

Legal Implications of a Standing Finance Committee Proposal

All reasonable efforts have been made in providing the following information. However due to the circumstances and the timeframes involved, these materials have been prepared for informational purposes only and are not legal advice. Transmission of the information is not intended to create, and receipt does not constitute, a lawyer-client relationship. To the extent permitted by law any liability (including without limitation for negligence or for any damages of any kind) for the legal analysis is excluded.

*This advice is provided in response to **Query 146 (Legal Implications of a Standing Finance Committee Proposal)**.*

Query:

A presentation at the recent Geneva Dialogue on Climate Finance put forward the idea of a Standing Finance Committee of the COP (see Annex 1). The idea was conceived during the ecbi Oxford Fellowship, which preceded the Geneva meeting, that specified what such a standing committee should do (see Annex 2).

The ultimate question is whether the proposal to create the SFC is legally feasible. The query can be 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 purpose of this memorandum is to respond to legal queries submitted by Benito Muller in relation to a proposal to create a SFC under the COP of the United Nations Framework Convention on Climate Change ("**UNFCC**" or "**the Convention**").

2. EXECUTIVE SUMMARY

- 2.1** 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.
- 2.2** 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.
- 2.3** 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.

3. BACKGROUND

- 3.1** According to the European Capacity Building Initiative's ("**ecbi**") 2010 Fellowship paper, a proposal has been formulated to create a SFC to provide support to the COP in exercising its functions with respect to the financial mechanism of the UNFCCC, and to carry out any other tasks related to climate finance the COP chooses to assign to it.
- 3.2** The SFC is, in particular, charged with supporting the COP in:
- (a) Providing guidance to the operating entities of the financial mechanism and recommendations to other actors;
 - (b) Assuring the accountability of the operating entities of the financial mechanism;
 - (c) Rationalizing the financial mechanism;
 - (d) Assessing the adequacy of climate change finance for developing countries, including measure, report and verification of support;
 - (e) Verifying the fulfilment of assessed contributions; and
 - (f) Reviewing the scale of assessed contributions.

3.3 To fulfil these functions, the SFC will draft guidance to the operating entities for approval by the COP, and submit regular reports to the COP on the performance of the operating entities, and on the financial needs of and flows to developing countries. The SFC will draft and periodically review the procedures for registration of financial flows and the system of certification of payments to be counted against financial obligations by parties.

3.4 Additionally, the ecbi 2010 Fellowship paper includes a proposal to create a Climate Fund as an operating entity of the SFC. The Climate Fund will be guided by and accountable to the COP. The aim of the Climate Fund is to provide climate finance to developing countries in a manner which respects the principle of equity and to promote direct access to its resources through National Implementing and Funding Entities.

4. CONSTITUTIONAL AUTHORITY OF THE COP

4.1 Does the COP at present have the authority to establish the SFC and are there any legal constraints in this regard?

(a) Background to the COP and the Financial Mechanism

(i) The COP was established by **Article 7(1) UNFCCC**. Pursuant to **Article 7(2) UNFCCC**, the COP was tasked with keeping under regular review the implementation of the Convention and any related legal instruments that the COP may adopt. In addition, the COP was empowered to make, "*within its mandate, the decisions necessary to promote the effective implementation of the Convention*".

(ii) The financial mechanism was established by **Article 11(1) UNFCCC** as a mechanism for the provision of financial resources on a grant or concessional basis, including for the transfer of technology. The financial mechanism functions under the guidance of and is accountable to the COP, which decides its policies, programme priorities and eligibility criteria related to the Convention.

(b) The COP and Subsidiary Bodies

(i) The COP has a clear mandate under **Article 7(2)(i) UNFCCC** to "[e]stablish such subsidiary bodies as are deemed necessary for the implementation of the Convention". For this purpose, it is useful to consider:

A. Whether the SFC would fall within the definition of a "*subsidiary body*"; and

B. Whether the SFC would meet the threshold standard of being "*deemed necessary*" for the implementation of the Convention.

(ii) It is likely that the SFC would constitute a "subsidiary body" under **Article 7(2)(ii) UNFCCC**. Although undefined in the UNFCCC itself, the Rules of Procedure define the term "subsidiary body" in a broad manner to include "*any body, including committees and working groups, established pursuant to Article 7(2)(i) of the Convention*". The SFC would fall within this definition.

