nations. It has also encouraged new ways of cooperation among these institutions and other partners, such as the regional development banks, NGOs, and the private sector. The GEF galaxy reveals, in fact, the multiple relationships which are taking place in the international arena among partners with a different profile and standing, and which all have a role to play for promoting sustainable development.

Annex

Memorandum of Understanding Between the Conference of the Parties to the Convention on Biological Diversity and the Council of the Global Environment Facility

Preamble

The Conference of the Parties to the Convention on Biological Diversity (hereinafter the Conference of the Parties) and the Council of the Global Environment Facility (hereinafter the Council),

Recognizing the characteristics of the financial Mechanism for the provision of financial resources for the purposes of the Convention on Biological Diversity (hereinafter the Convention) outlined in Article 21, paragraph 1, of the Convention, and the provisions of Article 21, paragraph 2, of the Convention, which call upon the Conference of the Parties to decide on the arrangements to give effect to Article 21, paragraph 1, after consultation with the institutional structure entrusted with the operation of the financial mechanism,

Recognizing further the willingness of the Global Environment Facility (hereinafter GEF) to serve for the purposes of the financial mechanism for the implementation of the Convention,

Recognizing that the financial mechanism shall function under the authority and guidance of and be accountable to the Conference of the Parties for the purposes of the Convention and that GEF as decided by the Conference of the Parties will operate the financial mechanism of the Convention on an interim basis in accordance with Article 39 of the Convention,

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

Have reached the following understanding:

1. Purpose

The purpose of the present Memorandum of Understanding is to make provision for the relationship between the Conference of the Parties and the Council in order to give effect to the provisions of Article 21, paragraph 1, of the Convention and paragraph 26 of the GEF Instrument and, on an interim basis, in accordance with Article 39 of the Convention.

2. Guidance from the Conference of the Parties

2.1 In accordance with Article 21 of the Convention the Conference of the Parties will determine the policy, strategy, programme priorities and eligibility criteria for access to and utilization of financial resources available through the financial mechanism, including monitoring and evaluation on a regular basis of such utilization. GEF, in operating the financial mechanism under the Convention, will finance activities that are in full conformity with the guidance provided to it by the Conference of the Parties. For this purpose, the Conference of the Parties will communicate its guidance, and any revisions to such guidance as it may adopt, on the following, matters:

- (a) Policy and strategy;
- (b) Programme priorities;
- (c) Eligibility criteria;
- (d) An indicative list of incremental costs;
- (e) A list of developed country Parties and other Parties which voluntarily assume the obligations of developed country Parties;
- (f) Any other matter relating to Article 21, including periodic determination of the amount of resources needed as detailed in paragraph 5 of this Memorandum.

2.2 The Council will communicate to the Conference of the Parties all relevant information, including information on the projects in the area of biological diversity funded by GEF outside the framework of the financial mechanism of the Convention.

3. Reporting

3.1 The Council will prepare and submit a report for each ordinary meeting of the Conference of the Parties.

3.2 The reports will include specific information on how the GEF Council, its Secretariat and its Implementing and Executing Agencies have applied the guidance and implemented the policy, strategies, programme priorities and eligibility criteria determined by the Conference of the Parties, as well as any other decision of the Conference of the Parties communicated to GEF, under Article 21 of the Convention. The Council should also report on its monitoring and evaluation activities concerning projects in the biodiversity focal area.

3.3 In particular, the reports will provide detailed information on the GEF biodiversity focal area, including:

- (a) Information on how GEF has responded to the guidance provided by the Conference of the Parties as described by paragraph 2, including, where appropriate, through its incorporation in the GEF operational strategy and operational programmes;
- (b) The conformity of the approved work programmes with guidance of the Conference of the Parties;
- (c) A synthesis of the different projects under implementation and a listing of the projects approved by the Council in the biodiversity focal area, as well as a financial report with an indication of the financial resources allocated to these projects;
- (d) A list of project proposals submitted for approval to the Council, through the GEF Implementing Agencies, by eligible Parties, including reporting on their approval status and, in cases of projects not approved, the reasons therefore;
- (e) A review of the project activities approved by GEF, and their outcomes, including information on funding and progress in implementation; and
- (f) Additional financial resources leveraged by GEF for the implementation of the Convention.

3.4 In order to meet the requirements of accountability to the Conference of the Parties, reports submitted by the Council will cover all GEF-financed activities carried out for the purpose of the Convention, whether decisions on such activities are made by the Council or by the GEF Implementing and/or Executing Agencies. To this end, the Council will make arrangements as might be necessary with the Implementing Agencies regarding disclosure of information.

