

# Oxford Energy and Environment Comment

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## Why Reinvent the Wheel?

On establishing new funds while guiding and holding accountable operating entities of the UNFCCC financial mechanism

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Consensus is emerging among the Parties to the UN Framework Convention on Climate Change (Convention) that a new international Climate Fund (Fund) should be established, a Fund which would dwarf all existing funds dedicated to supporting developing country climate change activities. There is also talk of establishing it as an operating entity of the Convention Financial Mechanism (FM). At the same time, there is a growing realization that the current relationship providing guidance and ensuring accountability between the Convention's Conference of Parties (COP) and the existing operating entity, is in need of reform. And there is a growing realization that these two issues are key to the success of the forthcoming UN climate change conference in Cancun, if not of the UN climate change regime as a whole.<sup>ii</sup> This Comment looks at how such a reform could be carried out and how it could be used in providing a legitimate and effective process to set up the new Fund.

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<sup>ii</sup> Halldor Thorgeirsson (Director, UNFCCC Bali Road Map support), for example, listed 'Establishing a New Fund, put in motion its design and put in place arrangements to ensure oversight over financial flows and the mobilization of long-term finance' as one of the key desirable Cancun outcomes in an Opening Keynote at Chatham House on 23 September 2010.

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## The Need for Expertise and Effectiveness – A Standing Committee on Finance

### Background

The relationship – defined in terms of guidance and accountability<sup>1</sup> – between the Global Environment Facility (GEF) – currently the sole operating entity of the FM – and the COP has long been regarded by many as problematic. This was one of the main factors in establishing the Adaptation Fund Board as the operating entity of the Kyoto Protocol Adaptation Fund (as opposed to leaving it to the GEF to operate). It has also led to a near consensus – reflected in the current negotiation text<sup>2</sup> – that the GEF needs to be reformed in order to serve more effectively as an operating entity of the FM.

However, it has also become increasingly clear that the problem is not with the GEF alone. COP guidance can sometimes be rather cryptic and could profit from improved drafting. It has also become clear that the COP (or for that matter the SBI) is institutionally incapable of carrying out the *supervision required to hold someone accountable*.<sup>1</sup> Indeed, it should not be asked to do so, in the same way in which national parliaments are by and large not asked to carry out their oversight functions in plenary, but are given the opportunity to avail themselves of the support of ‘oversight committees’, which can dedicate the necessary time and expertise for an effective supervision on behalf of their parliaments.

In short, the idea of holding operating entities accountable by having them self-report annually to the COP/SBI as a whole has clearly not stood the test of time, and cannot be seriously entertained by anyone who wishes to see genuine accountability of operating entities.

### A Finance Committee

The concept of a ‘Standing Committee on Finance’ (Finance Committee) – as presented at the high-level Geneva Dialogue on Climate Finance – originated in the ecbi Oxford Fellowship session that took place immediately prior to the Geneva meeting.<sup>3</sup>

The idea is to establish a standing committee of the COP – following the common practice of parliamentary standing committees – in a first instance *to support the COP in supervising the accountability* of the FM operating entities to the COP, and in *providing guidance* to them and recommendations to other actors. For this, the Finance Committee is to *draft guidance* to the operating entities for approval by the COP, and to submit *regular independent reports* on the *performance of the operating entities* to the COP. To do so effectively, the Finance Committee will be expected to meet between COP Sessions, and to carry out work in between meetings.

The proposed Finance Committee falls under the definition of ‘subsidiary body’ in the Draft Rules of Procedure,<sup>4</sup> which means that the COP would not only be permitted, but indeed be compelled to establish such a standing committee, if it is deemed necessary for the implementation of the Convention.<sup>5</sup>

The members of the Finance Committee are meant to be *Parties* to the Convention, selected by the COP, who are to delegate representatives (‘delegates’) to carry out the work of the Finance Committee. Parties elected to serve on the Finance Committee (i.e. the Finance Committee) will be enjoined to nominate delegates *with a certain profile* in order to provide the Finance Committee with

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<sup>i</sup> At present, the supervision of the COP is exercised through the provision by the GEF on an annual report on how it has performed in following the guidance of the COP, which then the COP takes note of.

the expertise required to function effectively. It is clear that financial expertise is of paramount importance in this context, but it should also be clear that expertise in finance is not the only prerequisite for effectiveness. In particular, in order to be able to draft guidance to operating entities successfully there is also a need for expertise in the different funding themes, and indeed in the workings not only of the operating entities, but also of the UNFCCC and its COP. The exact nature of such a multidisciplinary profile for Finance Committee delegates should be decided by the COP. However, Parties will have to keep in mind that the calibre of the people delegated to the Finance Committee will be the key determinant in whether it will be trusted by the relevant stakeholders in the capitals, particularly in finance ministries, who are not usually following closely the UNFCCC process.

