

The Adaptation Fund

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LEGAL ISSUES PERTAINING TO THE OPERATIONALIZATION OF THE ADAPTATION FUND

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A. INTRODUCTION

1. Having reviewed document AFB/B.2/7 entitled “Legal Status of the Adaptation Fund” and the document entitled “Legal Personality for the Adaptation Fund and Status of the UNFCCC Secretariat at Meetings of the Adaptation Fund Board: Legal Analysis prepared by the UNFCCC secretariat”, the Adaptation Fund (the AF) Board decided, by decision AFB/B.2/6, to request the secretariat of the AF Board (the AF Secretariat), the secretariat of the United Nations Framework Convention on Climate Change (the Convention)(the UNFCCC secretariat) and the International Bank for Reconstruction and Development (the World Bank), as the invited Trustee (the AF Trustee) to work with the Chair in consultation with the Vice-Chair and prepare, for consideration by the AF Board at its third meeting, a paper that lays out the advantages and disadvantages of the AF being given legal personality. It was requested that the paper also examine any other available options to assist in rendering the AF fully operational. In response to this decision by the AF Board, this paper was prepared by the AF Secretariat, the UNFCCC secretariat and the World Bank (as the invited Trustee), in consultation with the Chair and Vice-Chair, and is being submitted to the AF Board for its consideration.

B. BACKGROUND

2. The Conference of the Parties to the Convention (the CP) decided in its decision 10/CP.7 that the AF shall be established to finance concrete adaptation projects and programs. This decision was endorsed by the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol (the CMP) through decision 28/CMP.1. In decision 1/CMP.3, the CMP established the AF Board as the operating entity of the AF¹ and decided upon the governance modality of the AF. It also invited the Global Environment Facility (the GEF) to provide secretariat services to the AF Board,² and the World Bank to serve as the Trustee for the Adaptation Fund,³ both on an interim basis.

3. Pursuant to decision 1/CMP.3, the AF Board is responsible for supervising and managing the AF under the authority and guidance of the CMP, and is fully accountable to the CMP.⁴ The functions of the AF Board include monitoring and reviewing the implementation of the operation of the AF.⁵ Decision 1/CMP.3 provides that the eligible Parties, as well as implementing or executing entities chosen by the governments of the eligible Parties, may submit project proposals directly to the AF Board.⁶

4. To access funding from the AF, the eligible Parties and the implementing or executing entities need to meet the criteria adapted by the AF Board “based on principles and modalities listed in decision 5/CMP.2 to ensure that the implementing and executing entities have the capacity to implement the administrative and financial management guidelines of the Adaptation

¹ Decision 1/CMP.3, paragraph 4.

² Decision 1/CMP.3, paragraph 19.

³ Decision 1/CMP.3, paragraph 23.

⁴ Decision 1/CMP.3, paragraph 4.

⁵ Decision 1/CMP.3, paragraph 5(f).

⁶ Decision 1/CMP.3, paragraph 29.

Fund.”⁷ These principles and modalities include accountability in management, operation and use of the funds, competency in adaptation and financial management, sound financial management, including the use of international fiduciary standards, clearly defined responsibilities for quality assurance, management and implementation and independent monitoring, evaluation and financial audits.⁸

5. Against this background, consideration has to be given to how to operationalize fully the provisions of decision 1/CMP.3 and how the AF Board can fulfill its mandate to ensure that there is a sound operational, legal and administrative framework in place and to report accordingly to the CMP. The AF Board is responsible for ensuring appropriate due diligence and management of projects, appraisal, implementation, oversight, monitoring, and enforcement over project/program activities. In this context, measures would need to be put in place to ensure that eligible Parties and implementing and executing entities are facilitated in accessing resources directly or through entities in a flexible and expedited manner, taking cognizance of the need to have the capacity to meet applicable administrative and financial management requirements pursuant to paragraphs 5(c) and 30 of decision 1/CMP.3. Further, the AF Board would need to ensure that agreements with implementing, executing and recipient entities meet these obligations, to direct the Trustee to transfer funds from the AF Trust Fund, and to provide for legal recourse if its requirements are not met or obligations are not satisfied. These roles and the related tasks will expand, over time, with the number of projects as well as the number of implementing and executing entities and other direct recipients.

C. ESTABLISHING A SOUND FRAMEWORK TO FULLY OPERATIONALIZE THE AF

6. To fully operationalize the AF, the AF Board will put in place a sound operational, legal and administrative framework that will help all players to the AF to carry out their responsibilities in accordance with the relevant decisions of the CMP. A key element of the framework will be arrangements for reviewing and monitoring project/program activities carried out with AF resources, to ensure that AF resources are used in accordance with relevant decisions of the CMP and the AF Board. It is important that such arrangements are established in a legally sound manner, so that AF Board can secure necessary legal and administrative responsibilities and recourse over project/program activities.

