

I keep reading and rereading Article 11, and conclude that our “founding fathers” intended for the COP to **designate** rather than **create** operating entities. The Convention says “the COP and the entity or entities entrusted with the operation of the financial mechanism *shall agree upon arrangements* to give effect to the above paragraphs.” It does not say the COP creates the operating entities – it’s described as a contractual arrangement.

In addition, I’m puzzled by the idea that the COP could simply declare the Fund “hereby established” in Cancun. As a factual matter, until the Fund has a Trustee and a Board, it’s not really established. At the time of Cancun, it won’t even have a bank account. So what would be the point in saying the Fund is “hereby established,” except to express the strength of the political signal? I copy below Decision 7/CP.7 on the LDCF (same for SCCF) and underline some relevant portions.

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As to the first point, my opinion is (as elaborated in my “Why Reinvent the Wheel?”) is indeed that a Decision to *create an operating entity of the financial mechanism* would be inconsistent with Art. 11 of the Convention, which leaves essentially two options (that would be consistent with the Convention) for which there are precedents, namely:

(i) to give the operation of the new fund to an international entity that existed at the time the Convention was signed through an operating MOU with the COP (which would make this international entity – *not* the Fund! – and operating entity of the FM (the “**GEF model**”), or

(ii) to make the Board of the new Fund the operating entity of the Fund – and *not* the FM! – and ensure that the new Fund is established under the Convention by having the COP approve (*not* design!) the founding documents of the new Fund (the “**Adaptation Fund model**”)

>> We so indeed have limited precedents, but there is clearly a third interpretation: that “existing” does not refer to the time the Convention was signed (why would it?), but rather to the moment at which the operating entity enters into “arrangements” with the COP. Ergo, the entity itself must first exist before the COP can entrust it with responsibilities, which is why the Fund should be operationalized before the arrangements are negotiated.

I’m afraid I do not share this view. For one, if it were just a matter of making sure that the COP does not enter into arrangements with non-existing entities, then it would have been sufficient to say that its operation shall be entrusted to one or more international entities. To stress the fact that the international entities should exist, in other words, cannot mean that the operation should not be entrusted to fictitious entities, but to entities which existed when the sentence was written <<

Given the experience with the GEF model that ultimately led to the AF model, I personally prefer the latter because I do not see the former – *pace* the Convention ‘founding fathers (and mothers)’ – as sustainable in the long run. However, as I have tried to elaborate in my *Climate Finance after Tianjin and What Experience?*, this does not mean that “establishing the Fund under the Convention” has to be interpreted as establishing it in the COP.

Indeed, I think it is crucial that the process of operationalising the Fund – in particular of drafting the founding documents – is done under the guidance but at arm’s length from the COP, through what I called a multidisciplinary, multi-stakeholder Transitional Expert Panel (TEP). However, it is of equal importance that this TEP has the full confidence of the COP, if one wishes to avoid a rude awakening, when submitting the documents for approval, or, for that matter, when trying to get an MOU with it.

>> I see your logic here, though I wonder whether it would be correct to say that the TEP is operationalizing the Fund. In fact, the TEP is just drafting things – in your model, the COP breathes life into the Fund by approving the documents (and presumably by electing its board). In what sense is this *not* a case of the COP establishing the operating entity?

It is true, it may not be completely appropriate to refer to the drafting of the founding documents as part of the process of operationalising the fund. It would indeed be the COP that would ‘breathe life’ into the fund, which would obviously meant the creation of an operating entity. But following the AF example, that would not have to be an operating entity of the financial mechanism, but it could simply be the operating entity of the fund. <<

This brings me to the second issue, i.e. the ontological question of when a fund can be said ‘to exist’. As a philosopher, I think the issue goes beyond whether there are operational guidelines, a board, and a trustee, for it stands to reason that an empty fund does not exist either, regardless of the formal legal requirements. But I concur, a COP Decision “to establish a fund” is a decision to set in motion the operationalisation of such a fund. Formally, the Fund will only come into existence once it has the relevant guidelines, an executive organ, and someone with the legal authority (the board or someone else) to sign contracts.

However, there is arguably more to the COP deciding to establish a Fund than just to reaffirm a political commitment, namely that the COP is somehow involved in establishing it. In particular, one may well ask oneself about the content of such a decision if, in the end, there is the need for an MOU between the COP and the new Fund, supposedly established by it?

>> I guess I would say the COP calls for the fund, and the Fund is designed “under the mandate of the COP” by virtue of this Cancun decision. The COP explicitly calls on the Fund to enter into arrangements with it on the basis of Article 11, so the road map toward that “consummation” of the relationship is clear. Put another way: the Fund is designed pursuant to a COP decision. But it is not established by the COP.

So the Cancun Decision should not be that the COP “decides to establish a fund” but rather “decides that to call for a fund to be established”? <<