

METAPHYSICS OR PRAGMATICS?

How to proceed with the Arrangements between the COP and the GCF?

Submission to the Standing Committee on Finance for its fifth meeting,

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Most of the fourth meeting of the Standing Committee on Finance (SCF) held in Bonn ### was taken up by deliberations on the Arrangements between the Conference of Parties (COP) of the UN Framework Convention on Climate Change (Convention) and the Green Climate Fund (GCF). The deliberations were intense and in the end got bogged down over the issue of how to deal with the task of developing *modalities by which a particular funding decision may be reconsidered in light of [the] policies, programme priorities and eligibility criteria* established by the COP, as required by Article 11.3.b of the Convention.

This submission considers the debate on these Modalities and the underlying issues and puts forward a pragmatic proposal for compromise.

The (non-) Evolution of Positions

The two positions on operationalizing Art. 11.3 that ultimately dominated the fourth meeting of the SCF had been submitted by the Philippines and the US and were reflected in the SCF Co-chairs text of 14 May under the heading of *Reconsideration of funding decisions* as ‘Option 1’ and ‘Option 2’, respectively.

Option 1. After an instruction to the Board to develop the Art. 11.3 modalities, Option 1 allows Parties to present observations to the COP about guidance conformity of particular funding decisions. The COP should analyze the complaint, and – possibly having sought further clarification from the Board– may request the Board to reconsider the decision in question. Apart from the mandate to develop the modalities,¹ Option 1 – originally submitted to the COP in Doha by 17 developing countries including the Philippines² – is in essence the same as the relevant Modalities developed in the GEF MOU (see Table 1).

Option 2, in turn, allows recipients to request a review of a funding decision with regard to guidance

Option 1	GEF MOU
5. Reconsideration of funding decisions	<u>Reconsideration of funding decisions</u>
That pursuant to Article 11, paragraph 3, (a) and (b) of the Convention, the Board shall:	
a) Develop modalities by which a particular funding decision may be reconsidered in light of the guidance provided by the COP.	
In the event that any Party, eligible for funding under the guidance provided by the COP, considers that a decision of the Board regarding one of the specific projects does not comply with the guidance provided by the COP, the COP should analyse the observations presented and take decisions on the basis of compliance with such guidance.	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 analyse the observations presented to it by the Party and take decisions on the basis of compliance with such policies, programme priorities and eligibility criteria.
The COP may then request the Board for further clarification on this specific project decision and in due time further request for a reconsideration of that decision;	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.

conformity through the Independent Redress Mechanism (IRM) of the GCF which is still to be developed by the GCF Board. It furthermore stipulates that the Board itself will take the decision on whether to reconsider its decision.

¹ i.e. having said that the Board shall develop these Modalities

² FCCC/CP/2012/CRP.1

During the meeting, Option 1 was at one stage amended to include the provision that the COP should carry out Parties/recipients appeals against IRM verdicts (which presumably would have implicitly acknowledged the IRM as being involved in the Modalities to be developed by the Board under Option 1). Option 2, in turn was amended to give Parties/recipients the right to request further clarification from the Board, and to mandate the Board to report to the COP on its decisions with regard to such requests for review of funding decisions. These changes, albeit only transitory in nature, are important because they point the way to potential compromises such as that put forward at the end of this submission.

Unfortunately, any willingness to compromise evaporated in the final hours of the meeting, with the final text, dated 17 June, reverting to Option 1 in its original language and Option 2 having been replaced by language which made no reference to a review of funding decisions at all – language which, as such, would be more appropriate under the heading of ‘Reporting and Guidance’. Given this, the only tangible progress during the meeting turned out to be the introduction of a procedural alternative – call it **Option 3** – stipulating that the Modalities *will be developed by the COP and the GCF before the Fund starts making funding decisions.*

The Issues

The debate regarding the two main options was divided more or less along developed and developing country lines, the former in favour of Option 2 and opposed to Option 1, and the latter vice versa. Unless otherwise indicated, the quotes in this section (in italics) are from the final plenary session at the fourth SCF meeting on this agenda item,³ reported here without attribution so as to avoid a further politicization.

