

# LEGAL ANALYSIS OF THE GEF RESOURCE ALLOCATION FRAMEWORK

Prepared by  
The Center for International Environmental Law (CIEL)  
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May 2007



This Study was prepared by Glenn Wiser, Senior Attorney at the Center for International Environmental Law, under a grant from the German Federal Ministry for the Environment, Nature Conservation, and Nuclear Safety (Bundesministerium für Umwelt, Naturschutz und Reaktorsicherheit—BMU). The opinions expressed in the Study are those of the author and the Center for International Environmental Law, and do not necessarily reflect the opinions of the German Government or BMU.

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## Executive Summary

At a special meeting in August-September 2005, the GEF Council adopted a new framework for allocating GEF grants to recipient countries. The Resource Allocation Framework, or RAF, is intended to make GEF funding allocations more equitable, transparent, predictable, and effective by assigning eligible countries with numerical scores based on (1) their potential to generate global environmental benefits in a particular focal area (the “GEF Benefits Index,” or GBI) and (2) their capacity, policies, and practices relevant to successful implementation of GEF programs and projects (the “GEF Performance Index,” or GPI). For GEF-4, the RAF applies only to the climate change and biological diversity focal areas. Based upon a mid-term review in 2008 and other considerations, the GEF may implement a GEF-wide RAF by 2010.

The GEF Instrument requires the GEF to “function under the guidance of, and be accountable to, the Conferences of the Parties” of the conventions it serves, and to “act in conformity with the policies, program priorities and eligibility criteria decided by the Conference of the Parties for the purposes of the convention concerned.” The purpose of this Study is to address the core question of whether the RAF is consistent or compatible with the conventions that the GEF serves and, in turn, whether the GEF Council’s implementation of the RAF complies with the GEF Instrument. The Study focuses on the passages of the relevant legal instruments that define the relations between the GEF and the United Nations Framework Convention on Climate Change (UNFCCC), the Convention on Biological Diversity (CBD) and its Cartagena Biosafety Protocol and, to a lesser extent, the Stockholm Convention on Persistent Organic Pollutants (POPs).

As required by the GEF Instrument, the GEF Council has executed Memoranda of Understanding (MoU) with the COPs of all three conventions. The MoU provide that each COP will determine and communicate guidance to the GEF on the policies, programme priorities, and eligibility criteria for access to, and utilization of, financial resources available through the applicable financial mechanism. The GEF Council ensures that the GEF, in operating the convention financial mechanisms, will do so in conformity with the COP guidance. The Council’s failure to do so would constitute a breach of the GEF Instrument and MoU.

Each of the three convention COPs has issued initial guidance to communicate their instructions regarding the policies, program priorities, and eligibility criteria the GEF shall apply in operating the applicable financial mechanism. The Biodiversity and Climate Change COPs have each issued extensive additional guidance on a range of issues.

None of the COPs has provided the GEF with a prioritization or relative ranking of the many activities that they have described as “priorities.” The practice of the GEF and COPs over the years suggests that the GEF Council’s adoption of the RAF and imposition of it upon the financial mechanisms—without first receiving explicit pre-authorization to do so from the COPs—should not be viewed as a *per se* violation of the MoU or the GEF Instrument. Nonetheless, while the Council holds the exclusive power

to develop and adopt GEF operational policies and modalities, the impacts of those policies and modalities must fully conform with COP guidance.

This Study identifies many of those potential impacts and analyzes them in terms of the relevant legal instruments. It concludes that most aspects of the RAF conform with the guidance of the COPs or, at the least, are not clearly inconsistent with the guidance. In respect to the UNFCCC, the Study identifies several areas in which the RAF may need to be adjusted, depending on future decisions of the COP. These include (together with references to where they are discussed in Part 4):

- (i) Eligibility, if low RAF allocations prevent countries from pursuing certain types of eligible activities (Paragraph 105);
- (ii) Potential policy of addressing market transformation and market failures in least developed countries (LDCs) and small island developing states (SIDS) (Paragraph 110);
- (iii) Land use and land use change and forestry, if the COP determines that it should be a program priority of the financial mechanism (Paragraphs 132-133);
- (iv) Carbon capture and storage, if the COP determines that it should be a program priority of the financial mechanism (Paragraphs 134-135); and
- (v) Adaptation, depending on the extent to which the COP expects UNFCCC adaptation resources to flow through the climate change focal area (Paragraphs 138-143).

Additionally, the Study finds that implementation of the “50% rule” (which prohibits countries from utilizing more than half of their RAF allocations during the first two years of the replenishment) does not conform to the UNFCCC COP’s guidance requesting the GEF “to further simplify its procedures and improve the efficiency of the process through which developing country Parties receive funding for projects for the implementation of their [convention] commitments.” (See Paragraphs 186-190.)