The *composition* in terms of member Parties is ultimately a matter of negotiation. What has to be achieved, however, is that all Parties feel adequately represented. This means, in particular, that group *representation has to be legitimate*,<sup>i</sup> and possibly that there are certain Parties which are automatically on the committee.

### **Revocation of Status.**

However, even the best guidance and supervision by the COP will remain ineffectual if (persistent) sub-standard performance cannot be penalized. The only penalty available for MOU-based operating entities, is the revocation of the MOU. A truly effective system of guidance and supervision, therefore, also requires a procedure of revoking the status of operating entity of the UNFCCC Financial Mechanism.

### **Establishing a New Fund**

While, as mentioned in the preamble, consensus seems to be emerging about establishing a new international Fund to support climate change activities in developing countries, there are still considerable differences as to how this should be done.

### **The G77 and China Submission.**

In August 2008, the Philippines made a submission on behalf of the G77 and China entitled *Financial Mechanism for Meeting Financial Commitments under the Convention*<sup>6</sup> with the aim of operationalizing *an effective financial mechanism under the COP*. According to the section on ‘Design and Structure’ in that submission (see Box), the FM itself is to be operationalized by establishing a fund with thematic windows – or as a collection of thematic funds– to be managed by a Board under the authority of the COP.

Accordingly, the issue in establishing such a new fund would not be the creation of an operating entity of the FM, but to operationalize the FM itself. The FM would no longer have operating entities, and relations between it and existing funds/operating entities would have to be re-defined (‘worked out’).

The Board of the Fund would be appointed by the COP, which would also *decide on the policies, programme priorities, and eligibility criteria*. As concerns the procedures for establishing the fund(s), it stands to reason that they would be similar to those that were employed in establishing the

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<sup>i</sup> It has to be the groups in question who decide which Party is to represent them on the Finance Committee.

Adaptation Fund (AF), where (based on Decision 5/CMP.2) the operational framework for the AF was negotiated in the SBI (twenty-sixth and twenty-seventh sessions), and adopted at CMP 3 in Bali.

Indeed, the structure of the relationship between the AF and the CMP is interesting, in this context, in particular when compared to that between the COP and the GEF as MOU-based operating entity of the FM. The main differences between the two types of relationships are:

- The CMP selects the members of the Adaptation Fund Board, while the COP has no role in selecting the members of the GEF Council,
- The CMP has control over the rules of procedure and the operational guidelines of the AF (i.e. both documents and any amendments are subject to CMP approval) while the COP has no such control over any such rules and procedures of the GEF.

Contrary to a misconception that still prevails in some quarters, the fact that the AF is under the authority of the CMP does not imply that the CMP has the means to micro-manage the AF. For *operational purposes*, the Adaptation Fund Board is as independent of the CMP as the GEF Council is of the COP.

#### **Design and Structure of the Operationalised Financial Mechanism proposed by G77 & China**

- 1 *The COP is the supreme decision-making body of the Convention, under whose authority and guidance the mechanism will operate. The COP shall decide on the policies, programme priorities, and eligibility criteria.*
- 2 *The COP will appoint a Board, which shall have an equitable and balanced representation of all Parties within a transparent and efficient system of governance. The Board shall be assisted by a Secretariat of professional staff contracted by the Board.*
- 3 *The COP and Board shall establish specialized funds, and funding windows under its governance, and a mechanism to link various funds.*
- 4 *Funds would be administered by a Trustee or Trustees selected through a process of open bidding.*
- 5 *Each of the separate funds may be advised by an expert group or committee, which could also be supported by a technical panel or panels addressing specific issues addressed by the fund.*
- 6 *To ensure transparent and efficient governance, other possible components of the structure include a consultative/advisory group of all relevant stakeholders, and an independent assessment panel.*
- 7 *Modalities for the determination of the role of existing funds and entity/ies for the operation of the financial mechanism will have to be worked out.*

#### **The American Three-Step Process.**

After Copenhagen, the US has put forward some ideas of how to establish the Copenhagen Green Climate Fund of the Copenhagen Accord. The US vision of how the new Fund should be established involves three distinct sequential steps.