7. Implementing entities and operational and fiduciary responsibility. Where AF resources are accessed through implementing entities, the implementing entities would, as a rule, assume operational and financial fiduciary oversight responsibilities over project/program activities, including the necessary technical, environmental, social and financial due diligence in project preparation. Implementing entities are organizations designated *ex ante* by the AF Board, that have organizational structures and systems capable of meeting Board-approved fiduciary and other standards.⁹

⁷ Decision 1/CMP.3, paragraphs 5(c) and 30.

⁸ Decision 5/CMP.2, paragraphs 1 and 2.

⁹ Paragraph 2 of Roles and Responsibilities of Implementing and Executing Entities (Annex IX to AFB/B.2/16), adopted by the AF Board in decision AFB/B.2/15.

8. As proposed, the implementing entities would enter into financing agreements with eligible recipient Parties, executing entities or other recipients, under which the recipients would use the AF resources and carry out AF-funded activities in accordance with the decisions of the AF Board and the policies and procedures of the implementing entities. The Trustee would transfer funds to the implementing entities upon the direction of the AF Board. The implementing entities would disburse the funds received from the Trustee to the recipients, and monitor and supervise the project/program activities funded by AF resources in accordance with the terms of the financing agreements. The implementing entities would in turn be accountable to the AF Board, as the operating entity for the AF, for the use of the AF resources and for implementation of the project/program activities carried out by the recipients.

9. Executing entities and operational and fiduciary responsibility. In the case of access through executing entities or direct access by eligible Parties, legal, fiduciary and financial arrangements would need to be put in place for the AF to adequately oversee and enforce the activities carried out by recipients. Those arrangements would include the following:

- (i) appraising projects and conducting necessary technical, environmental, social and financial due diligence in project preparation,
- (ii) entering into grant and other financing agreements with recipients, under which the recipients would agree to carry out activities and use the AF funds in accordance with the decisions of the CMP and the AF Board, and
- (iii) supervising, monitoring and reporting on and enforcing implementation of project activities and use of the funds, to ensure that the activities funded by the AF are carried out in a sound manner, consistent with decisions of the CMP and the AF Board.

10. In case of the access through implementing entities, those arrangements would be conducted by the implementing entities, as discussed above. In the case of direct access through executing entities or by eligible Parties, executing entities themselves (or eligible Parties) would be receiving funds and carrying out activities for or as the recipients. Because the functions of execution and of fiduciary oversight of activities are in principle mutually exclusive, a way would need to be found for the AF to exercise legal responsibility for oversight, reporting and evaluation of recipient, project implementation, including the ability to enforce any required legal recourse.

D. AF LEGAL AND CONTRACTUAL ARRANGEMENTS

11. Where can legal and contractual responsibility for fiduciary oversight of AF operations be placed? Turning to each of the AF-related entities (the AF, the AF Board, the AF Secretariat and the Trustee), there is very limited capacity to contract:

- (a) The legal status of the AF and AF Board flows from the relevant decisions of the CP and the CMP, as well as the provisions of Convention and its Kyoto Protocol.

The Adaptation Fund itself was established by decisions of the CP and the CMP (i.e. 10/CP.7, 28/CMP.1 and 1/CMP.3, as described in paragraph 2 above). Neither the existing decisions of the CP and the CMP nor the provisions of the Convention and the Kyoto Protocol confer legal personality on the AF. Therefore, the AF does not currently have independent legal status, and therefore has no capacity to contract in its own name.

- (b) The AF Board is a body established by decision of the CMP (i.e. 1/CMP.3), comprising 16 members and 16 alternates representing the Parties.¹⁰ The functions of the AF Board are, *inter alia*, set out in paragraph 5 of decision 1/CMP.3. These functions do not include the capacity to enter into contracts on behalf of the AF or the CMP.
- (c) Accordingly, if the AF Board were to enter into legal agreements, in the absence of a decision by the CMP to authorize the AF Board to enter into legal agreements, and without the AF itself having legal personality, the AF Board members could be considered as entering into agreements in their personal capacities, with the consequence that the AF Board members may be held personally liable for such transactions.¹¹
- (d) The GEF Secretariat was invited to serve as the AF Secretariat on an interim basis, under paragraph 19 of decision 1/CMP.3. Neither the GEF nor the GEF Secretariat is an independent legal entity. The GEF and the GEF Secretariat were established under the Instrument for the Establishment of the Restructured Global Environment Facility (the GEF Instrument).¹² While the GEF operates in a functionally independent manner, it is administratively supported by the World Bank. The GEF Secretariat does not have the capacity to contract on its own, unless the World Bank, as the entity providing administrative support, makes such arrangements on behalf of the GEF Secretariat. As such, the role and responsibilities of the AF Secretariat, agreed by the AF Board in the Role and Responsibilities of the AF Secretariat¹³ and the draft Memorandum of Understanding between the CMP and the Council of the GEF¹⁴, do not include (i) entering into legal agreements with implementing and executing entities and/or

