

Establishing a GCF operated Southern Solidarity Fund

LEGAL OPTIONS AND CHALLENGES

Legal Note*

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1. Introduction

In a recent Concept Note,¹ Benito Müller put forward the idea of a *Southern Solidarity Fund* (SSF) to receive voluntary contributions from developing countries for South-South climate change cooperation. It is meant to be established by the Conference of the Parties (COP) of the UN Framework Convention on Climate Change (FCCC or Convention) with a developing country Board, and to be operated by the Green Climate Fund (GCF), as an operating entity of the FCCC financial mechanism. As such, it is meant to give developing countries ‘the opportunity to provide support to their peers for climate change activities’² which ‘should be able to avail itself of the best available delivery systems, such as is hoped will be established under the Green Climate Fund, in particular through Enhanced Direct Access, where operational decision-making is devolved to recipient countries.’³

The goal of such an SSF, in other words, is meant to be to facilitate South-South climate finance. Such finance would be solidarity-based, without compromising the positions of developing countries with respect to developed country contributions. The (developing country) contributions would be made on a purely voluntary basis, with no implicit or explicit recognition of any substantive commitment under the FCCC or a future climate agreement.

This Note explores the options for establishing an SSF as a separate, ring-fenced funding entity operated by the GCF. *It concludes by endorsing the establishment of an SSF through a COP decision – this would be accompanied by the COP requesting the GCF to administer the new fund. The establishment of an SSF would follow the example of the Special Climate Change Fund (SCCF) and the Least Developed Country Fund (LDCF), both administered by the Global Environment Facility (GEF).*

* The views and opinions expressed in this note are those of the authors and do not necessarily reflect the views or opinions of any institution with which the authors are affiliated.

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2. Establishing an SSF through a GCF Board Decision

The GCF Board (the Board) can only establish an SSF if it has the explicit or implicit power to set up new funds. Such power requires (i) legal personality and (ii) legal capacity including the capacity to establish new funds.

Legal Personality. The GCF serves as operating entity of the financial mechanism of the FCCC in accordance with Article 11 of the Convention. In order to operate effectively, Parties to the Convention have conferred to the fund ‘juridical personality’ and ‘such legal capacity as is necessary for the exercise of [the Fund’s] functions and the protection of its interests’.⁴

Legal Capacity. International institutions are empowered ‘to exercise only those rights, privileges, duties, and powers which have been conferred on them explicitly or implicitly’.⁵ The institution’s legal capacities are limited to those specific legal acts that it has been authorized to undertake.⁶

This means that the GCF can only set up a new fund if the COP has conferred – explicitly or implicitly – the relevant capacities to the Board. *Yet neither the Governing Instrument (the Instrument) nor any subsequent COP decisions explicitly vest the authority or right to establish new funds in the Board.* Consequently, powers to establish a new fund would have to be implicitly derived from the Fund’s scopes and constituting decisions.

Under the GCF Instrument, the Board is authorized to set up ‘thematic windows’⁷ or define access modalities, for example by establishing ‘additional modalities that further enhance direct access, including through funding entities with a view to enhancing country ownership of projects and programmes’.⁸ The Board can further ‘(e)xercise such other functions as may be appropriate to fulfill the objectives of the Fund.’⁹ These authorities could cover the establishment of an SSF if it could be regarded as a thematic window, an access modality, or as being essential for achieving the GCF’s objectives.

The proposed SSF, however, is meant to be a separate, ring-fenced fund that specifically allows contributing and recipient developing countries to decide on the allocation of resources.¹⁰ *Such a fund would therefore, in our view, neither qualify as ‘thematic window(s) and/or substructure to address specific activities’, nor would it define a modality to access the Fund’s resources.*¹¹ Furthermore, the establishment of a new fund – an SSF – could hardly be deemed necessary for the fulfilling of the existing Fund’s objectives.¹²

This interpretation is supported by a review of the extent and content of the guidance that the Board has received from the COP.¹³ The COP assumes an active and involved role in guiding the GCF. Such guidance includes quite detailed instructions on ‘matters related to policies, programme priorities and eligibility criteria’.¹⁴ It would be hard to argue that the COP would provide guidance to the Board on the eligibility criteria for finance, but would not do so on the establishment of a whole new funding vehicle if that were in the Board’s remit.

