Dedicated Multilateral Fund

Governance and institutional arrangements

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I. Introduction

As negotiators consider the financial aspects of the Global Plastics Treaty, consensus exists on the need for a financial mechanism to support the implementation of the future instrument.

However, divergence has arisen around the most effective way to operationalise the mechanism and deliver funds in an efficient and predictable manner.

Throughout the meetings of the Intergovernmental Negotiating Committee (INC), a newly established dedicated multilateral fund has featured prominently in discussions as a fundamental component of the financial mechanism to deliver on the shared objective of ending plastic pollution. Nevertheless, in its nature and design, several key considerations require elaboration to ensure its effectiveness.

This briefing reviews key considerations on certain governance and institutional arrangements related to the establishment of the financial mechanism, in particular the fund or funds that form it, providing examples from other multilateral environment frameworks to inform deliberations.

II. Relationship to governing body

A. Issue

Any new fund or component of the future financial mechanism should have at its core one clear objective — to enable the most efficient and cost-effective implementation of the instrument.

The future instrument will be overseen by a governing body, most likely a Conference of the Parties (CoP), which will act as the main decision-making body. The governing body will set out policies and strategies, determine priorities and review progress towards ending plastic pollution.

The dedicated multilateral fund will be tasked providing financial and technical assistance to eligible parties to facilitate implementation and enable compliance. It is therefore crucial that, in its design, the relationship between the governing body of the instrument is made clear to ensure close alignment.

B. Relevant considerations

The exact nature of the relationship between the governing body of the instrument and the fund will have an impact on the operationalisation of the fund. Several considerations are relevant, including:

- **policies and strategies**: The policies and strategies for delivering financial resources by the fund should best serve the needs of the instrument. Therefore, the relationship of the governing body to the fund in setting out those policies and strategies should be close

- **prioritisation**: As the governing body reviews progress in implementation and towards the objective, priorities and approaches may change over time. It is important for the governing body to be able to update, in turn, the flows of financial assistance as needed

- **eligibility**: The governing body of the instrument should have ultimate decision-making power to determine the eligibility of parties to receive financial assistance, defining the entities eligible to submit proposals and to receive, manage and spend financial resources. These could include official national entities, subnational entities, sub-regional or regional entities, multilateral implementing entities and non-governmental entities

- **operationalisation**: A fund operating directly *under the authority of* the governing body ensures a direct level of oversight and influence. A financial mechanism that operates *under the guidance of* or *is accountable to* the governing body provides a less direct level of oversight and influence, creating higher risk of misalignment.

Examples of the relationship between the governing bodies of various conventions and their financial mechanisms include:

Multilateral Fund for the Implementation of the Montreal Protocol (MLF) was the first financial mechanism to be born from an international treaty. The fund, which was a newly established dedicated multilateral fund, operates under the authority of the Parties to the Montreal Protocol which decide on its overall priorities. The MLF is managed by an Executive Committee, selected by the governing body of the Montreal Protocol and is tasked with developing and monitoring the implementation of specific operational policies, guidelines and administrative arrangements, including the disbursement of resources[1]

Global Environment Facility (GEF) Trust Fund serves as the financial mechanism, or as one of the operating entities within the financial mechanism, for six conventions.[2] The governing bodies of the conventions for which GEF Trust Fund serves as the financial mechanism provide broad strategic *guidance* to the two governing bodies of the GEF — the GEF Assembly and GEF Council. The GEF Assembly is responsible for reviewing and evaluating the GEF's general policies, operations and membership while the GEF Council converts this broad guidance into operational criteria (guidelines) for GEF projects. The relationship between the CoPs of the conventions and the GEF Council are governed by various Memorandums of Understanding[3]

Global Biodiversity Framework Fund (GBFF) sits within the GEF 'family of funds' that includes several other multilateral funds in addition to the GEF Trust Fund, namely the Least Developed Countries Fund (LDCF), Special Climate Change Fund (SCCF), Nagoya Protocol Implementation Fund (NPIF) and Capacity-building Initiative for Transparency Trust Fund (CBIT).[4] The GBFF Council translates guidance and priorities from the CDB CoP in a similar manner to the GEF Council[5]