¹⁰ Under 1/CMP.3, paragraphs 6, 7, 8 and 9, the members and alternates are identified by their respective governments, nominated by the relevant groups of the Parties, and elected by the CMP to serve as government representatives. Under paragraph 4 of decision 1/CMP.3, the AF Board is accountable to the CMP for the performance of its functions.

¹¹ While the World Bank as Trustee enjoys certain privileges and immunities for its operations and activities, such privileges and immunities will not extend to the AF or to the AF Board members. They would apply in respect of the assets held in the AF Trust Fund administered by the World Bank, as provided in the draft Terms and Conditions to be concluded between the CMP and the World Bank.

¹² The GEF Instrument governs the operations and activities of the GEF Secretariat. The GEF Secretariat is accountable to the GEF Council for its performance. Accordingly, the scope of services provided to the AF by the GEF Secretariat acting as the AF Secretariat is restricted to what is permitted under the GEF Instrument and by the GEF Council.

¹³ Document AFB/B.1/13, Annex 2.

¹⁴ Document AFB/B.2/16, Annex VII.

other recipients, or (ii) providing operational and financial fiduciary oversight functions over AF funded project/program activities.

- (e) The World Bank was invited to serve as the Trustee on an interim basis. The World Bank is an international organization established under its Articles of Agreement. The World Bank administers and manages over \$25 billion in more than 1000 trust funds. Those trust funds are divided into two categories: i) trust funds for which the World Bank provides a specified set of services, typically limited to administrative and financial support; and ii) trust funds for which the World Bank as Trustee provides a full range of financial, administrative and operational support.
- (f) With respect to the first category of trust funds (referred to as financial intermediary funds), the World Bank undertakes the upstream trust fund activities (i.e., receiving, holding and managing funds from donors and others, including cashflow and investment management, and providing reporting on financial and accounting records of trust funds) but not engaging in downstream, operational activities (i.e. reviewing, supervising and monitoring project activities, entering into grant and other financing agreements, and reporting on project activities and the use of funds by the recipients).¹⁵
- (g) With respect to the second category of trust funds, the World Bank manages both upstream activities and downstream activities. For these trust funds, all operational activities are appraised, reviewed, implemented, supervised and reported on in accordance with World Bank policies and procedures.
- (h) The AF invitation to the World Bank is within the first category of trust fund services provided by the World Bank. The World Bank was invited to serve as the trustee for the AF on an interim basis, under paragraph 23 of decision 1/CMP.3. Under that decision, the World Bank as Trustee for the AF would provide a specified set of administrative and financial services. It would manage and use the funds, assets and receipts held in trust, record commitments and make transfers of funds from the AF Trust Fund on the written instruction provided to the Trustee by the AF Board.¹⁶ This is consistent with the relevant CMP decision, which does not provide any role for the Trustee in the operational aspects of the AF; the fiduciary responsibility of the Trustee is limited to that of a mere financial intermediary. That is, the Trustee has no responsibility for the use of the AF Trust Fund funds transferred or for supervising, monitoring, reporting

¹⁵ For these trust funds, the World Bank would serve merely as a financial intermediary without assuming any responsibility for the use of trust fund resources transferred to recipients or the activities carried out by such resources. Operational functions are undertaken by other entities, such as implementing entities. While the World Bank's function as trustee would be limited to financial and administrative services under financial intermediary funds, occasionally the World Bank also serves as one of the implementing entities for such funds. In its capacity as implementing entity, the World Bank would engage in operational activities.

¹⁶ Decision 1/CMP.3, paragraphs 21 and 24.

on or verifying AF activities. All functions and responsibilities related to the operational aspects of the AF are assigned to the AF Board.

12. In view of the above, the World Bank, as the invited Trustee, is the only entity related to the AF endowed with legal personality and the capacity to contract. However, under the terms of decision 1/CMP.3, the Trustee would not engage in any operational aspects of the AF. It would not supervise activities carried out by recipients, enter into financing agreements with recipients, or review the capacity of implementing and executing entities.