**Step 1 – A COP Decision.** The first step is a COP decision, possibly at Cancun, that a new fund is to be established as an operating entity of the UNFCCC Financial Mechanism, under the guidance of, and accountable to, the COP. That decision would also include (i) the basic composition and criteria for the Board, (ii) the identity of the Trustee, (iii) the thematic areas to be funded.

**Step 2 – Operationalizing the Fund through a Working Group.** Noting this COP decision, a temporary multidisciplinary Working Group (WG) of experts from all interested countries is to be convened, led by finance ministries in a fully inclusive manner (but outside the UNFCCC). The task of the Working Group is two-fold: (i) to develop a framework document for the Fund, setting forth key issues including funding criteria, financial instruments, role of the secretariat, access modalities,

etc., and (ii) to select, at its final meeting, the founding Board of the Fund, which is then to adopt the framework document.

**Step 3 – An MOU between the COP and the Fund.** Once the Fund is established (Step 2), it is to formalize its relationship with the COP as an operating entity of the Financial Mechanism by agreeing an MOU which sets out the terms of ‘guidance and accountability’.

The American three-step process proposal does have some similarities with the process that was used in establishing the Adaptation Fund. Both involve a COP decision on establishing a new fund, and both involve (i) drafting a framework document (‘Instrument’) for the fund in question, and (ii) selecting a Fund Board, yet there are also significant differences. Apart from the need to enter into an MOU, the main difference is in the role of the COP. While according to the AF model, the COP would both approve the Instrument and appoint the Board, it is explicitly excluded from doing either under the US proposal, which essentially mirrors the COP/GEF model, as explicated above. It may be useful to look at these points in a little more detail.

### **Creating a new operating entity?**

One of the key ingredients of the proposed three-step process is to establish the envisaged Fund as an operating entity of the FM. Step one includes a COP decision that this should be done, and step three explains how it will ultimately be achieved. The problem is that this may not quite be as straightforward as it sounds.

As mentioned earlier, there is at present only one operating entity of the FM (the GEF), which has this status by virtue of an MOU with the COP. However, its usual designation as ‘*an* operating entity’ gives reason to believe that a plurality of such operating entities would be consistent with the Framework Convention.

It is also true that the term ‘operating entity’ has been applied to entities that were created after the entry into force of the Convention: The Adaptation Fund Board was designated by the CMP as the operating entity of the Adaptation Fund, (note, incidentally, without having to enter into an MOU).<sup>7</sup>

One might therefore think that it should be straightforward to create a new operating entity of the FM, whether inside the UNFCCC, or outside through an MOU. Unfortunately, that is not so. The problem lies in the last sentence of Article 11.1 of the Convention, which stipulates that the operation of the FM *shall be entrusted to one or more existing international entities*. Opinion seems to be divided as to when these entities are meant to have existed (the balance being in favour of before 1992). But clearly the idea of creating anything as an operating entity of the FM has the potential to be inconsistent with the Convention.

If, therefore, the new Fund is established outside the UNFCCC, then the only way of linking it to the FM may well be by having it operated by an international entity that (i) did exist in 1992 and (ii) is – or would be made – an operating entity of the FM. In short, by way of the GEF Trust Fund model. If, on the other hand, the new Fund were negotiated under the UNFCCC, then it could legitimately be regarded as *a Fund of the FM*, and its Board could operate it without having to become an operating entity of the FM itself.

