

Legal note on proposed recommendations on institutional linkages and relations between the Adaptation Fund and the other institutions under the Convention

Note by the UNFCCC Legal Affairs Programme

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1. The Co-facilitators of the Standing Committee on Finance (SCF) working group on future linkages between the Adaptation Fund (AF) and the other institutions under the Convention have requested the secretariat to review the feasibility and language in the following two options proposed by some members of the SCF, as possible recommendations to the Conference of the Parties (COP), and make recommendations on possible textual proposals:

- The SCF agrees to recommend to the COP to invite the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol (CMP) to consider whether the SCF, in the context of its mandate to ensure coherence and coordination in the delivery of climate change financing, can provide input to the guidance to the Adaptation Fund Board (AFB).
- The SCF agrees to recommend to the COP to consider with the CMP, designating the AFB as an operating entity of the Financial Mechanism (FM) of the Convention.

2. At the outset, it is noted that these two options address different issues and they are not mutually exclusive.

Option 1: The SCF can provide input to the guidance to the Adaptation Fund Board

3. The COP established the SCF to assist the COP in exercising its functions with respect to the financial mechanism of the Convention in terms of, inter alia, improving coherence and coordination in the delivery of climate change financing, rationalization of the financial mechanism, mobilization of financial resources and measurement, reporting and verification of support provided to developing country Parties (see decision 1/CP.16, para. 112). The COP further decided that the SCF shall perform any other functions that may be assigned to it by the COP (see decision 2/CP.17, para. 122).

4. The AFB operates under the authority and guidance of the CMP. The CMP provides annual guidance to the AFB, after consideration of the annual report of the AFB to the CMP. Such guidance is developed solely by the CMP, and the CMP has not adopted modalities for input from any external source in the preparation of its guidance to the AFB.

5. As the Kyoto Protocol is a separate and distinct international legal agreement over which the COP has no legal authority, a decision by the CMP is required to give effect to any decision by the COP mandating the SCF to take action with respect to the AFB,¹ including a COP decision mandating the SCF to provide input to the CMP in the preparation of its guidance to the AFB.

6. Accordingly:

- a. **The COP may request the SCF to undertake activities with respect to the Adaptation Fund and the AFB, including authorizing the SCF to provide input to the guidance being prepared by the CMP to the AFB. Such input could be included in the SCF report to the COP.**
- b. **Further to a COP decision authorizing the SCF to provide input to the guidance to the AFB, a complementary decision by the CMP is required to give effect to and enable the SCF to provide such input to the CMP. That CMP decision should clarify the modalities for the SCF to provide such input to the CMP (e.g. on timing of such input). The CMP would consider the element of the SCF report containing such input to the AFB guidance.**

7. Based on the above, possible textual recommendations from the SCF could read as follows:

- a. **The SCF agrees to recommend to the COP to consider to request the SCF to provide input to the CMP on guidance to the AFB, taking into account the annual reports of the AFB to the CMP, for consideration by the CMP in the preparation of annual guidance by the CMP to the AFB.**

¹ See e.g. decisions 6/CP.20, para. 22, and 2/CMP.10, para. 7.

- b. **The SCF agrees to recommend to the COP that such guidance be provided by the SCF starting in [year] in its report to COP[X], with such input to be considered by the CMP at its X session.**
- c. **The SCF further agrees to recommend to the COP to invite the CMP to endorse the decision of the COP requesting the SCF to provide input to the CMP on its guidance to the AFB, and for the CMP to decide on the procedures and issues for the SCF to consider in the preparation of such input.**

Option 2: COP to consider with the CMP designating the AFB as an operating entity of the Financial Mechanism

8. In accordance with Article 11, paragraph 1, of the Convention, the COP has the sole prerogative to entrust the operations of the financial mechanism to one or more existing international entities. The COP has taken decisions to entrust the Global Environment Facility (GEF) and Green Climate Fund (GCF) as operating entities of the Financial Mechanism.

9. The AF is an international entity of the Kyoto Protocol to provide financing to support adaptation projects and programmes in eligible developing countries. The CMP established the AFB to supervise and manage the AF, under the authority and guidance of the CMP, and that it shall be fully accountable to the CMP, which shall decide on its overall policies in line with relevant decisions (see decision 1/CMP.3, paras 2 and 4).

10. Accordingly:

- a. **The COP may designate the AF as an operating entity of the Financial Mechanism. This follows the precedent of the GEF and the GCF (and not the GCF Board or the GEF Council) being designated by the COP as operating entities of the Financial Mechanism.**
- b. **As the AF remains under the authority and guidance of the CMP, a CMP decision is required to confirm/endorse such a decision of the COP.**

11. In accordance with Article 11, designation as an operating entity of the Financial Mechanism:

- a. The AF will serve as an operating entity of the Financial Mechanism in accordance with the legal parameters established by Article 11 of the Convention, including the accountability framework and reporting arrangements defined therein;
- b. The AF would be subject to the authority and accountability of the COP, which includes Parties to the Convention that are not Parties to the Kyoto Protocol;
- c. The COP shall decide on the AF's policies, programme priorities and eligibility criteria related to the Convention, and provide guidance directly to the AF after reviewing the reports of the AF to the COP;
- d. The AF would support all activities under the Convention;
- e. The AF to have an equitable and balanced representation of Parties to the Convention within a transparent system of governance (in accordance with Article 11, paragraph 2). However, it should be borne in mind that Parties to the Convention that are not Parties to the Kyoto Protocol may only participate as observers at meetings of the AFB (as stated in Article 13, paragraph 2, and Article 15, paragraph 2, of the Kyoto Protocol);
- f. The COP and AF would agree on arrangements to give effect to this decision (in accordance with Article 11, paragraph 3) to address, inter alia:
 - i. Modalities to ensure conformity of funded projects with the policies, programme priorities and eligibility criteria established by the COP;
 - ii. Modalities for reconsideration of a particular funding decision in light of the policies, programme priorities and eligibility criteria established by the COP;
 - iii. Reporting requirements of the operating entities;
 - iv. Determination of predictable and identifiable funding necessary and available for the Convention's implementation and conditions for period review of such funding.
- g. The COP's review of the Financial Mechanism would include the AF.

12. Based on the above, possible textual recommendation from the SCF could read as follows:
- a. **The SCF agrees to recommend to the COP to consider designating the Adaptation Fund as an operating entity of the Financial Mechanism of the Convention, with arrangements to be concluded between the COP and the AF to ensure that it is accountable to and functions under the guidance of the COP to support projects, programmes, policies and other activities in developing country Parties.**
 - b. **The SCF agrees to recommend to the COP to consider and decide that when the AF is designated as an operating entity of the Financial Mechanism, it will be guided by the principles and provisions of the Convention and that the COP will provide guidance to the AFB, including on matters related to policies, programme priorities and eligibility criteria and matters related thereto, taking into account the annual reports of the AFB to the COP;**
 - c. **The SCF further agrees to recommend to the COP to invite the CMP to endorse the decision of the COP to designate the AF as an operating entity of the Financial Mechanism.**
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