13. If requested by the CMP to take on a full suite of fiduciary and supervisory responsibilities, the World Bank would do so only with respect to activities that are under its own management and in accordance with its own policies and procedures. Services provided by the World Bank would be limited to project and program activities for the benefit of World Bank member countries. The World Bank would then appraise, review and approve AF project and program activities in accordance with its policies and procedures, including in respect of environmental and social safeguards, procurement, financial management, disbursement, and framework regarding governance and anti-corruption. Assigning such operational functions to the World Bank as the Trustee would in practice make the World Bank the implementing entity for any Party seeking access to AF funding. Imposing such limitations to the modality and scope of access to AF funding would be neither desirable nor adequate in light of the underlying principles of the relevant decisions of the CMP, including paragraph 20 of decision 1/CMP.3. The World Bank may, however, perform such functions as one of the implementing entities designated by the AF Board.

14. In the case of access to AF funding through implementing entities, the implementing entities as independent legal entities would assume the responsibilities of fiduciary oversight, monitoring and reporting on project activities, and enter into financing agreements with the recipients of AF funds. In the case of direct access through executing entities or by eligible Parties, the current framework of decision 1/CMP.3 does not provide for a legal entity which would assume those responsibilities. Therefore, unless any one or more entities agrees and, if necessary, is given legal capacity to make arrangements for direct access on behalf of the AF, there would be serious operational and financial difficulties in operationalizing direct access.

E. OPTIONS

15. To ensure that the AF may operate in a sound manner, there must be a framework under which the AF can secure all necessary legal, operational, fiduciary and administrative arrangements. The option of endowing the AF with legal personality was presented in document AFB/B.2/7 for consideration by the AF Board. This section explores possible options to be considered with their relative advantages and disadvantages. Those options include i) retaining the status quo and providing funding only through implementing entities, ii) requesting the CMP to authorize the AF Board to enter into certain legal agreements, and iii) endowing the AF with legal personality. Because the option of endowing the AF with legal personality has received the most attention, it is presented with the most complete list of advantages and disadvantages.

16. **Option 1: Retaining the Status Quo.** The option of retaining the status quo – that is, an Adaptation Fund without legal personality – has the following advantages and disadvantages:

- (a) Pros: It requires no further action by the CMP.
- (b) Cons: The current arrangement lacks a necessary framework to operationalize direct access to AF resources (in particular, to provide legal and contractual responsibility for fiduciary oversight of AF operations). In the absence of such a framework, including a legal entity to assume certain essential responsibilities over project activities, AF Board decisions to extend direct access financing, and financing to executing entities, could entail higher legal risks for AF Board members in their personal capacity. Furthermore, disbursing funds without having a sound framework would expose the AF to potential financial, operational and reputational risks.

Because of the lack of a framework necessary to explicitly place legal and contractual responsibility for fiduciary oversight of AF operations with an entity with legal personality, and because of the potential risk of exposure to the AF Board members, if this option of the status quo is chosen, the AF Board may have to provide funding only through implementing entities, until the necessary framework is put in place for direct access.

17. **Option 2: CMP Authorization to the AF Board.** The AF Board may consider requesting the CMP to authorize the AF Board to enter into certain legal agreements.¹⁷ Legal agreements to be entered into may include financing agreements with recipients and contracts to hire legal entities to provide certain fiduciary functions for the AF.

- (a) Pros: This option would address the issue of the AF Board’s capacity to contract and secure legal recourse against the recipients. Under this option, the AF Board could, on behalf of the CMP, hire consulting firms and other entities, as necessary, to conduct certain functions upon the direction of the AF Board on an individual project/program basis. The AF Board would decide which activities should be undertaken, and could obtain appropriate levels of fiduciary management and oversight, regardless of the operational modalities of access to AF resources. The Board could also contract to purchase Board insurance.
- (b) Cons: It requires further action by the CMP. In light of the present legal status and operational modality of the CMP itself, the operability of this option may be

¹⁷ For example, the Parties to the Montreal Protocol on Substances that Deplete the Ozone Layer, by Decision II/8 Financial Mechanism (UNEP/OzL.Pro.2/3), mandated the Executive Committee of the Montreal Protocol Multilateral Fund to enter, on behalf of the Parties, into agreements with implementing agencies. See also the terms of reference of the Executive Committee and of the Montreal Protocol Multilateral Fund attached as Appendixes II and IV, respectively, to UNEP/OzL.Pro.2/3. Prior to the 1994 decision by the Parties to endow the MPMF with legal personality, the Executive Committee entered into agreements with implementing agencies, under Decision 11/8 Financial Mechanism.

questioned, if it is not accompanied with certain measures being adopted at the domestic level. This option could also leave the members and alternates of the AF Board exposed to legal liability in their personal capacity for decisions taken and contracts concluded in their official function on the AF Board unless appropriate protection is provided.