### **Why sideline the UNFCCC Process?**

The second key ingredient of the three-step process is to establish the new Fund outside the UNFCCC/COP. It is important to scrutinize what reasons there could be for doing so. As concerns the

US, it seems to be possible to infer from statements regarding the type of people that are meant to be on the envisaged working group – i.e. ‘people who know what they’re doing with respect to finance’<sup>8</sup> – that the relevant *expertise is insufficiently represented in the COP*. Others have (privately) also argued – particularly after the final night in Copenhagen – that the consensus-based *UNFCCC process has become unmanageable* due to the detrimental influence of certain negotiators who deliberately derail the process. There may well be other arguments that might be offered in favour of ‘taking business away’ from the COP, but for the present purposes, let me just consider the cogency of these two.

**Insufficient expertise.** The idea that establishing a multilateral fund (designing its instrument) is an intellectually Herculean task that can only be performed by demigods – or, to be more precise, Treasury officials – is at best a myth. There are sufficiently many existing multilateral funds with instruments that can be borrowed from: No need to re-invent the wheel! Moreover, the case of establishing the *Global Fund* (GF) – which is frequently and rightly cited as a good example – shows that funds can be established efficiently without being Treasury-led: The Transitional Working Group<sup>9</sup> that was set up to establish the Global Fund not only included representatives from charitable foundations, NGOs, the private sector, and the UN system, but was chaired by Dr Chrispus Kiyonga, former Ugandan Minister of Health, and supported by a Technical Support Secretariat lead by Paul Ehmer from USAID.<sup>1</sup>

There is no doubt that the process of establishing a fund can be expedited if the people involved bring in certain types of expertise and experience. Having knowledge of how Treasuries work may well be desirable in this context. Yet, equally important would seem to be a working knowledge of the existing multilateral funds.<sup>ii</sup> Moreover, judging from the GF experience, some knowledge of the subject matter of what the fund is going to be used for, need not be a handicap.

Some of this expertise may be insufficiently represented in the current COP delegations, but this does not inevitably mean that business must be taken elsewhere. There is no reason why the relevant expertise could not be delegated, particularly in the context of a specific task such as setting up a new fund. All that is required is a request for Parties to send delegates with the desired expertise. And there is no reason why a small group of experts with the requisite experience under the COP could not function as expeditiously as a working group outside the UNFCCC.<sup>iii</sup>

**Process deadlock and ‘troublesome’ negotiators.** The other, and probably more sensitive reason put forward by some for wishing to take any substantive discussion out of the COP, is the idea that the UNFCCC process has become completely paralysed, incapable of taking any decisions, chiefly due to the activities of a few ‘troublesome’ individuals. While personally I do not subscribe to this idea, it seems to be quite widely held, and thus deserves some further scrutiny in this context.

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<sup>i</sup> Note, incidentally, that the current Board of the GF is still chaired by a Minister of Health (Dr. Tedros Adhanom Ghebreyesus of Ethiopia) and that the government members are from health (7), foreign affairs (4) and development (3).

<sup>ii</sup> Note that – as witnessed in the composition of the GF Board – this knowledge is not necessarily Treasury-based.

<sup>iii</sup> In this context, it may be worth clarifying that the Adaptation Fund ‘instrument’ was actually negotiated between CMP 1 (Montreal) and CMP 3 in Bali. The relevant ‘working group’ – i.e. the SBI contact group – met *four* times (SB 24 to SB 27) which, is not that different from the *three* times that the TWG took to establish the GF.

Assuming, for the sake of argument, that the COP really has an unmanageable ‘troublemaker problem’. The question that needs to be asked then is whether a move away from the COP could really solve that ‘problem’, in particular for the envisaged ‘step-two’ WG.

Of course, the conveners could simply not invite the Parties in question, but this would clearly contradict the envisaged inclusiveness of the WG. Alternatively, they could try to influence who is being delegated by countries – say by trying to exert some form of (diplomatic) influence not to send the individual(s) in question, or by adding certain conditions as to who can be sent (e.g. by reference to a specific ministry). This, however, would be an infringement of the sovereign right of States to decide who should represent them and, as such, it would seriously undermine the legitimacy of that process.

At this point, one might be tempted into thinking that this could be a price worth paying in order to get a result. However, this would be unwise, particularly in the context of the proposed three step process. Why? For one, it is unlikely that even the first of the three steps would be taken if the process by which the Fund is to be established is perceived to be illegitimate. To ask the COP to adopt a decision that a new fund is to be established without having an assurance that the key modalities of that fund will be developed through a legitimate process is akin to asking it to sign a blank (governance) cheque – something which, given the current levels of distrust, is unlikely to happen.