(iii) Whether the SFC would be "*deemed necessary for the implementation of the Convention*" is more open to debate. However, in light of the proposed mandate of the SFC to provide support to the COP in exercising its functions

with respect to the financial mechanism of the UNFCCC, and to carry out any other tasks related to climate finance the COP chooses to assign, it is arguable that the SFC may be "deemed necessary" for the implementation of the following provisions of the UNFCCC:

- A. **Article 11(1)**, pursuant to which the financial mechanism "*shall function under the guidance of and be accountable to the Conference of the Parties, which shall decide on its policies, programme priorities and eligibility criteria related to this Convention*";
- B. **Article 11(3)(a)**, pursuant to which the COP and the operating entities shall agree on the "*[m]odalities to ensure that the funded projects to address climate change are in conformity with the policies, programme priorities and eligibility criteria established by the Conference of the Parties*"; and
- C. **Article 11(4)**, pursuant to which "*the Conference of the Parties shall review the financial mechanism and take appropriate measures*". In this regard, the creation of the SFC would assist the COP in following its guidelines to the review of the financial mechanism set out in **Decision 3/CP.4** and **Decision 6/CP.13**, which state that the review will take appropriate measures regarding:
 - 1) Its conformity with the provisions of **Article 11 UNFCCC**;
 - 2) Its conformity with the guidance of the COP;
 - 3) The effectiveness of the activities it funds in implementing the Convention;
 - 4) Its effectiveness in providing financial resources on a grant or concessional basis, including for the transfer of technology, for the implementation of the Convention's objective on the basis of the guidance provided by the COP;
 - 5) Its effectiveness in providing resources to developing country Parties under **Article 4(3) UNFCCC**; and
 - 6) How to facilitate consistency in financing activities and how to improve the complementarity of the financial mechanism with other sources of investment and financial flows, including:
 - a) Examining relevant sources and means of financing, as indicated in **Article 11(5) UNFCCC**, that would assist developing countries to contribute to the achievement of the objective of the Convention, in particular innovative means of financing, such as for the development of endogenous technologies in developing countries;
 - b) Examining the role of the financial mechanism in scaling up the level of resources; and

- c) Assessing enabling environments for catalysing investment in, and the transfer of, sustainable technologies that mitigate greenhouse gas emissions, and for enhancing resilience to climate change.

D. There is no specific guidance on what is considered to be "*deemed necessary for the implementation of the Convention*". However, from the perspective of the past practice of the COP, the test does not appear to be a stringent one. In the past, the COP has established two temporary subsidiary bodies: the ad hoc group on the Berlin Mandate (**Decision 1/CP.1**) and the ad hoc group on Article 13 (**Decision 20/CP.1**). In each case, the COP simply referred to the relevant Articles of the UNFCCC as the basis to create the ad hoc groups.

(c) **Conclusion**

- (i) In light of the preceding analysis, it is likely that the COP does possess the requisite authority to establish the 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.

4.2 What would establishing the SFC entail from a legal perspective?

(a) **Legal Requirements to Establish the SFC**

- (i) As already noted, the legal basis for the establishment of the SFC is **Article 7(2)(i) UNFCCC** (reiterated in **Rule 27(2) RoP**), which confirms that the COP has the power to "[e]stablish such subsidiary bodies as are deemed necessary for the implementation of the Convention".
- (ii) In order to establish the SFC in practice, the COP must pass a decision (see **Decision 1/CP.1** and **Decision 20/CP.1** for previous examples). In order to pass a decision, the COP must follow its Rules of Procedure:
 - A. Pursuant to **Rule 36 RoP**, proposals shall normally be introduced in writing by the Parties and handed to the secretariat, which shall circulate copies to delegations. As a general rule, no proposal shall be discussed or put to the vote at any meeting unless copies of it have been circulated to delegations not later than the day preceding the meeting.
 - B. Pursuant to **Rule 42(1) RoP**, the Parties shall make every effort to reach agreement on all matters of substance by consensus. However, if all efforts to reach consensus have been exhausted and no agreement has been reached, the decision shall, as a last resort, be taken by a two-thirds majority vote of the Parties present and voting. For this purpose, pursuant to **Rule 41 RoP**, each Party shall have one vote except in the case of regional economic integration organizations which shall exercise their right to vote with a number

of votes equal to the number of their member States that are Parties to the Convention.