18. **Option 3: Endowing the AF with Legal Personality.** Endowing the AF with legal personality was proposed to help the AF operationalize the direct access provision and other activities of the AF, while avoiding an imprudent risk allocation structure.¹⁸

- (a) Pros: This option would provide the AF with the ability to oversee and enforce activities to be carried out by the recipients as well as to seek legal recourse, if necessary, regardless of the operational modalities of access to AF resources. The AF Board could enter into legal agreements with executing entities and others, while the AF Board members would be better protected against becoming personally liable for their acts performed as AF Board members. The AF would have the capacity to hire its own staff, consulting firms and other entities, as necessary, to conduct fiduciary, operational, administrative and other activities on behalf of the AF,¹⁹ so that the AF may ensure that AF resources be used by the recipients for the purposes intended. A legal personality also would allow the AF to purchase insurance against claims and liabilities brought against the AF, the AF Board members or officials of the AF, if any, in connection with the operations and activities in their official capacities. As a legal entity, the AF may also seek to obtain its own privileges and immunities, including immunities from taxation, from members of the CMP.
- (b) Cons: It requires further action by the CMP. It would entail work and related costs to establish the legal personality, including attorneys' costs for necessary legal/due diligence work. While the arrangement may be structured in a lean and efficient manner, for example by outsourcing certain tasks, certain financial and human resources would be needed to maintain and manage the operations of the AF. The legal personality of the AF would need to be recognized by a host country. An agreement with Parties, particularly with the host country and perhaps trading jurisdictions, would be needed to obtain tax and other immunities/exemptions. Such a process may take time.

19. Further consultation would be required with concerned parties before determining the exact method and processes proposed to be followed in endowing the AF with legal personality. In particular, if the AF were to be established as a legal entity, the country that hosts the AF

¹⁸ As provided in document AFB/B.2/7, conferring legal personality on a fund would not be unprecedented. The Parties to the Montreal Protocol, at their Sixth Meeting in 1994, agreed to endow the Multilateral Fund with juridical personality.

¹⁹ For example, the Global Fund to Fight AIDS, Tuberculosis and Malaria (Global Fund), as an independent legal entity registered under Swiss law, hires local fund agents located in countries or in the region, to provide the Global Fund with a range of independent program performance and supervisory services to monitor grant recipients.

would need to recognize the legal personality of the AF and the specific arrangement under which the AF were established as a legal entity.. Annex II provides an overview of the legal attributes of juridical personality and the process through which the CMP could confer such personality on the AF.

ANNEX I. EXAMPLES OF THE ARRANGEMENTS USED UNDER OTHER PROGRAMS

1. GLOBAL ENVIRONMENT FACILITY

1. In 1994, the restructured Global Environment Facility (GEF) was established as a financial mechanism in accordance with the Instrument for the Establishment of the Restructured Global Environment Facility. The GEF Trust Fund was established and administered by the International Bank for Reconstruction and Development (the World Bank) as Trustee (the Trustee), pursuant to the terms of the Instrument. The GEF does not have legal personality or capacity to contract. Rather, it relies on the implementing agencies for operational and fiduciary responsibilities and accountability and on the Trustee for financial trusteeship and administrative support.

2. Access to GEF funding for project activities was initially limited to the three Implementing Agencies named in the Instrument (the World Bank, United Nations Development Programme (UNDP) and United Nations Environment Programme (UNEP)). Recognizing the proven track records, capacities and comparative advantages of certain other institutions, the GEF Council subsequently decided to expand access to GEF resources to the Asian Development Bank, the African Development Bank, the European Bank for Reconstruction and Development, the Inter-American Development Bank, the Food and Agriculture Organization of the United Nations, the International Fund for Agricultural Development, and the United Nations Industrial Development Organization (together with the Implementing Agencies, the GEF Agencies).

3. The GEF Council or the Chief Executive Officer of the GEF (CEO), as the case may be, approves a proposal submitted by a GEF Agency for GEF funding. Depending on the type of the project, the CEO endorses the funding following approval by the GEF Council or the CEO. Upon the necessary approval and endorsement, the Trustee will commit and transfer funds to the relevant GEF Agency, pursuant to the terms of a financial procedures agreement. Under the agreement, the Trustee receives certain financial reports from the relevant GEF Agency; however, the Trustee has no role in supervising or monitoring use of the GEF funds transferred to GEF Agency or project activities carried out therewith.