Given the inevitable interest which the topic would engender among Parties, it is highly likely that a truly inclusive and legitimate WG would face the same issues as the COP. Indeed, the WG would face the additional problem of having to go through a constitutive process, as it would, for example, have to agree on rules of procedure and on modalities for forming drafting sub-groups.

Faced with this, one might be tempted to conclude that the only way forward is to give up the idea of an inclusive and legitimate process altogether. This, however, would be wrong, for there is an alternative: The conclusion to ‘throw in the towel’ would be based on the incorrect promise that Copenhagen demonstrated that the UNFCCC process has become intrinsically unmanageable, where in fact all that was shown is that it can be badly managed. In the past, the UNFCCC process has time and again managed to deliver highly complex outcomes, and this capacity has not evaporated in Copenhagen. It is true that the process is not perfect. In particular, properly managed, it does take time, but since the new Fund is meant to be the corner stone of longer-term climate finance, it is worth taking that time to get it right. And getting it right, in this context, means making proper use of the UNFCCC ‘wheel’ and not trying to re-invent it elsewhere as a ‘proxy-COP’.

In short, what is needed is a body under the UNFCCC which has the buy-in of all Parties with respect to democratic and substantive legitimacy as well as effectiveness, which can carry out the function of the envisaged WG in establishing the strategic framework for the new Fund. And while it would be possible to form such a body on an ad hoc basis, it is clear that the envisaged Finance Committee should be able to take on this role, which in the spirit of Ockham’s Razor means that its first task should be to design the instrument for the new Fund for approval by the COP, and to support the COP in drafting amendments if required.<sup>i</sup>

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<sup>i</sup> To avoid misunderstandings, it must be emphasized that, unless the new Fund is to have an omnipotent Board embodying both the administrative as well as the normative/strategic functions of the new Fund, the WG envisaged in the three-step proposal could not simply cease operations after having established the Board. It would have to co-exist with that Board as a genuine proxy-COP.

## **What to do in Tianjin and Cancun?**

In terms of operationalizing the Finance Mechanism of the UNFCCC, there are two key decisions that should be prepared in Tianjin for adoption in Cancun, namely a Decision to establish a Standing Committee on Finance, and a Decision to establish a new Climate Fund.

### **Decision to establish a Standing Committee on Finance**

A Decision to establish a Standing Committee on Finance as a (non-open-ended) subsidiary body under the UNFCCC should be prepared in Tianjin and adopted in Cancun. The decision would have to contain, inter alia,

- a specification of the Committee's Party membership composition;
- a specification of the profile(s) of expertise that delegates to the Committee would be expected to reflect;
- a specification of the standing functions of the Committee, say as explained above.

### **Decision to establish a Climate Fund**

A Decision to establish a Climate Fund under the guidance of, and accountable to, the COP as an operating entity of the Financial Mechanism should be prepared in Tianjin and adopted in Cancun (subsequent to the Decision on the Finance Committee).

Mirroring the Nairobi Adaptation Fund Decision,<sup>10</sup> the Cancun Climate Fund Decision could include decisions on the principles and modalities for the Fund, as well as a decision on the composition of the Climate Fund Board. In addition it should issue a request to the Finance Committee to draft an instrument for the new fund for approval by the COP at COP 17 in 2011. The instrument will then serve as the framework for the Board of the Climate Fund, once established, to complete the operationalization of the Fund.

### **The need for compromise**

What are the chances of this happening? It is difficult to say. What is clear, however, is that there would need to be willingness to compromise on all sides.

Establishing a Standing Committee on Finance, with a core remit of supporting the COP in its relations with operating entities of the Financial Mechanism, is clearly not the same as operationalizing the FM without the use of operating entities. The hope is that the idea of retaining operating entities would become more palatable to those who oppose it, by creating a Finance Committee that ensures proper accountability of operating entities.

Establishing the new Fund through the Finance Committee, in turn, clearly is not establishing it outside the UNFCCC. The hope here is that the profile of the Finance Committee delegates will be sufficient to dispel any concerns about a lack of expertise in that body to design the framework document for the Fund competently and efficiently.