3. Establishing an SSF through a COP Decision

Considering the powers conferred to the Board, as well as the level of detail of COP guidance, *it is safe to conclude that the establishment of a new fund without a COP decision would not fall under the current powers of the GCF.* This interpretation is further supported by the history of discussions on the financial mechanism of the UNFCCC and the continued concerns, in particular of developing country parties, relating to the establishment of a close relationship between the COP and the operating entities of the financial mechanism.

*We would therefore recommend that the COP establishes the SSF through a decision that confers the necessary legal capacities to it.*¹⁵ The operationalization of such a decision can be transferred to the GCF as an operating entity of the Financial Mechanism of the Convention.

Considering the legal nature of the GCF, the COP could not establish an SSF formally *under* the GCF, at least not in the absence of the explicit agreement of the Board. It could, however, decide to establish a new fund *alongside* the GCF and request the Board to administer this fund.

4. Operating an SSF

The COP could decide to (i) establish an SSF and its governance directly through decision or (ii) formally request the Board to make the necessary arrangements to set up a SSF.

Under the first option, the COP would also establish the organs of the new fund – that is its board and decision-making structure. Under the second option, the COP would expedite the establishment of the new fund by requesting the Board to make the necessary arrangements to set up and operate the new fund. As an international institution with a vested legal personality, the GCF is legally enabled to enter into contracts that establish new funding vehicles.¹⁶ The Board could define the legal capacities of the new fund through contract, provided that these capacities are in line with the mandate of the GCF, Instrument, and the COP decision requesting the establishment of the new fund.

Alternatively, *the COP could request the Board to adopt the necessary arrangements to operationalize and manage the fund.*¹⁷ A precedent for such an arrangement is the establishment of the [Special Climate Change Fund](#) (SCCF) and the [Least Developing Country Fund](#) (LDCF), two funds set up in 2001 by a COP decision and subsequently managed by the GEF.¹⁸

In the case of the SCCF and the LDCF, the COP invited the GEF in 2001 to make the ‘necessary arrangements’ for the ‘establishment of these funds’ and to report to COP-8, which was to be held in October 2002.¹⁹ The World Bank, in its capacity as GEF trustee, reviewed the GEF Instrument and concluded that nothing precluded the GEF from administering new funds. At the GEF Council meeting in May 2002, the Council reviewed Document GEF/C.19/6, ‘Arrangements for the Establishment of the New Climate Change Funds’, and approved the arrangements proposed for the new funds.²⁰ The GCF Council then decided (i) that the ‘operational policies and procedures and governance structure of the GEF’ would apply to the two funds;²¹ (ii) that different voting rules would apply to the SCCF and LDCF Council meetings;²² and (iii) to set up trustee arrangements with the World Bank.²³

Since the GEF lacks legal personality, the mandates setting up the SCCF/LDCF were operationalized through multi-donor trust fund administration agreements (TF AAs) which were entered into by the World Bank, as trustee of the particular fund, and Parties contributing to that fund.²⁴ Administration and use of resources held in the SCCF/LDCF are governed by the terms and conditions set forth in the respective TF AAs. With respect to decision making for these two funds, the rules of the TF AA apply and the GEF Council meets as the Council for the LDCF and the SCCF (the LDCF/SCCF Council). GEF administrative policies and rules (such as fiduciary standards, streamlined project cycle, result-based frameworks, and monitoring and evaluation practices, among others) apply to the two funds, except when the LDCF/SCCF Council decides otherwise in response to COP guidance, as appropriate.

The SCCF/LDCF are operated by the GEF and, as such, utilize GEF administration and modalities. Similarly, the Board could operate the SSF, as long as the Instrument does not preclude the Board from managing additional trust funds in its capacity as an Operating Entity of the Financial

Mechanism of the UNFCCC. In our opinion, there is no indication in the Instrument and subsequent COP decisions that would preclude the GCF from operating an SSF. *Like the SCCF/LCF, which are ‘voluntary funds’²⁵ under the GEF and governed by a special trust fund agreement, an SSF could be operated by special agreement.*

In the case of an SSF, a trust fund and operating agreement could be concluded between the Board, the developing country Parties contributing to such fund, and the GCF trustee.²⁶ Alternatively, the Board could conclude an operating agreement with the developing country Parties participating in the fund (contributing and receiving), thus establishing the operational modalities of the fund. The GCF trustee would then enter into separate trust fund agreements with the contributing Parties to the fund.