4. The GEF Agency conducts the necessary technical, environmental, social and financial due diligence in accordance with its own policies and procedures, both prior to the submission of the proposal to the GEF and after the funding has been approved. The GEF Agency enters into a financing agreement, usually a grant agreement, with the recipient of the funds. The financing agreement provides that the recipient will use the GEF resources and carry out the activities in accordance with the relevant GEF Council/CEO approval and endorsement. The GEF Agency monitors and supervises the project activities funded by the GEF throughout the life of the GEF funding, in accordance with its policies and procedures and the terms of the financing agreement. The GEF Agency is accountable to the GEF Council for its activities funded by the GEF.

2. MULTILATERAL FUND FOR THE IMPLEMENTATION OF THE MONTREAL PROTOCOL

5. The Multilateral Fund of the Montreal Protocol (MFMP) and its Executive Committee were created by treaty. Article 10 of the Montreal Protocol on Substances that Deplete the Ozone Layer (the Montreal Protocol), as amended by the London Amendment in 1990, established these bodies and stated that “The Multilateral Fund shall operate under the authority of the Parties who shall decide on its overall policies.” (Article 10 (4).)²⁰

6. Unlike the AF, the MFMP has full juridical personality. This personality was conferred on it by a decision of the Parties to the Montreal Protocol, and further specified in a host country agreement between the Government of Canada and the MFMP.²¹ Pursuant to that agreement “The Multilateral Fund shall possess juridical personality [and the] capacity: (a) to contract; (b) to acquire and dispose of immovable and personal property; and (c) to institute legal proceedings.” (Article 2.) Other articles of the same agreement also make it clear that the MFMP can hold assets in its own name and that these assets and its property, regardless of where they are held, are protected from suit and exempt from taxation.

7. What led to the signing of this agreement was a discussion that had taken place at the Preparatory Meeting for the 6th Meeting of the Parties to the Montreal Protocol (Nairobi, 3-5 October 1994). In the Report of that meeting one reads that:

“The Chairman of the legal drafting group, speaking in his personal capacity, explained that it was his understanding that certain legal difficulties had arisen when the host Government had sought to enter into legal arrangements with the Multilateral Fund so that it could operate effectively in Canada. The United Nations Legal Office had concluded that the Multilateral Fund did not have the necessary legal character to enter into those arrangements. The purpose of the draft decision was to enable it do to so.”²²

8. The 6th Meeting of the Parties adopted the decision to confer juridical personality on the MFMP. The Parties to Montreal Protocol decided that the MFMP should have “such legal capacity as is necessary for the exercise of its functions and the protection of its interest, in particular the capacity to enter into contracts, to acquire and dispose of movable and immovable property and to institute legal proceedings in defence of its interests.”²³ It also noted that the members of the MFMP Secretariat should have the privileges and immunities necessary to carry out their functions.

9. The MFMP is managed by the Executive Committee with an equal representation of seven developed and seven developing countries, which are elected annually by a Meeting of the

²⁰ See also, paragraph 5 of Article 10, which provides the establishment of the Executive Committee.

²¹ Agreement Between the Government of Canada and the Multilateral Fund for the Implementation of the 1987 Montreal Protocol on Substances that Deplete the Ozone Layer, Relating to Matters Resulting from the Establishment in Canada of the Multilateral Funds and its Organs. (23 November 1998.)

²² UNEP/OzL.Pro.6/Prep/2, page 10, para. 51.

²³ Montreal Protocol MOP Decision VI/16, Doc. UNEP/OzL.Pro.6/7/(1994).

Parties. The Executive Committee reports annually to the Meeting of the Parties on its operations.

10. The operational work financed by the MFMP is undertaken through four implementing agencies, which have contractual agreements with the Executive Committee (UNEP, UNDP, the United Nations Industrial Development Organization (UNIDO) and the World Bank); the Parties to the Montreal Protocol mandated the Executive Committee of the MFMP to enter, on behalf of the Parties, into agreements with the implementing agencies for the MFMP.²⁴ The implementing agencies provide fiduciary oversight over the project activities and use of MFMP funds transferred to them. Under the agreements with the Executive Committee, the implementing agencies are responsible for cooperating with the Executive Committee, and report to the Executive Committee, through the MFMP Secretariat, on activities financed by the MFMP.

11. UNEP serves as the Treasurer of the MFMP, and is responsible for receiving and administering pledged contributions and disbursing funds to the MFMP Secretariat and the implementing agencies based on the directive of the Executive Committee.

12. The MFMP is replenished every three years by the donors. In addition to monetary contributions to the MFMP, under Article 10, paragraph 6 of the Montreal Protocol, the donors may provide their contributions to the MFMP through their bilateral programs up to 20% of their contributions. The amounts of financing or in-kind contributions made by their bilateral agencies to the projects approved by the Executive Committee are counted towards their contributions to the MFMP. The donor countries participating in the bilateral programs report to the Executive Committee through the MFMP Secretariat on their bilateral activities.