What is easy to say is that the world needs some significant outcome in Cancun! The two suggested decisions are achievable and they would be a significant component of the balanced package of decisions that Cancun should deliver.

## **Annex: Advice on Legal Implications of a Standing Finance Committee Proposal**

On 27 September, the Legal Response Initiative<sup>1</sup> provided advice regarding the following query:

### **The Query**

Is the idea to create a Standing Finance Committee, as proposed by the 2010 ecbi Oxford Fellowship, legally feasible. The query was divided into two parts:

#### **(a) *Constitutional Authority of the COP:***

- (i) Does the COP at present have the authority to establish the SFC and are there any legal constraints in this regard?
- (ii) What would establishing the SFC entail from a legal perspective?

#### **(b) *Interaction with other Subsidiary Bodies:***

- (i) What are the implications with respect to interactions between the SFC and other UNFCCC bodies?

### **The Advice (Executive Summary)**

- (1) It is likely that the Conference of the Parties ('COP') does possess the requisite authority to establish a Standing Finance Committee ('SFC'). The principal legal constraint in this regard is that the establishment of the SFC must be deemed necessary for the implementation of the Convention. However, in light of the SFC's proposed mandate as well as the past practice of the COP in creating subsidiary bodies, it is likely that the SFC would satisfy this threshold standard.
- (2) In order to establish the SFC in practice, the COP must comply with various provisions of the Rules of Procedure of the COP and its Subsidiary Bodies ('Rules of Procedure' or 'RoP'), in particular those governing the submission of proposals, voting on decisions, and the working practices of subsidiary bodies.
- (3) The creation of the SFC also requires detailed guidance on how it should interact with both the COP and its subsidiary bodies. In relation to the Subsidiary Body for Implementation ('SBI'), the COP may need to amend its mandate to avoid any duplication of work with the SFC. In relation to the operating entities of the financial mechanism, the COP may need to amend their reporting requirements so that the SFC is able to carry out its mandate effectively, in particular its objective of assuring the accountability of the operating entities.

### **Endnotes**

<sup>1</sup> *A mechanism for the provision of financial resources on a grant or concessional basis, ... is hereby defined. It shall function under the guidance of and be accountable to the Conference of the Parties, [Art 11.1 UNFCCC].*

<sup>2</sup> 15. *[[The Parties reaffirm the role of the GEF as an operating entity of the financial mechanism under Article 11 of the Convention] Parties agree to [revise] [review] the institutional arrangements between the financial mechanism of the Convention and the Global Environment Facility to ensure a more effective response to the needs of developing country Parties.]* Source: FCCC/AWGLCA/2010/14, page 41.

<sup>3</sup> For the full Oxford proposal text and a summary of the discussion see the Report of the 2010 Oxford Seminar at [www.EuroCapacity.org](http://www.EuroCapacity.org)

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<sup>i</sup> [www.legalresponseinitiative.org](http://www.legalresponseinitiative.org)

<sup>4</sup> Rule 2.8. "*Subsidiary body*" means those bodies established by Articles 9 and 10 of the Convention, as well as any body, including committees and working groups, established pursuant to Article 7(2)(i) of the Convention.[FCCC/CP/1996/2] Note that according to Rule 27, the COP Rules of Procedure *shall apply mutatis mutandis to the proceedings of the subsidiary bodies*. Note also that 'subsidiary bodies' need not be open-ended (cf. Rule 27.3).

<sup>5</sup> UNFCCC Art. 7.2(i).

<sup>6</sup> FCCC/AWGLCA/2008/MISC.2/Add.1

<sup>7</sup> Paragraph 3, Decision 1/CMP.3, FCCC/KP/CMP/2007/9/Add.1

<sup>8</sup> Todd Stern, 'Remarks at the Geneva Dialogue on Climate Finance', Geneva Dialogue on Climate Finance, 3 September 2010. [www.state.gov/g/oes/rls/remarks/2010/146821.htm](http://www.state.gov/g/oes/rls/remarks/2010/146821.htm)

<sup>9</sup> For more information on the work of the GF TWG see [www.theglobalfund.org/en/twg](http://www.theglobalfund.org/en/twg).

<sup>10</sup> Decision 5/CMP.2 (Adaptation Fund), in FCCC/KP/CMP/2006/10/Add.1