3.5 The Council will also provide information on other matters concerning the discharge of its functions under Article 21, paragraph 1, as may be requested by the Conference of the Parties. If the Council has difficulties in responding to any such request, it will explain its concerns to the Conference of the Parties and the Conference of the Parties and the Council will find a mutually agreed solution.

4. Monitoring and evaluation

4.1 The Conference of the Parties may raise with the Council any matter arising from the reports received.

4.2 The funding decisions for specific projects should be agreed between the developing country Party concerned and GEF in accordance with policy, strategy, programme priorities and eligibility criteria established by the Conference of the Parties. The GEF Council is responsible for approving the GEF work programmes. If a Party considers that a decision of the Council regarding a specific project was not made in compliance with the policies, programme priorities and eligibility criteria established by the Conference of the Parties in the context of the Convention, the Conference of the Parties should analyse the observations presented to it by the Party and take decisions on the basis of compliance with such policy, strategy, programme priorities and eligibility criteria. In the event that the Conference of the Parties considers that this specific project decision does not comply with the policy strategy, programme priorities and eligibility criteria established by the Conference of the Parties, it may ask the GEF Council for further clarification on the specific project decision.

4.3 As provided for in Article 21, paragraph 3, of the Convention, the Conference of the Parties will periodically review the effectiveness of the financial mechanism in implementing the Convention and communicate to the Council relevant decisions taken by the Conference of the Parties as the result of such review, to improve the effectiveness of the financial mechanism in assisting developing country Parties to implement the Convention.

5. Determination of funding requirements

5.1 In anticipation of the replenishment of GEF, the Conference of the Parties will make an assessment of the amount of funds that are necessary to assist developing countries, in accordance with the guidance provided by the Conference of the Parties, in fulfilling their commitments under the Convention over the next GEF replenishment cycle, taking into account:

- (a) Article 20, paragraph 2, and Article 21, paragraph 1, of the Convention;
- (b) Guidance to the financial mechanism from the Conference of the Parties which calls for future financial resources;
- (c) The information communicated to the Conference of the Parties in the national reports submitted in accordance with Article 26 of the Convention;
- (d) National strategies, plans or programs developed in accordance with Article 6 of the Convention;
- (e) Information communicated to the Conference of the Parties from GEF on the number of eligible programmes and projects that were submitted to GEF, the number that were approved for funding, and the number that were turned down owing to lack of resources;
- (f) Experience gained by those concerned in the implementation of projects.

5.2 On the occasion of each replenishment GEF will, in its regular report to the Conference of the Parties as provided for in paragraph 3 of this Memorandum of Understanding indicate how it has responded during the replenishment cycle to the previous assessment by the Conference of the Parties prepared in accordance with paragraph 5.1 and inform the Conference of the Parties of the conclusion of replenishment negotiations.

5.3 On the basis of the report referred to in paragraph 5.2 of this Memorandum of Understanding the Conference of the Parties will review the amount of funding necessary for the implementation of the Convention, on the occasion of each replenishment of the financial mechanism.

6. Reciprocal representation

On a reciprocal basis, representatives of GEF will be invited to attend meetings of the Conference of the Parties and representatives of the Convention will be invited to attend meetings of GEF.

7. Inter-secretariat cooperation

The Secretariat of the Convention and the Secretariat of GEF will communicate and cooperate with each other and consult on a regular basis to facilitate the effectiveness of the financial mechanism in assisting developing country Parties to implement the Convention. In particular, the two secretariats will consult on the project proposals under consideration for

inclusion in a proposed work programme, especially with regard to the consistency of the project proposals with the guidance of the Conference of the Parties. Official documentation of GEF will be made available to the Secretariat of the Convention on Biological Diversity.

8. Amendments

Any amendments to the present Memorandum of Understanding will be decided upon by the Conference of the Parties and the Council in writing.

9. Interpretation

If differences arise in the interpretation of the present Memorandum of Understanding, the Conference of the Parties and the Council will reach a mutually acceptable solution.

10. Entry into effect

10.1 The present Memorandum of Understanding will come into effect upon approval by the Conference of the Parties and by the Council. Either participant may withdraw this Memorandum of Understanding at any time by written notification addressed to the other. The withdrawal will take effect six months after its notification.

10.2 The withdrawal of this Memorandum of Understanding by either Party to this Memorandum of Understanding shall not affect any projects considered and/or approved in accordance with the Memorandum of Understanding prior to the withdrawal.