3. GLOBAL FUND TO FIGHT AIDS, TUBERCULOSIS AND MALARIA

13. The Global Fund to Fight AIDS, Tuberculosis and Malaria (Global Fund) was established in 2002 with full legal personality as a mechanism to increase the resources available to fight these three diseases. The Global Fund is a foundation organized under the laws of Switzerland, by Deed of Incorporation and By-laws, with its principal offices in Geneva, Switzerland. A headquarters agreement was entered into between the Swiss government and the Global Fund to regulate their relationship.²⁵ The agreement establishes the international juridical personality and legal capacity of the Global Fund in Switzerland. Switzerland also accords certain privileges and immunities to the Global Fund, members of its Board, and officials of the Global Fund.

14. The Global Fund is structured as a partnership between developed and developing countries, the private sector, civil society and affected communities. The Global Fund Board is responsible for providing guidance to the Secretariat for the policies governing the funding, disbursement and oversight of grant activities. It endorses policies and strategic decisions and approves grant funding decisions. The Global Fund Board consists of 20 voting members

²⁴ Decision II/8 Financial Mechanism (UNEP/OzL.Pro.2/3).

²⁵ Agreement between the Swiss Federal Council and the Global Fund in view of determining the legal status of the Global Fund in Switzerland, dated December 13, 2004.

(representing developing and donor countries, civil society and the private sector) and four ex-officio non-voting members (the World Health Organization (WHO), UNAIDS, the World Bank as Trustee, and Swiss representative). The Global Fund Secretariat manages its day-to-day operations, including mobilizing resources, managing grants, providing legal and administrative support, and reporting information on the Global Fund's activities to the Global Fund Board and the public. The Secretariat is currently administratively supported by the WHO, pursuant to an administrative services agreement between the WHO and the Global Fund.

15. In each country served by the Global Fund, a Country Coordinating Mechanism (CCM), a country-level management board represented by public and private sectors, is responsible for submission of funding proposals. All grant proposals are reviewed by an independent group of experts appointed by the Global Fund Board (Technical Review Panel or TRP). The TRP rates proposals based on technical merits and consistency according to proven best practices, and makes recommendations to the Global Fund Board on whether or not they should be funded. The Global Fund Board periodically approves grants, according to the TRP's recommendations, subject to availability of funds. The CCM oversees progress of approved grant activities during implementation.

16. Global Fund activities are managed by the Secretariat. The Global Fund disburses funds to Principal Recipients (PRs), designated in-country organizations (governments, private entities, NGOs, etc.) chosen by the CCM to receive funding allocations. The Global Fund enters directly into grant agreements with the PRs, under which PRs are responsible for project implementation. The grant agreements are negotiated by the Secretariat and signed by the Executive Director of the Secretariat of the Global Fund.²⁶ At the request of the PRs, funds may also be disbursed to recipients other than the PRs.

17. The World Bank provides limited trustee functions to the Global Fund, administering and managing the Global Fund trust fund, and disbursing funds from the trust fund to PRs based on instructions received from the Global Fund Secretariat. As Trustee, the World Bank is not responsible for the use by any recipients of any funds disbursed from the trust fund.

18. The Global Fund's oversight, monitoring and evaluation system is the responsibility of the Global Fund Board, with advice from an independent Technical Evaluation Reference Group. Global Fund staff oversee grants at the country level. Local Fund Agents (LFAs), usually private sector accounting firms hired by the Global Fund, provide financial oversight over the PRs. LFAs are responsible for the Global Fund's fiduciary risk management at country level. They provide the Global Fund Secretariat with the information required to make grant management decisions. They regularly verify, assess and report on the program implementation by PRs and on program results.

²⁶ See Global Fund's Proposals Process in Brief at <http://www.theglobalfund.org/en/apply/proposals/>. See also GFATM Standard Grant Agreement at: http://www.theglobalfund.org/en/files/about/structures/lfa/background/LFAToolsGuidelines/BeforeGrantImplementation/Standard_Form_Grant_Agreement.pdf.