Concerning the CBD, the Study identifies a number of important areas in which adoption and implementation of the RAF do not conform with COP guidance, or in which the COP has expressed significant skepticism about the RAF. These include:

- (i) Country eligibility, depending on the outcome of the in-depth review of the financial mechanism that COP 9 will conduct (Paragraphs 146-147);
- (ii) GEF Benefits Index treatment of marine biodiversity, especially in respect to SIDS (Paragraphs 154-158, 172);
- (iii) Regional projects, depending on the impact that the RAF has on the ability and willingness of LDCs and SIDS to participate in them (Paragraphs 159-161);
- (iv) Impact on funding for the Cartagena Biosafety Protocol (Paragraphs 163-165, 171);

- (v) Agricultural biodiversity, insofar as its exclusion from consideration under the GBI<sub>BIO</sub> is concerned (Paragraph 173); and
- (vi) Implementation of the 50% rule, which does not conform to the COP's guidance requesting the GEF to further simplify and streamline procedures in consideration of the special conditions within developing country Parties, in particular LDCs and SIDS (Paragraphs 186-190).

The Study also finds that the GBI<sub>BIO</sub> fails to take into account the interests of developing countries, especially LDCs and SIDS, which may have national priorities under the CBD related to the COP program priorities of access and benefit sharing (particularly insofar as the human role in conservation efforts is concerned), alien species, and biodiversity and climate change.

The Study briefly analyses some of the implications the RAF may have for the GEF Small Grants Program (SGP). Neither the UNFCCC nor CBD COP has issued guidance to the GEF regarding how the SGP should be managed. Accordingly, while the GEF's new approach of shifting support for the SGP from GEF core funding to individual countries could have serious, negative implications for the future of the program, it does not raise a question at this time of whether it is in conformity with COP guidance.

The Study concludes by examining what remedies may be available to address the fact that the GEF and GEF Council may have failed to act in conformity with guidance from the COPs, in breach of the GEF Instrument and the respective MoU. Despite the terms of the various MoU, the GEF is, legally and practically speaking, functionally autonomous from the conventions it serves. No effective sanctions are available to the COPs that would empower them to force the GEF to conform with their guidance. Consequently, the COPs cannot exercise enforceable control over the entity that operates their financial mechanisms. In the final analysis, the legal relations between the conventions, the GEF, and the individual states party to each must be defined and enforced within the political context under which they have been established and maintained.





## List of Acronyms and Abbreviations

ABS	access and benefit sharing
BFI	broad framework indicator
CAIT	Climate Analysis Indicators Tool
CBD	Convention on Biological Diversity
CBO	community-based organization
CDM	Clean Development Mechanism
CEO	Chief Executive Officer
CEPIA	country environment policy institution assessment indicator
COP	Conference of the Parties
COP/MOP	Conference of the Parties serving as the Meeting of the Parties
GBI	GEF Benefits Index
GBI <sub>BIO</sub>	GEF Benefits Index for biodiversity
GBI <sub>CC</sub>	GEF Benefits Index for climate change
GEF	Global Environment Facility
GEF-4	fourth GEF replenishment
GHG	greenhouse gas
GPI	GEF Performance Index
IA	Implementing Agency
IDA	International Development Association
IFAD	International Fund for Agricultural Development
ILC	International Law Commission
IUCN	World Conservation Union
LDCF	Least Developed Country Fund
LDC	least developed country
LULUCF	land use and land use change and forestry
MEA	multilateral environmental agreement
MoU	Memorandum (or Memoranda) of Understanding
NGO	non-governmental organization
OFP	Operational Focal Point
OP	operational program
OPS3	Third Overall Performance Study
POPs	persistent organic pollutants
PPI	project portfolio indicator
RAF	Resource Allocation Framework
SBI	Subsidiary Body for Implementation
SCCF	Special Climate Change Fund
SGP	GEF Small Grants Programme
SIDS	small island developing states
SP	strategic priority
SPA	strategic priority for adaptation
UNCCD	UN Convention to Combat Desertification in Countries Experiencing Serious Drought and/or Desertification, particularly in Africa
UNFCCC	United Nations Framework Convention on Climate Change
USD	United States dollars



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## 1. Introduction

### 1.1. Background and Purpose of Analysis

1. At a special meeting in August-September 2005, the Council of the Global Environment Facility (GEF) adopted a new framework for allocating GEF grants to recipient countries:

1. The Council agrees to implement, for the GEF-4 replenishment, a resource allocation framework based on an index of a country's potential to generate global environmental benefits in the biodiversity and climate change focal areas and an index of performance.

...  
2. (e) The Council will review the [Resource Allocation Framework] after two years of implementation. The review will examine the operational experience with the RAF.<sup>1</sup>

2. The Resource Allocation Framework (RAF) is described in the Policy Recommendations of the Fourth Replenishment of the GEF Trust Fund as part of the GEF institutional reforms:

A major element of the GEF-3 replenishment reform agenda was the establishment of a framework for allocation to countries based on global environmental priorities [and] country-level performance. As agreed by the Council, the Resource Allocation Framework will be initially implemented in GEF-4 for the biodiversity and climate change focal areas, and the Secretariat will work to develop a GEF-wide RAF based on global environmental priorities and country level performance relevant to those priorities. There will be an independent mid-term review of the RAF to be considered by the Council in November/December 2008, at which time the Council will review the Secretariat's progress in developing indicators for the other focal areas. Taking into account (i) the findings of the mid-