Adaptation Fund was established by the the Conference of the Parties (CoP) of the UNFCCC serving as the meeting of the Parties to the Kyoto Protocol (CMP), setting out the Adaptation Fund Board (AFB) as operating entity to supervise and manage the Adaptation Fund.[6] The AFB is fully accountable to the CoP, operating under its authority and guidance. The AFB develops strategic priorities, policies and guidelines for the Fund and recommends their adoption to the CoP[7]

Loss and Damage Fund is a designated operating entity of the UNFCCC financial mechanism, which also serves the Paris Agreement. The Loss and Damage Fund (LDF) is accountable to and functions under the guidance of the CoP of the UNFCCC serving as the meeting of the Parties of the Paris Agreement (CMA).[8] The board of the fund is tasked with receiving guidance from the CoP and CMA on policies, programmes and eligibility criteria, taking appropriate action in response to said guidance and submitting reports to CoP and CMA for their consideration

Green Climate Fund was established by the UNFCCC at CoP16 (decision 1/CP.16) and launches at CoP17 (decision 3/CP.17) following the work a Transitional Committee. The Green Climate Fund (GCF) is an operating entity of the UNFCCC financial mechanism and is accountable to and functioning under the guidance of the CoP. The GCF Board is tasked with receiving, and taking appropriate action in response to, guidance from the CoP, including on matters related to policies, programme priorities and eligibility criteria and matters related thereto.[9]

III. Legal status of fund

A. Issue

The establishment of a new dedicated multilateral fund will raise the question of its legal status.

B. Relevant considerations

Three elements of legal status define what role the fund can play in the international arena. These include:[10]

- **international juridical/legal personality** is defined under international law as the capacity to enjoy legal rights, duties and powers on the international plane and having the capacity to maintain its rights by bringing international claims. The classical attributes of international juridical or legal personality of an international fund or financial institution are (i) the right to negotiate and conclude international agreements or treaties, (ii) the right to put forth international claims and appear before international courts and international tribunals and (iii) the right to entertain bilateral diplomatic relations with States and other international actors

- **legal capacity** usually refers to specific acts that the institution can undertake in the discharge of its functions. Legal capacity is distinct from international legal personality. International legal personality encompasses certain rights, privileges, duties and powers on the international plane. Legal capacity, on the other hand, is limited to only those specific legal acts that the institution is empowered to undertake. These acts normally include the legal capacity to (i) contract, (ii) acquire and dispose of immovable and movable property and (iii) institute legal proceedings

- **privileges and immunities** are designed to permit international institutions to undertake their activities without hindrance by national governments. The central component of the privileges and immunities clause is jurisdictional immunity from legal claims in national courts against the institution, representatives of Member States and officials of the institution. In return, the institution is required to provide for an alternative means to address claims and settle disputes against the institution.

Four main ways exist for a multilateral fund or financial institution to acquire or be conferred with the three elements of legal status:[11]

- **constituent instrument**. The International Development Association (IDA), the International Monetary Fund (IMF) and the International Bank for Reconstruction and Development (World Bank) derive their international juridical or legal personality legal capacity, privileges and immunities from the treaties or constituent instruments of these institutions

- **decision of the supreme organ of an intergovernmental body**. International funds or financing institutions may also acquire their international legal status through a decision of the supreme decision-making organ of an intergovernmental body of the Member States

- **national laws of member states**. In the case where no treaty provision or decision of an intergovernmental body explicitly accords international legal status on a fund or financing institution, one or more member states may decide unilaterally to confer international legal status on the multilateral fund or financial institution

- **through an institutional linkage with another institution**. In some cases, international funds may derive aspects of its legal status, for example its privileges and immunities, from an institutional linkage with another institution, for example the UN or the World Bank.