(b) **Rules of Procedure for the SFC**

- (i) In order to establish the working procedures of the SFC, the COP must take account of **Rule 27 RoP**:
- A. Pursuant to **Rule 27(1) RoP**, the Rules of Procedure of the COP apply *mutatis mutandis* to the proceedings of subsidiary bodies.
 - B. Pursuant to **Rule 27(3) RoP**, in the case of a subsidiary body that is not open-ended, a majority of the Parties designated by the COP to participate therein shall constitute a quorum.
 - C. Pursuant to **Rule 27(4) RoP**, the COP shall decide on the dates of the sessions of the subsidiary bodies, taking note of the desirability of holding such sessions in conjunction with the sessions of the COP.
 - D. Pursuant to **Rule 27(5) RoP**, unless the COP decides otherwise, the Chairman of any subsidiary body other than those established by **Articles 9 and 10 UNFCCC**, shall be elected by that subsidiary body from among the representatives of the Parties present at the session. The Chairmen, Vice-Chairmen and Rapporteurs of such subsidiary bodies shall be elected with due regard to the principle of equitable geographical representation and shall not serve for more than two consecutive terms of one year.
 - E. Pursuant to **Rule 27(6) RoP**, each subsidiary body shall elect its own Vice-Chairman and Rapporteur.
 - F. Pursuant to **Rule 27(7) RoP**, subject to **Articles 9 and 10** of the Convention, the Conference of the Parties shall determine the matters to be considered by each subsidiary body and may authorize the President, upon the request of the Chairmen of a subsidiary body, to adjust the allocation of work.

(c) **Conclusion**

- (i) In order to establish the SFC in practice, the COP must comply with various provisions of its Rules of Procedure, in particular those governing the submission of proposals, voting on decisions, and the working practices of subsidiary bodies.

5. INTERACTIONS WITH OTHER SUBSIDIARY BODIES

5.1 What are the implications with respect to interactions between the SFC and other UNFCCC bodies?

(a) **Background to Subsidiary Bodies under the UNFCCC**

- (i) Two permanent subsidiary bodies were established pursuant to the UNFCCC: the Subsidiary Body for Scientific and Technological Advice ("SBSTA") (**Article 9**) and the SBI (**Article 10**). In addition, pursuant to

Article 11(1) UNFCCC, the operation of the financial mechanism was entrusted to operating entities.

- (ii) In light of the proposed mandate of the SFC, this note will only consider implications with respect to interactions between the SFC, the SBI and the operating entities of the financial mechanism.

(b) **General Rule**

- (i) At the outset, attention should be drawn to **Rule 27(2) RoP**, which sets out the general approach regarding interactions between the subsidiary bodies. The Rule states that, subject to **Articles 9 and 10 UNFCCC**, the COP "shall determine the matters to be considered by each subsidiary body and may authorize the President, upon the request of the Chairman of a subsidiary body, to adjust the allocation of work".
- (ii) In this light, the general rule is that the COP has the power to determine how the SFC interacts with the other subsidiary bodies and to allocate work between them as it sees fit.

(c) **Interactions between the SFC and the SBI**

- (i) The SBI was created by **Article 10(1) UNFCCC** "to assist the Conference of the Parties in the assessment and review of the effective implementation of the Convention" and to "report regularly to the Conference of the Parties on all aspects of its work". Pursuant to **Article 10(2) UNFCCC**, the SBI is specifically tasked with, *inter alia*, assisting the COP, as appropriate, in the preparation and implementation of its decisions.
- (ii) In **Annexes I and II to Decision 6/CP.1**, the COP sets out in greater detail the functions of the SBI. The following provisions are of particular relevance to potential interactions with the SFC:
 - A. Pursuant to **Section 3(a) of Annex I(B)**, the SBI was tasked with advising the COP on the policies, eligibility criteria and programme priorities related to the financial mechanism and, if so requested by the COP:
 - 1) Review the financial mechanism and advise on appropriate measures;
 - 2) Consider reports from the operating entity or entities of the financial mechanism on activities related to climate change; and
 - 3) Make recommendations related to the arrangements for the operational linkages between the COP and the operating entity or entities.
 - B. Pursuant to **Sections 2 and 3 of Annex II(B)**, the SBI was further tasked with considering the reports from the operating entities of the financial mechanism, making recommendations thereon to the COP, further elaborating policies, programme priorities and eligibility criteria for the financial mechanism, and providing assistance to the COP.