ANNEX II. LEGAL ATTRIBUTES OF, AND THE PROCESSES FOR ENDOWING THE ADAPTATION FUND WITH, LEGAL PERSONALITY

Adaptation Fund Issues to consider regarding the conferment of Legal Status by the CMP		
Issue	Options	Key Features
1. What legal attributes should the CMP consider?	<ol style="list-style-type: none"> 1. International Juridical Personality 2. Legal capacity 3. Privileges and immunities 	<ol style="list-style-type: none"> 1. <u>International juridical personality</u> <ol style="list-style-type: none"> a. To act on the international plane b. To interact and contract with other international legal entities and actors 2. <u>Legal capacity</u> <ol style="list-style-type: none"> a. To acquire and own property and assets, including the Adaptation Fund CERs; b. To enter into contracts c. To participate in legal proceedings 3. <u>Privileges and immunities</u> <ol style="list-style-type: none"> a. Privileges and immunities for the Adaptation Fund, Adaptation Fund Board members and alternates, and Adaptation Fund secretariat and staff for the fulfilment of their purpose b. Immunity from legal actions in national courts for the Adaptation Fund, Adaptation Fund Board members/alternates, and the Adaptation Fund secretariat and c. Exemptions from taxes and visa restrictions d. Immunity from seizure of the assets and property owned by the Adaptation Fund
2. Which bodies/entities under the Adaptation Fund could be conferred with which legal attribute by the CMP?	<ol style="list-style-type: none"> 1. Adaptation Fund 2. Adaptation Fund Board 3. Adaptation Fund Secretariat 	<ol style="list-style-type: none"> 1. <u>International juridical personality</u> <ol style="list-style-type: none"> a. Adaptation Fund 2. <u>Legal Capacity</u> <ol style="list-style-type: none"> a. Adaptation Fund b. The CMP will need to designate the individual(s) authorized to execute contracts on behalf of the Adaptation Fund 3. <u>Privileges and immunities</u> <ol style="list-style-type: none"> a. Adaptation Fund, its property and assets b. Adaptation Fund Board members and alternates c. Adaptation Fund Secretariat and staff

Adaptation Fund Issues to consider regarding the conferment of Legal Status by the CMP		
Issue	Options	Key Features
3. In which State or Jurisdiction should these legal attributes be recognized	<ul style="list-style-type: none"> a. In the State that serves as the seat for the Adaptation Fund Secretariat b. All Parties of the Kyoto Protocol c. States that are observers to the Kyoto Protocol 	<p>State that is seat for the Adaptation Fund Secretariat</p> <ul style="list-style-type: none"> a. The State where the Adaptation Fund secretariat has its seat would need to take the necessary legislative action, if necessary conclude a Headquarters Agreement, to recognize and provide legal authority for the Adaptation Fund the operate in that State's jurisdiction b. The Adaptation Fund, Board members and alternates, and Secretariat and staff would enjoy privileges and immunities, and legal capacity in only this State <p>All Parties to the Kyoto Protocol</p> <ul style="list-style-type: none"> a. The Adaptation Fund, Board members and alternates, and Secretariat and staff would enjoy privileges and immunities, and legal capacity in all Parties to the Kyoto Protocol b. Parties would be required to take appropriate legislative measures to implement c. The State where the Adaptation Fund Secretariat has its seat would need to take the necessary legislative action, if necessary conclude a Headquarters Agreement, to recognize and provide legal authority for the Adaptation Fund to operate in that State's jurisdiction. <p>In Observer States to the Kyoto Protocol</p> <p>The CMP could encourage States that are observers to the Kyoto Protocol to also afford the Adaptation Fund these legal attributes, in view of the global objectives of the Adaptation Fund</p>

Adaptation Fund		
Issues to consider regarding the conferment of Legal Status by the CMP		
Issue	Options	Key Features
4. Through what action should the CMP confer these legal attributes to the Adaptation Fund?	<ul style="list-style-type: none"> a. A decision of the CMP b. An Amendment to the Kyoto Protocol c. A Separate legal instrument to the Kyoto Protocol 	<p>CMP decision</p> <ul style="list-style-type: none"> a. One uniform provision that would apply to all Parties to the Kyoto Protocol b. Would take time to negotiate c. Would take time for all Parties to take the necessary legislative action to implement the decision d. A decision may not be sufficient for some States to take the necessary legislative action e. The legal effect of a CMP decision may be questioned by some States and in some national courts <p>Amendment to KP</p> <ul style="list-style-type: none"> a. A legally sound option, whose legal effect would not be questioned b. Subject to the amendment procedures under Article 20 of the Kyoto Protocol c. Would be effective in only those Parties that ratify/accept the amendment d. One uniform provision that would apply to all Parties to the Kyoto Protocol e. Would take time to negotiate and to enter into force for all Parties <p>Separate legal instrument</p> <ul style="list-style-type: none"> a. A legally sound option, whose legal effect would not be questioned b. Would be effective in those States that ratify/accept the agreement c. One uniform provision that would apply to all States d. Would take time to negotiate and to enter into force