Option 1 and the issue of political risk

What is wrong with Option 1? There were essentially two types of objection raised during the meeting, namely objections on *a legal theoretical basis*, and certain *practical* objections. Let us, for the moment, focus on the latter. The issue here is, essentially, that any involvement of the COP in the process of reconsidering particular funding decisions would introduce a political risk which would scare away not only government contributions to the GCF, but also co-investors in (large-scale) GCF funded projects.

The picture that was painted of the COP was that of an institution which can become very politicized *because any NGO, any stakeholder and any Party has the right to say whatever they like at the COP, which introduces a level of political risk which would make it very difficult to finance projects knowing that the decisions of the GCF Board could be overturned by the COP, basically in a very political forum which the COP is.*

However, this objection is targeting a straw man caricature which fails to reflect what Option 1 actually proposes. For one, Option 1 clearly restricts complainants to Parties. A number of scenarios – not necessarily convincing – were put forward as to why the involvement of Parties would lead to the alleged political risk,⁴ but the key reason why there is no genuine reason for such a risk is that,

³ http://unfccc4.meta-fusion.com/kongresse/scf04/templ/play.php?id_kongresssession=6522

⁴ The issue was raised whether third parties should be allowed to complain. If they are not, i.e. if only host Parties are allowed, then it is difficult to see how this should lead to political risk over and above the normal political risk: why would a government seek a reconsideration of a GCF approval of a hosted project instead of

contrary to what is implied in this caricature, Option 1 is fully cognizant of the fact that the COP cannot ‘overturn’ any decision of the GCF Board, be they strategic or particular, as in the context of the Art. 11.3 modalities: *The COP can at most send a request for reconsideration*. This does not mean that investors might not be led to believe that there would be additional political risk under Option 1, but that can easily be avoided by explaining what it actually entails.

Another objection to Option 1 which, as mentioned above, is essentially the procedure adopted in the GEF MOU, has been that it is *an impractical procedure that, likely for that reason, has never been invoked in the 20 year history of the GEF*. It was even suggested that the procedure was never invoked because there were no reasons for complaints (however, there may have been a hint of sarcasm). While I am not sure whether there has actually ever been an attempt to invoke the GEF procedure with respect to a particular funding decision of the GEF Council, I know that Parties have put forward complaints about the GEF in opening plenary statements. And, more often than not, this was where the ‘process’ got stuck. The problem with the GEF process, and *ipso facto* Option 1, is not just that it is impractical, but also that it is insufficiently operationalized. The GEF MOU (and Option 1) stipulates *what* is to be done, but not *how*.

The apparent default assumption that Parties should initiate the GEF process by including their complaints in their opening plenary statements is not only impractical, but deeply unfair. Being forced to make these complaints in a political forum such as the COP will deter many Parties with legitimate grievances from even initiating the process. This is not in anyone’s real interest, particularly in the longer term. What is needed is a de-politicized format for dealing with such complaints, be they about particular funding decisions, or about the performance of operating entities in general.

Option 2 and the issue of accountability

What is wrong with Option 2? At the meeting, everyone appeared to agree that the GCF *needs to comply with international fiduciary standards and [that] we must have a system in place to audit the operations*. The problem with Option 2 – as has been highlighted in both of the CSO observer submissions to the SCF for its fourth meeting⁵ – is that it contravenes best governance/auditing practice. The IRM, as one of the members put it, *will be formed by the board of directors. The people will be named by the board of directors. That is not independent. Just to put the word ‘independent’ on it does not make it independent. So what you are getting there is an internal compliance audit*.