Examples:

- **Multilateral Fund to Support the Implementation of the Montreal Protocol**. The Meeting of the Parties of the Montreal Protocol (MoP), which is similar to the Conference of the Parties (CoP) found in other conventions, conferred the MLF with international juridical personality and its privileges and immunities through Decision VI/16.[12] This was further confirmed by the Canadian Government in its national legislation. The MLF also enjoys an institutional linkage with the UN as UNEP established and manages the Trust Fund for the Multilateral Fund under the Montreal Protocol on Substances that Deplete the Ozone Layer as its treasurer

- **Global Environment Facility Trust Fund**. As outlined in the Instrument for the Establishment of the Restructured Global Environment Facility, World Bank, the legal owner of the GEF Trust Fund.[13] The GEF has no explicit legal capacity of legal personality or privileges and immunities and derives these from the World Bank

- **Global Biodiversity Framework Fund**. As part of the GEF family of funds, the GBFF also derives its legal status from the World Bank[14]

- **Adaptation Fund Board**. The Adaptation Fund Board was accorded legal capacity by the Government of Germany in February 2011 through an act of Parliament. With legal capacity, the Adaptation Fund Board has authority to conclude and sign legal agreements with implementing entities for funding of adaptation fund projects from the Adaptation Fund; however, the AFB has no international legal personality. The members and alternate members of the Adaptation Fund Board have privileges and immunities in Germany as defined in the law granting the AFB its legal capacity. The Trust Fund of the Adaptation Fund, established by the World Bank in its role as trustee, is accorded the privileges and immunities of the World Bank. The Adaptation Fund itself has neither legal capacity nor privileges and immunities[15]

- **Loss and Damage Fund**. The Governing Instrument of the Loss and Damage Fund confers the fund with its international legal personality and legal capacity. It also states that he Fund itself and its officials in the Fund Secretariat "will enjoy such privileges and immunities as are necessary". In order to fulfil these requirements, the CoP/CMA decision to establish the fund identified the World Bank as the host and operationalise the Fund as a financial intermediary fund (FIF), therefore allowing it to operate with the legal personality and legal capacity of the World Bank and ensuring that the privileges and immunities accorded to the World Bank will apply to the officials, property, assets, archives, income, operations and transactions of the Fund[16]

- **Green Climate Fund**. In order to operative effectively internationally, the Governing Instrument of the Green Climate Fund sets out that the fund will possess juridical personality and will have such legal capacity as is necessary for the exercise of its functions.[17] While the GCF exists as a legally independent institution, as determined by the Governing Instrument and the Headquarters Agreement between the GCF and Republic of Korea, it does not enjoy universal privileges and immunities due to the absence of an institutional linkage with another institution (i.e. UN or World Bank) or a constituent treaty.[18] The GCF has therefore had to enter into bilateral agreements with countries in which it operates to establish privileges and immunities for the Fund and its officers, which has many challenges and resulted in delays in implementation.[19]

IV. Governance

A. Issue

Well-designed multilateral financial institutions can be instrumental in catalysing action, supporting cooperation and coordination and enabling alignment between donor and recipient interests. This means a financial mechanism up to the task of ending plastic pollution will need to be built of foundations that enables coherent and efficient governance and decision making.

Conventionally, at the centre of any fund would be a committee, board or council that is empowered by the governing body of the instrument the fund serves. This body would be responsible for a range of functions, including:[20]

- **strategic planning and policymaking**. This includes developing, agreeing, reviewing and revising the fund's objectives, strategies, policies, programmes and guidelines in light of the guidance provided by the governing body of the instrument
- **oversight**. This includes mobilising, managing, allocating, disbursing and reviewing the use of the fund's financial resources and overseeing the role and performance of the fund's major entities (*e.g.* trustee, secretariat) and officers (*e.g.* CEO, staff) to ensure the fund's effective and efficient operation
- **expert advice**. This includes securing expert advice to support the management of the fund and its operations and establishing and overseeing various scientific and technical bodies (*e.g.* expert panels) to help the fund achieve its purpose
- **engagement**. This includes engaging with other institutions that perform related functions, including other funds, implementing agencies and other public, private and non-profit bodies that work in areas related to ending plastic pollution and with stakeholders through both formal arrangements (*e.g.* partnership forums) and other means (*e.g.* dialogue, publications, website)
- **review and reporting**. This includes periodic review and reporting of the fund's operations to its superior entity (*e.g.* governing body of the instrument), governments and the public, and oftens involves input from independent evaluators (*e.g.* auditors, review panels).