Memorandum of Understanding Between the Conference of the Parties to the United Nations Framework Convention on Climate Change and the Council of the Global Environment Facility

This Memorandum of Understanding is concluded between the Conference of the Parties (hereinafter referred to as "the COP") to the United Nations Framework Convention on Climate Change (hereinafter referred to as "the Convention") and the Council of the Global Environment Facility (hereinafter referred to as the "Council of the GEF"), the interna-

tional entity entrusted on an interim basis with the operation of the financial mechanism referred to in Article 11 of the Convention.

Introduction

The Parties to this Memorandum of Understanding,

Recalling Article 11 of the Convention and recognizing that the financial mechanism is to provide financial resources on a grant and concessional basis, including for the transfer of technology, and is to function under the guidance of and be accountable to the COP, which shall decide on its policies, programme priorities and eligibility criteria related to the Convention,

Recalling Article 11.1 which states that the operation of the financial mechanism shall be entrusted to one or more existing international entities,

Recalling also the decision of the first session of the COP on the maintenance of the interim arrangements referred to in Article 21.3 that the restructured GEF shall continue, on an interim basis, to be the international entity entrusted with the operation of the financial mechanism, referred to in Article 11,

Recalling further the willingness of the GEF to serve for the purposes of the financial mechanism of the Convention as provided in paragraph 6 of the Instrument for the Establishment of the Restructured Global Environment Facility (hereinafter referred to as "the Instrument"),

Recalling that, in accordance with Article 11.3, the COP and the entity or entities entrusted with the operation of the financial mechanism shall agree upon arrangements to give effect to Article 11.1 and 11.2,

Recalling further that in accordance with paragraph 27 of the Instrument, the Council of the GEF is to consider and approve cooperative arrangements with the COP,

Have agreed as follows:

Purpose of arrangements

1. The purpose of this Memorandum is to give effect to the respective roles and responsibilities of the COP, the supreme body of the Convention, and the GEF, the international entity entrusted with the operation of the financial mechanism and to provide for the required interaction between them under Article 11 of the Convention and paragraphs 26 and 27 of the Instrument.

Determination and communication of guidance from the COP

2. The COP will, pursuant to Article 11.1, decide on policies, programme priorities and eligibility criteria related to the Convention for the financial mechanism which shall function under the guidance of and be accountable to the COP.
3. The COP will, after each of its sessions, communicate to the Council of the GEF any policy guidance approved by the COP concerning the financial mechanism.

Conformity with COP guidance

4. The Council will ensure the effective operation of the GEF as a source of funding activities for the purposes of the Convention in conformity with the guidance of the COP. It will report regularly to the COP on its activities related to the Convention and on the conformity of those activities with the guidance received from the COP.

Reconsideration of funding decisions

5. The funding decisions for specific projects should be agreed between the developing country Party concerned and the GEF in conformity with policy guidance from the COP. The Council of the GEF is responsible for approving the GEF work programmes. If any Party considers that a decision of the Council regarding a specific project in a proposed work programme does not comply with the policies, programme priorities and eligibility criteria established by the COP in the context of the Convention, the COP should analyze the observations presented to it by the Party and take decisions on the basis of compliance with such policies, programme priorities and eligibility criteria. In the event that the COP considers that this specific project decision does not comply with the policies, programme priorities and eligibility criteria established by the COP, it may ask the Council of the GEF for further clarification on the specific project decision and in due time may ask for a reconsideration of that decision.

Reports from the GEF to the COP

6. Annual reports of the GEF will be made available to the COP through its secretariat. Other official public documentation of the GEF will also be made available to the COP through its secretariat. In order to meet the requirement of its accountability to the COP, the Annual Report of the

GEF will cover all GEF-financed activities carried out in implementing the Convention, whether such activities are carried out by the GEF Implementing Agencies, the GEF Secretariat or by executing agencies implementing GEF-financed projects. To this end, the Council of the GEF will require all such bodies, with respect to GEF-financed activities, to comply with GEF policy on disclosure of information.

7. In its reporting on GEF-financed activities under the financial mechanism, the GEF should include specific information on how it has applied the guidance and decisions of the COP in its work related to the Convention. This report should be of a substantive nature and incorporate the programme of GEF activities in the areas covered by the Convention and an analysis of how the GEF, in its operations related to the Convention, has implemented the policies, programme priorities and eligibility criteria established by the COP. In particular, a synthesis of the different projects under implementation and a listing of the projects approved by the Council in the climate change focal area as well as a financial report with an indication of the financial resources required for those projects should be included. The Council should also report on its monitoring and evaluation activities concerning projects in the climate change focal area.