Moreover, assuming the particular funding decisions referred to in Art. 11.3.b are actually taken by the Board,⁶ a further principled objection is that the outcome of a complaints assessment by the IRM would go the Board – the very body which is under investigation and which, as such, may well be seen as having a conflict of interests. However, it is important to point out, and to keep in mind, that this potential conflict of interest also arises in Option 1. The fact is that both options have one key communality: they both end up with a request/recommendation to the GCF Board. Nothing less,

closing down the project domestically? The key issue in the reconsideration of particular funding decisions referred to in Art. 11 is not the reconsideration of an approval, but the reconsideration of a rejection – and it is difficult to see how that would add political risk. It must also be highlighted that the danger of introducing this sort of political risk is by no means restricted to Option 1: given the current political divisions on the GCF Board, the very same objections could, *mutatis mutandis*, be levelled at Option 2.

⁵ Oxford Institute for Energy Studies and Transparency International

⁶ The situation changes dramatically if the particular funding decisions are devolved, say through the use of Enhanced Direct Access, in which case they would fall legitimately within the purview of an internal complaints procedure. Note that since the business model of the GCF has not been adopted, this strongly suggests that the whole discussion on the Art. 11.3 modalities is premature, and consequently that the best and only practicable way to proceed is to opt for Option 3, i.e. to postpone the decision.

nothing more. Under Option 1, the COP may request the Board to reconsider a particular funding decision, while under Option 2, the IRM *will receive complaints related to the operation of the Fund and will evaluate and make recommendations*⁷ to the GCF Board. The final judgment on whether the decision in question is to be upheld or not rests in both cases with the GCF Board.

While this may be unfortunate from a governance point of view, it may well pave the way for a compromise.

The issue of control (including the Genesis debate)

Before turning to consider this compromise, it may be necessary to confront an underlying issue that has given rise, as one member put it, to a certain amount of *shadowboxing events over a word here and a word there that make a difference in terms of whether the GCF is highly autonomous and the relationship with the COP is reduced to a mostly nominal one, as compared to the GCF being under the COP in a very meaningful way.*

As pointed out by the same member, the dispute regarding the degree of control of the COP over the GCF has been going on from the very beginning of the deliberations on the GCF, before the Transitional Committee, during the Transitional Committee, and ever since. The debate typically involves such esoteric issues as the exact time at which the GCF came into existence and who ultimately created it. Such debates are largely metaphysical, not to say theological, and should really be avoided, as there is not enough ecumenical spirit among the protagonists to reach a consensus.

However, there is an objection to Option 1 which was based on a claim that does need to be addressed in this context. It was argued *on a legal theoretical basis* that the COP can have no role in the reconsideration of funding decisions because it can only issue *guidance on policies, programme priorities and eligibility criteria. Clearly reconsideration of independent funding decisions does not fall into any of these categories.*

While it is true that any reconsiderations of funding decisions can only be *in light of these policies, programme priorities and eligibility criteria*,⁸ it is simply not true that guidance by the COP is somehow restricted to these topics, as is clearly reflected in paragraph 5 of Decision 3/CP.17 ('Launching the Green Climate Fund') in which the COP decided *to provide guidance to the Board of the Green Climate Fund, including on matters related to policies, programme priorities and eligibility criteria and matters related thereto.*⁹

Indeed, it is essential that COP guidance not be restricted to these three topics, for if one is interested in the idea of external compliance/performance audits of the operating entities there are clearly performance benchmarks that are not covered by these project-centred topics.

⁷ Explanatory note in US submission. Note that this element of Option 1 is perfectly compatible with Option 2, in as much as it envisages that the Board shall *develop modalities by which a particular funding decision may be reconsidered in light of the guidance provided by the COP.*

⁸ UNFCCC Art. 11.3.b.

⁹ Emphasis added.

The Solution?