- (iii) In light of the above provisions, it is clear that a large part of the proposed mandate of the SFC is already allocated to the SBI. This is not necessarily problematic since:
 - A. As already noted, pursuant to **Rule 27(7) RoP**, the COP is empowered to allocate tasks between its subsidiary bodies as it sees fit; and
 - B. Re-allocating the financial mechanism functions of the SBI would still leave intact the SBI's broader functions and enable the body to focus on other areas of the Convention.
- (iv) Ultimately, the precise nature of the relationship between the SFC and the SBI is an issue for the COP to determine as it sees fit. It is for the discretion of the COP whether the SBI should maintain a role in relation to the implementation of the financial mechanism and how this role would relate to the SFC's proposed mandate. In this regard, two points should be noted:
 - A. First, the precise relationship between the SFC and the SBI should be set out clearly in any proposal to create the SFC; and
 - B. Secondly, if the COP were to decide to alter the tasks allocated to the SBI, a decision of the COP should be rendered to this effect.
- (d) **Interactions between the SFC and the Operating Entities of the Financial Mechanism**
 - (i) Pursuant to **Article 11(1) UNFCCC**, the operation of the financial mechanism was entrusted to one or more existing international entities. In **Decision 11/CP.1**, the COP issued guidance on the policies, programme priorities and eligibility criteria to the operating entities of the financial mechanism. In addition, the COP has endorsed the agreed conclusions of the Intergovernmental Negotiating Committee for a Framework Convention on Climate Change, which set out the modalities for the functioning of operational linkages between the COP and the operating entities ("**Agreed Operational Conclusions**") (see Report of the COP on its 1st Session, Part Two, pp.62ff.). In this latter regard, the following provisions are of particular relevance to the proposed mandate of the SFC:
 - A. Pursuant to **paragraph 2**, the COP will, after each of its sessions, communicate to the governing body of the operating entity relevant policy guidance for implementation and action by that governing body, which shall accordingly ensure the conformity of the entity's work with the guidance of the COP. Guidance from the COP will address issues relating to policies, programme priorities and eligibility criteria, as well as possible relevant aspects of the activities of the operating entity that are related to the Convention; and
 - B. Pursuant to **paragraphs 3 – 8**, the operating entities are required to report to the COP on a variety of specific matters but also on "*all its activities carried out in implementing the Convention*" (**paragraph 6**).

- (ii) In light of the above provisions, two points should be noted regarding interactions between the SFC and the operating entities:
- A. First, the SFC's proposed mandate, which includes drafting guidance to the operating entities for approval by the COP, is complementary to the COP's role as outlined in **paragraph 2** of the **Agreed Operational Conclusions**. This provision should be used to inform the specific type of guidance that the SFC should be tasked with drafting.
 - B. Secondly, the reporting requirements outlined in **paragraphs 3 – 8** of the **Agreed Operational Conclusions** may require amending to take account of the SFC. In particular, if one of the perceived aims of the SFC is to submit regular reports to the COP on the performance of the operating entities, it is arguable that the operating entities should be reporting directly to the SFC as well as the COP in the future.

(e) **Conclusion**

- (i) The creation of the SFC requires detailed guidance on how it should interact with both the COP and its subsidiary bodies. In relation to the 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.

6. Sources

6.1 Treaties and Related Documents

- UN Framework Convention on Climate Change (<http://unfccc.int/2860.php>)
- Rules of Procedure of the Conference of the Parties and the Subsidiary Bodies (<http://unfccc.int/resource/docs/cop2/02.pdf>)

6.2 Reports of the Conference of the Parties

- Report of the COP on its 1st Session, Part Two, 6 June 1995 (<http://unfccc.int/resource/docs/cop1/07a01.pdf>)
- Report of the COP on its 4th Session, Part Two, 25 January 1999 (<http://unfccc.int/resource/docs/cop4/16a01.pdf>)
- Report of the COP on its 13th Session, Part Two, 14 March 2008 (<http://unfccc.int/resource/docs/2007/cop13/eng/06a01.pdf>)
- Report of the COP on its 14th Session, Part Two, 19 March 2009 (<http://unfccc.int/resource/docs/2008/cop14/eng/07.pdf>)
- Report of the COP on its 15th Session, Part Two, 30 March 2010 (<http://unfccc.int/resource/docs/2009/cop15/eng/11.pdf>)