The INC and future governing body of the instrument will need to take decisions on how a new financial mechanism will be governed to discharge its functions in the pursuit of ensuring the stable and predictable delivery of financial resources for the implementation of the treaty.

B. Relevant considerations

1. Composition

The committee, board or council is typically made up of members of the instrument that established the fund, i.e. the parties to the convention or protocol that the fund supports.

With respect to composition, two relevant considerations when determining the composition of such a body include (i) balanced representation of the Parties, including geographical representation and the need for any standing seats for specific constituencies, such as small island developing states (SIDS) and least developed countries (LDCs) and (ii) the size of the body, which should be large enough to ensure adequate representation of member states but small enough to avoid becoming unwieldy and ensure efficient decision-making.

It should be noted that use of an existing fund typically means relying on the governing body of that fund, inheriting its decision-making procedures, composition and institutional culture.

Some examples of the composition of fund board, committees or councils include:

- **the Executive Committee of the MLF** consists of seven Parties from the group of Parties operating under paragraph 1 of Article 5 of the Protocol (i.e. developing countries) and seven Parties from the group of Parties not so operating (i.e. developed countries). Each group selects its Executive Committee members. The seven seats allocated to the group of developing countries shall be allocated as follows: two seats to Parties of the African region, two seats to Parties of the region of Asia and the Pacific, two seats to Parties of the region of Latin America and the Caribbean and one rotating seat among the regions referred, including the region of Eastern Europe and Central Asia. The members of the Executive Committee are endorsed by the Meeting of the Parties[21]
- **the GEF Council** consists of 32 members, with 16 members from developing countries, 14 from developed countries and two from the countries of central and Eastern Europe and the former Soviet Union. Interestingly, the GEF Council also meets as the Council for the GBFF
- **the Global Biodiversity Framework Fund Council** is based on the balanced and equitable representation as is present in the GEF Council in accordance with the GEF Instrument (*see above*), subject to the confirmation to participate by Council members. With respect to the governance of, and decision-making for, the GBF Fund, the GEF Council will meet as the Council for the GBF Fund[22]
- **the Adaptation Fund Board** comprises 16 members representing Parties to the Kyoto Protocol as follows: a) two representatives from each of the five United Nations regional groups, b) one representative of the small island developing States, c) one representative of the least developed country Parties, d) two other representatives from the Parties included in Annex I to the Convention (Annex I Parties) and e) two other representatives from the Parties not included in Annex I to the Convention (non-Annex I Parties)[23]
- **the Loss and Damage Fund Board** is comprised of 26 members, as follows: 12 members from developed countries; three from Asia-Pacific; three from African States; three from Latin American and Caribbean States, two from small island developing States; two from the least developed countries; one from a developing country not included in the regional groups and constituencies previously referred to. Each member of the board has an alternate member that may participate through the principal member, without the right to vote unless they are serving as the member[24]
- **the Green Climate Fund** governing instrument states that the GCF board will have 24 members, composed of an equal number of members from developing and developed country Parties. The instrument also states that representation from developing country parties will include representatives from relevant UN regional groups and representatives from SIDS and LDCs.[25]

2. Authority

The governing body of the fund benefits from being given the appropriate authority to allow it to discharge its functions effectively and efficiently. Such authority could include:

- **executive**. The governing body could be given the authority to select and appoint the executive head of the new fund. However, some flexibility in the appointment process may need to be accommodated to reflect the UN requirements. This may include, for example, the right of the Secretary-General to formally appoint the executive head (after a selection process run by the governing body)
- **policies**. The governing body's authority to establish its own operational and administrative policies. Due regard,

however, should be paid by the governing body when establishing policies which impact on the way in which relevant interventions must be implemented; if the new fund wishes to work with a wide range of partners in an efficient manner, it may wish to avoid adopting its own implementation-related policies which must be complied with by its partners in addition to the partners' own policies, as such modalities, as has been seen with GCF, can delay implementation of relevant interventions.

3. Decision-making

Establishing fair, representative and efficient decision-making procedures is a key aspect of good governance. These should enable decision-making that considers the circumstances and views of all relevant constituencies, is not politicised and can be conducted in an efficient and timely manner to ensure the regular flow of finance to where it is needed.