While both of the Options are tainted with the aforementioned potential conflict of interest, it is possible to combine the two in a way which may mitigate this shortcoming without evoking the spectre of political risks referred to earlier. The idea involves the establishment of a small ('Ombuds') Panel of SCF members, and a specific interpretation of the role of the COP in the process. The idea is to involve the Ombuds Panel in the operations of the IRM in order to provide increased independence from the Board, so as to ensure that not all *people will be named by the board of directors*, (see above). In return, the COP involvement in the reconsideration of funding decisions could be restricted to complaints regarding due process. The COP, to use the words of one of the SCF members, would not act as an *Appeals Court* (given that it cannot overturn GCF Board decisions), but as a *Supreme Court* considering only procedural complaints.

Establishing an Ombuds Panel would also allow for the GEF procedure (component of Option 1) to be de-politicized as referred to earlier: given that the SCF is meant to provide (i) *expert input, including through independent reviews and assessments, into the preparation and conduct of the periodic reviews of the financial mechanism by the COP*,¹⁰ and (ii) *draft guidance for the operating entities of the financial mechanism*, the SCF is the natural first port of call for any complaints by Parties regarding the performance of operating entities. The advantage of having an Ombuds Panel in this context would be its potential to provide the degree of privacy required to remove the process from the political sphere (in the same way as other UNFCCC processes accord privacy to private sector entities in the case of commercially sensitive discussions). Giving Parties a space to air their grievances without politicizing the issues is key to the long-term health of the Financial Mechanism of the Convention, and should have been accorded a long time ago.

However, given that the IRM still has to be developed by the GCF Board, the best way forward at present may be to proceed with Option 3, which would allow the SCF and the GCF Board to work together on putting in place this compromise.

¹⁰ Standing Committee Decision 2/CP.17

Annex A. Co-chairs' text on the arrangements between the COP and the Green Climate Fund (created 14 May 2013)

5. Reconsideration of funding decisions

Option 1

That pursuant to Article 11, paragraph 3, (a) and (b) of the Convention, the Board shall:

a) Develop modalities by which a particular funding decision may be reconsidered in light of the guidance provided by the COP. In the event that any Party, eligible for funding under the guidance provided by the COP, considers that a decision of the Board regarding one of the specific projects does not comply with the guidance provided by the COP, the COP should analyse the observations presented and take decisions on the basis of compliance with such guidance. The COP may then request the Board for further clarification on this specific project decision and in due time further request for a reconsideration of that decision;

Option 2

1. The GCF Board has full responsibility for funding decisions and will approve funding in line with the GCF's principles, criteria, modalities, policies, and programmes.

2. A recipient that considers that a given Board funding decision does not comport with guidance provided by the COP with respect to the policies, programme priorities, and eligibility criteria may request a review through the independent redress mechanism established by the Board in paragraph 69 of the GCF Instrument. Any funding decisions, including reconsideration of funding decisions, are the responsibility of the Board.

Explanatory Note: As provided in the proposed text, we propose that the redress mechanism, which is to be developed by the Board per paragraph 69 of the Governing Instrument, enable review of funding decisions, including in light of the policies, programme priorities, and eligibility criteria as conveyed in COP guidance.

Article 11.3(b) provides that the arrangements shall include modalities by which a particular funding decision may be reconsidered in light of COP policies, programme priorities and eligibility criteria. The Convention does not, however, specify that the COP itself should have a role in these modalities, and in addition, paragraph 5 of the GCF Instrument, as approved by the COP, reserves to the Board 'full responsibility for funding decisions'.

Further, consistent with paragraph 3 of the GCF Instrument, which requires the GCF to be 'guided by efficiency and effectiveness', funding decisions by the GCF Board should be prompt and avoid unnecessarily delays, including any reconsideration procedure. The MOU between the GEF and the COP includes a provision effectuating Article 11.3(b) in providing for reconsideration of funding decisions. Paragraph 5 of the GEF MOU creates an impractical procedure that, likely for that reason, has never been invoked in the 20 year history of the GEF.

Taking this history into account, the GCF Instrument states that 'the Board will establish an independent redress mechanism that will report to the Board. The mechanism will receive complaints related to the operation of the Fund and will evaluate and make recommendations'.