8. The Council of the GEF may seek guidance from the COP on any matter it considers relevant to the operation of the financial mechanism of the Convention.

Determination of funding necessary and available

9. In accordance with Article 11.3(d) of the Convention, which calls for arrangements to determine in a predictable and identifiable manner the amount of funding necessary and available for the implementation of the Convention and the conditions under which that amount shall be periodically reviewed, the COP and the Council shall jointly determine the aggregate GEF funding requirements for the purpose of the Convention. Procedures to facilitate such a joint determination will be developed by the COP and the Council and annexed to this Memorandum.

Cooperation between secretariats

10. The secretariats of the Convention and of the GEF shall cooperate and exchange on a regular basis views and experiences necessary to facilitate the effectiveness of the financial mechanism in assisting Parties to implement the Convention.

Representation in meetings of governing bodies

11. The participation of representatives of the Council of the GEF in meetings of the COP and of its subsidiary bodies will be governed by the rules of procedure of the COP. Likewise, the participation of representatives of the Convention in meetings of the Council of the GEF will be determined in accordance with the rules of procedure of the Council of the GEF. In formulating and applying its rules, each organization will make every effort to accord the other organization reciprocal representation privileges.

Review and evaluation of the financial mechanism

12. The COP will periodically review and evaluate the effectiveness of all modalities established in accordance with Article 11.3. Such evaluations will be taken into account by the COP in its decision, pursuant to Article 11.4, on arrangements for the financial mechanism.

Modification of the Memorandum of Understanding

13. This Memorandum of Understanding may only be modified in writing by agreement between the COP and the Council of the GEF.

Entry into effect

14. This Memorandum of Understanding shall come into force upon its approval by the COP of the Convention and the Council of the GEF.

Termination

15. This Memorandum of Understanding may be terminated by either Party giving six months' notice in writing to the other.

Annex to the Memorandum of Understanding

Determination of funding necessary and available for the implementation of the Convention

In accordance with Article 11.3(d) of the Convention, which calls for arrangements to determine in a predictable and identifiable manner the

amount of funding necessary and available for the implementation of the Convention and the conditions under which that amount shall be periodically reviewed, the COP and the Council will jointly determine the aggregate GEF funding requirements for the purpose of the Convention in accordance with the following procedures.

1. In anticipation of a replenishment of the GEF, the COP will make an assessment of the amount of funds that are necessary to assist developing countries, in accordance with the guidance provided by the COP, in fulfilling their commitments under the Convention over the next GEF replenishment cycle, taking into account:

- (a) The amount of funds necessary to meet the agreed full costs to be incurred by developing country Parties in order to prepare their national communications under Article 12.1 of the Convention on the basis of the guidelines for national communications of non-Annex I Parties adopted by the Conference of the Parties at its second session, and the information communicated to the COP under Article 12 of the Convention;
- (b) Financial resources needed by the developing country Parties to meet the agreed full incremental costs of implementing measures¹ that are covered by Article 4.1 of the Convention and that are agreed between a developing country Party and the international entity or entities referred to in Article 11 of the Convention;
- (c) Information communicated to the COP from the GEF on the number of eligible programmes and projects that were submitted to the GEF, the number that were approved for funding, and the number that were turned down owing to lack of resources;
- (d) Other sources of funding available for the implementation of the Convention.

2. The GEF replenishment negotiations will take into account fully and comprehensively the COP's assessment

3. On the occasion of each replenishment, the GEF will, in its regular report to the COP as provided for in paragraphs 6 and 7 of this Memorandum of Understanding, indicate how it has responded during the replenishment cycle to the COP's previous assessment prepared in accordance with paragraph I of this annex, inform the COP of the conclusion of replenishment negotiations and indicate the amount of new and additional funding to be contributed to the GEF Trust Fund in the next re-

¹ Including national, or where appropriate regional, plans or programmes developed towards the achievement of the Convention's objective.

plenishment cycle for the purposes of the GEF, including the implementation of the Convention. The COP may, in its action on the GEF reports, consider the adequacy of the resources available for implementation of the Convention.

4. The reiteration of this process on the occasion of each replenishment will present the opportunity to review the amount of funding necessary and available for the implementation of the Convention in accordance with Article 11.3(d).