In most cases, decision-making in multilateral settings requires both a significant number of members to be present (a quorum) and a procedures for making decisions, either by consensus, voting or by other means.

To ensure that decision-making is representative and accountable to all constituencies, a quorum will be required. Different funds require a simple majority (e.g. the Adaptation Fund) to form a quorum, whereas others may require two-thirds of the body to be present (e.g. the GEF), or a majority of each of the relevant voting groups to be present.

A newly established fund must also determine its decision-making procedures. Most funds require decision-making to be made via consensus (i.e. no formal opposition to a decision-making), unless in situations where no consensus is achievable, decisions may be taken via a vote. In practical terms, votes very rarely take place, but are an essential driver of consensus.

Some examples of the decision-making process for other funds include:

- **Multilateral Fund**: Decisions by the Parties shall be taken by consensus whenever possible. If all efforts at consensus have been exhausted and no agreement reached, decisions may be adopted by a vote. Decisions shall be adopted by a two-thirds majority vote of the Parties present and voting, representing a majority of each group present and voting – ensuring that neither donors nor recipients dominate the operations of the Fund[26]
- **Global Environment Facility**: Decisions of the Assembly and the Council shall be taken by consensus. In the case of the Council if, in the consideration of any matter of substance, all practicable efforts by the Council and its Chairperson have been made and no consensus appears attainable, any Member of the Council may require a formal vote. Unless otherwise provided in the GEF Instrument, decisions requiring a formal vote by the Council shall be taken by a double weighted majority; that is, an affirmative vote representing both a 60 per cent majority of the total number of Participants and a 60 per cent majority of the total contributions[27]
- **Global Biodiversity Framework Fund**: Decisions of the GBF Fund Council are to be taken by consensus, along the lines of the GEF Instrument, with voting possible if consensus cannot be reached. The GBF Fund votes are also taken by a double-weighted majority in the same manner as the GEF outlined above[28]
- **Adaptation Fund**: Decisions of the Board shall be taken by consensus whenever possible. If all efforts at reaching a consensus have been exhausted and no agreement has been reached, decisions shall be taken by a two-thirds majority of the members present at the meeting on the basis of one member, one vote
- **Loss and Damage Fund**: Decisions of the Board will be taken by consensus. If all efforts at reaching consensus have been exhausted and no consensus is reached, decisions will be taken by a four-fifths majority of the members present and voting[29]
- **Green Climate Fund**: As per the Governing Instrument, decisions of the GCF board are to be made by consensus.[30] The GCF board later elaborated the procedures for the event that all efforts at reaching consensus have been exhausted, in which the decisions are put to a vote and taken by a four-fifths majority of the board members present and voting.[31]

V. Secretariat

A. Issue

The function of a Secretariat is to support the Parties and the governing body of the fund to discharge its functions and achieve the objectives of the Fund. A Secretariat provides organisational, administrative and technical support to the governing body of the fund.

To perform its role successfully, a secretariat should be comprised of professionals with expertise in management, administration, finance and, here, plastic pollution and other relevant fields.

In the various funds, secretariat functions are provided by different agencies:

- **Multilateral Fund.** The Executive Committee is supported by the MLF secretariat
- **Global Environment Facility**. The GEF Council is supported by the GEF secretariat
- **Global Biodiversity Framework Fund**. The GBFF is also supported by the GEF secretariat
- **Adaptation Fund**. The CMP invited the GEF to provide secretariat functions on an interim basis to be reviewed in 2011.[32] The AF Secretariat now provides support to the AF Board
- **Loss and Damage Fund**. As stated by the governing instrument, the LDF is to be serviced by a "new, dedicated and independent secretariat"[33]
- **Green Climate Fund**. GCF established a fully independent secretariat which services and is accountable to the GCF Board, headquartered in the Republic of Korea.[34]

B. Relevant considerations

Functional independence

As any effective national system separates and balances different roles and powers, so to must an effective international arrangement. This is particularly true where a variety of different actors are likely to be involved, large sums of money are to be managed and discussions of financing may become politicised.

Ensuring that the fund secretariat is dedicated solely to serving the governing body of the fund and independent from the convention secretariat may help to ensure that disbursement of funding remains distinct from the political discussions regarding interpretation and implementation of the Global Plastics Treaty and the negotiation of substantive rules and procedures.