Annex B. Co-chairs' text on the arrangements between the COP and the Green Climate Fund; Consolidated version (created 8 June 2013)

Option 1 (original text)

Reconsideration of funding decisions

Reiterates that the GCF Board has full responsibility for funding decisions and will approve funding in line with the GCF's principles, criteria, modalities, policies, and programmes;

Decides that the Board shall develop modalities by which a particular funding decision may be reconsidered in light of the guidance provided by the COP. In the event that [any Party, eligible for funding under the guidance provided by the COP] [a recipient], considers that a given funding decision of the Board regarding one of the specific projects does not comply with the guidance provided by the COP with respect to the policies, programme priorities, and eligibility criteria, [the COP should analyse the observations presented and take decisions on the basis of compliance with such guidance. The COP may then request the Board for further clarification on this specific project decision and in due time further request for a reconsideration of that decision] [the recipient may request a review through the independent redress mechanism established by the Board in paragraph 69 of the GCF Instrument. Any funding decisions, including reconsideration of funding decisions, are the responsibility of the Board];

Option 2 (modified text)

Independent Redress Mechanism (Reconsideration of funding decisions)

Recalls that the GCF has been mandated to establish an Independent Redress Mechanism issues related to Article 11.4 (?) of the Convention, review of the Funding decisions;

Reiterates that the GCF Board has full responsibility for funding decisions and will approve funding in line with the GCF's principles, criteria, modalities, policies, and programmes;

Decides that the Board shall establish an open and transparent process to reconsider for all matters of concern to the Operation of the Fund. This process should be easily accessible by Parties and information on this process should be communicated to parties on an on-going basis.

Recalling Article 3b of the Convention, in the event that [any Party eligible etc] (recipient) (party) considers that a given funding decision of the Board regarding one of the specific projects does not comply with the guidance provided by the COP with respect to the policies, programme priorities, and eligibility criteria and guidance provided, that Party or Parties may then request that the Board provides further clarification on this specific funding decision.

The Board shall ensure that all requests to the Independent Redress mechanism should automatically be considered. The Board shall report to report to the COP on these procedures and all other aspects of its operations.

[If a party is of the view that a particular funding decision is important to it meeting its commitment to the Convention and its protocols, and the party has availed itself to the Independent Redress mechanism of the GCF and is not satisfied that its concerns was respect to a particular funding decision was not handled in an independent open and transparent manner and the outcomes of the Independent Redress Process is not consistent with priorities, programs and eligibility criteria, that

party may appeal to the COP to review the matter on its behalf. This appeal to the COP will be on the basis in Article 3b of the convention].

The COP may then take appropriate measures in its provision of further guidance to the GCF.

Annex C. Co-chairs' text on the arrangements between the COP and the Green Climate Fund – first version (created 17 June)

[Reconsideration of funding decisions] [Independent Redress Mechanism]

12. These arrangements reaffirm that the Board has full responsibility for funding decisions.
13. The GCF Board has been mandated by paragraph 69 of its governing instrument to establish an independent redress mechanism that will report to the Board.
14. The independent redress mechanism will be open and transparent and easily available to all Parties, and address, inter alia, Article 11, paragraph 3(b) of the Convention.
15. The GCF will include in its annual reports to the COP the recommendations of its independent redress mechanism, and any action taken by the Board in response to those recommendations. The COP may provide additional guidance [to clarify policies, program priorities, and on eligibility criteria as they impact [the] funding decisions.
15. alt The modalities for addressing Article 11, paragraph 3 (b) will be developed by the COP and the GCF before the Fund starts making funding decisions.
15. alt 1 The Board shall develop modalities by which a particular funding decision may be reconsidered in light of the guidance provided by the COP.] In the event that any Party, eligible for funding under the guidance provided by the COP, considers that a decision of the Board regarding one of the specific projects does not comply with the guidance provided by the COP the COP should analyse the observations presented and take decisions on the basis of compliance with such guidance. The COP may then request the Board for further clarification on this specific project decision and in due time further request for a reconsideration of that decision

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