The operating agreements of an SSF could include special governance and voting requirements that could differ from those applying to the Board, in order to reflect the particular nature and restricted participation of an SSF. The Board and each contributing Party would have to agree to the decision making and voting procedures that would apply to an SSF as a new voluntary fund operated by the GCF.

5. Conclusions

Of the options reviewed in this Note, the one that is most aligned with Müller’s proposal of an SSF is: the establishment of the fund through a COP decision together with a request that the Board operates the new fund. The Board could take the necessary arrangements to operationalize an SSF and enter into agreements with those seeking to capitalize the new fund.

Endnotes

¹ Benito Müller (2014a), '[South-South Solidarity in Climate Finance: A GCF operated Southern Solidarity Fund](#)', OCP/ecbi/OIES, April 2014.

² Such as having to get involved in the highly politicized 'firewall' debate – see Benito Müller (2014b), '[Avoiding Firewall Fundamentalism](#)', OCP Blog, 6 May 2014.

³ Müller (2014a). For more on Enhanced Direct Access see, for example, Benito Müller (2014c), '[What is EDA? A Rough Guide to Enhanced Direct Access](#)'; OCP/ecbi/OIES March 2014, or Benito Müller (2014d), '[Enhanced \(Direct\) Access Through \(National\) Funding Entities' Etymology and Examples](#)'; OIES Information Note on the Green Climate Fund Business Model Framework April 2013

⁴ Instrument of the GCF, para. 7.

⁵ Transitional Committee for the design of the Green Climate Fund (Transitional Committee 2011a), '[Background note: Review of the legal status of select international funds and financial institutions](#)', 29 June 2011, TC-2/WSII/2, para. 4.

⁶ Ibid. para. 26.

⁷ Ibid., para. 39.

⁸ Ibid., para. 47.

⁹ Ibid., para.18.

¹⁰ Müller (2014a).

¹¹ Ibid., para. 18(c).

¹² Ibid., para. 18(p).

¹³ [Decision 5/CP.19](#), Annex.

¹⁴ Ibid., para. 2. See also para. 15 of [the scoping report of the Transitional Committee's Workstream II, Second meeting TC-2/WSII/1](#), 29 June 2011. According to a recent decision, the COP sees the Board's primary role in supporting 'projects, programmes, policies and other activities in developing country Parties using thematic funding windows'. Decision 5/CP.19, Preamble.

¹⁵ Transitional Committee 2011a, para. 26-27.

¹⁶ Legal personality is generally conferred through the constituting instruments of an international institution, the supreme organ of an intergovernmental body, or national law. Transitional Committee 2011a para. 8ff.

¹⁷ As in the case of the SCCF and LCDF, a formal acceptance by the future managing entity is required. An important arrangement would be setting up a separate executive organ for the SSF under the GCF institutional umbrella. This is the case of the SCCF and LCDF, whose executive organs are formally separated from the Global Environment Facility's Council.

¹⁸ [Decision 7/CP.7](#), paras 2 and 6 for the SCCF and LCDF respectively.

¹⁹ Ibid., paras 4 and 7 respectively. See also GEF Special Council Meeting (GEF Special Council Meeting 2006), '[Governance of the Climate Change Funds](#)', GEF/C.29/5, 9 August 2006, para. 2.

²⁰ GEF Special Council Meeting 2006, para. 3.

²¹ Ibid., para. 4.

²² Ibid., paras 16-18.

²³ GEF Council, '[Arrangements for the Establishment of the new Climate Change Funds](#)' GEF/C.19/6, 17 April 2002. This required further amendments to the multi-donor trust fund administration agreement with the World Bank, because at the time of its adoption there were no special governance provisions for the two funds.

²⁴ GEF Special Council Meeting 2006, para. 12.

²⁵ Ibid.

²⁶ Instrument, para. 26.