At the same time, an appropriate relationship between the two (while maintaining independence) could help to build synergies and ensure coordination.

Interim arrangements

In the event a new dedicated fund is established, interim arrangements may need to be made before a new independent secretariat is established. In this case, existing institutions could be invited or requested to set up an interim secretariat for the new fund as an autonomous unit within the relevant institution.

For example, during the establishment of the GCF the UNFCCC CoP requested that the UNFCCC and GEF secretariats set up an interim secretariat for GCF as an autonomous unit within the UNFCCC secretariat premises. The GCF interim secretariat supported the GCF Board for its first five meetings.

VI. Trustee

A. Issue

When establishing a new fund for the implementation of the treaty, member states will need to decide whether a separate trustee is required or whether the new fund should manage such functions in-house or finances should be managed by some other means. The function of a trustee would generally be to:

- establish and manage a trust fund or funds in accordance with the fund instrument
- receive and hold in trust financial contributions
- invest and manage the funds (and associated assets and receipts)
- transfer and disburse funds
- undertake its functions in compliance with the instructions of the Fund Board
- report regularly on the fund's financial status and management.

B. Relevant considerations

There are a variety of considerations that must be made when determining the role and function of any trustee or treasurer. These include:

- the scale and extent of the trustee's costs which will be covered by the Fund. Fund instruments generally provide that the reasonable costs of the trustee in performing its duties will be covered. The scale of costs, however, may differ significantly between institutions, and should be considered when selecting a trustee
- the time taken and ease to 'procure' a trustee. Engaging formally with any potential trustee as early as possible may be beneficial; selecting the trustee after the design of the new fund is final many limit the choice of potential entities that are in a position to undertake the proposed functions
- the scope of the trustee's functions. In most fund instruments, the trustee performs a well-defined fiduciary role (i.e. like a banker) under the instructions of the operating entity/fund board (i.e. its client).

Some examples of the trustee arrangements for other funds include:

- **Multilateral Fund**. In the case of MLF, UNEP serves the role of a 'fund treasurer' to receive and administer pledged contributions (including cash, promissory notes or bilateral assistance) and to disburse funds to the fund secretariat and the implementing agencies in accordance with the directive of the board. The treasurer attends each meeting of the board and is responsible for preparing a status of contributions and disbursements for each meeting, the accounts of the fund as well as the reconciliation of the accounts on an annual basis and any study requested by the board and/or by Meetings of the Parties to the Montreal Protocol, as relevant[35]
- **Global Environment Facility**. GEF invited the World Bank to serve as trustee. In serving as the Trustee of the Fund, the World Bank shall serve in a fiduciary and administrative capacity and shall be bound by its Articles of Agreement, by-laws, rules and decisions. The role of the trustee is elaborated in Annex B of the fund agreement and amongst its fiduciary duties the trustee is also responsible for mobilisation of resources for the Fund and the preparation of such studies and arrangements as may be requested for this purpose[36]
- **Global Biodiversity Framework Fund**. For the GBFF, the World Bank was invited to serve as the trustee, in accordance with its policies and procedures, as it does for all other trust funds within the GEF family of funds[37]
- **Adaptation Fund**. AF also entrusts the role of trustee to the World Bank. As well as its role in managing the fund, the World Bank also sells the Certified Emission Reduction certificates that help support the fund[38]
- **Loss and Damage Fund**. The World Bank was, in the CoP/CMA decision to establish the Loss and Damage Fund, invited to serve as the interim trustee of the Fund. The role of the Trustee is further elaborated in the Governing Instrument, including administration of the assets of the fund, receipt of contributions, implementation of the terms of contribution arrangements, the holding and investing of funds, the transfer of funds to implementing entities and/or other relevant recipients, accounting, reporting and financial and fiduciary management, as well as ensuring compliance with established procedures and internal controls[39]
- **Green Climate Fund**. The role interim trustee for the Green Climate Fund was served by the World Bank from its establishment until 2019, when it became the permanent trustee of the Green Climate Fund Trust Fund, subject to performance reviews every four years.[40]

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