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<sup>1</sup> GEF Council, *Joint Summary of the Chairs, Special Meeting of the Council, August 31-September 1, 2005* (Oct. 18, 2005).

term review, (ii) the progress in developing indicators for other focal areas, and (iii) subsequent decisions by the Council on the GEF-wide RAF framework, the Secretariat will implement a GEF-wide RAF by 2010, if feasible.<sup>2</sup>

3. In September 2006, the GEF Secretariat presented the country allocations under the new RAF for the biodiversity and climate change focal areas.<sup>3</sup> During the fourth replenishment period, US\$1 billion will be allocated to each of these two focal areas. Five percent of each US\$1 billion allocation will support projects within the Small Grants Programme and capacity building, and five percent will support regional and global projects in both focal areas. Thus, US\$1.8 billion will be available for allocation, through the RAF, to countries with individual country-indicative allocations and to the rest of the countries as “a group.”

4. In negotiations on the RAF, GEF Council members underlined the need for a simple, flexible, and transparent system that does not detract from the GEF’s overarching priorities. Yet it is not clear whether this has been achieved by the RAF as it was adopted in September 2005. A legal analysis conducted in 2004 by the World Bank addressed the question, “Would a GEF performance-based framework be consistent with the GEF Instrument?”<sup>4</sup> The Bank concluded in its analysis that nothing in the GEF Instrument, nor in the guidance to the GEF from the Conferences of the Parties to the conventions it serves, requires or prohibits the use by the GEF of a performance-based allocation system such as the RAF. Moreover, in reviewing the memoranda of understanding between the GEF Council and the respective Conferences of the Parties, the Bank stated that even if adoption and implementation of the RAF led to a conflict between the GEF and the conventions, the only “sanction” available to a COP would be “to reconsider the position of the GEF as the financial mechanism for the implementation of its convention.”<sup>5</sup>

5. The Bank’s analysis implied that the lack of a viable mechanism to enforce an obligation of the GEF Council rendered the question of such a conflict moot. The analysis did not answer whether the RAF would be consistent with the environmental conventions served by the GEF, or with their guidance to the GEF.<sup>6</sup> These questions are critical, because the GEF Instrument *requires* the GEF and the Council to “act in conformity with the policies, program priorities and eligibility criteria decided by the

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<sup>2</sup> GEF Council, *Summary of Negotiations on the Fourth Replenishment of the GEF Trust Fund*, 8, para. 14, GEF/C.29/3 (revised Oct. 16, 2006).

<sup>3</sup> GEF Council, *GEF Resource Allocation Framework: Indicative Resource Allocations for GEF-4, for the Biodiversity and Climate Change Focal Areas* (15 Sept. 2006) [hereinafter, RAF Public Disclosure Document].

<sup>4</sup> David Freestone, Acting Deputy General Counsel, The World Bank, *Office Memorandum: Would a GEF Performance-Based Framework Be Consistent with the GEF Instrument?*, dated Apr. 20, 2004, in GEF Seminar on Resource Allocation Framework, *GEF Resource Allocation Framework*, 58, annex 7 (Aug. 5, 2004).

<sup>5</sup> *Id.* at 63.

<sup>6</sup> The Bank’s analysis concluded by stating that such questions could not be answered without first knowing the details of the new framework.

Conference of the Parties for the purposes of the convention concerned.”<sup>7</sup> Thus, a thorough analysis of whether the RAF complies with the GEF Instrument is not possible without evaluating the RAF’s consistency with those conventions and their guidance. The purpose of the present Study is to address this core question: Whether the RAF is consistent or compatible with the conventions that the GEF serves. Addressing that question will, in turn, permit a more informed opinion as to whether the GEF Council’s implementation of the RAF complies with the GEF Instrument.

## **1.2. Scope and Structure of Study**

6. The core question that this Study addresses is whether the RAF is consistent or compatible with the conventions that the GEF serves. Accordingly, the Study focuses on the passages of the relevant legal instruments that define the relations between the GEF and the United Nations Framework Convention on Climate Change (UNFCCC), the Convention on Biological Diversity (CBD) and its Cartagena Biosafety Protocol and, to a lesser extent, the Stockholm Convention on Persistent Organic Pollutants (POPs).<sup>8</sup>

7. The role of the Stockholm Convention in the analysis is necessarily limited, because the RAF does not apply to the POPs focal area during GEF-4 and no RAF criteria have been published for it yet. Thus, it is not possible at this time to evaluate whether the RAF is consistent with the Stockholm Convention and its guidance. Nevertheless, the relevant Stockholm Convention instruments are included in the review to help illustrate the common features found under all three conventions, and because a compilation of Stockholm instruments in this Study may prove useful for future, additional analysis of the RAF, when and if a decision is made to expand it GEF-wide.

8. Activities related to implementation of the Cartagena Biosafety Protocol to the CBD are eligible for GEF funding under the biodiversity focal area. Developing countries and countries with economies in transition may apply for such funding as part of their RAF biodiversity allocations. The analysis therefore includes considerations of how the RAF may impact GEF compliance with Cartagena Protocol guidance, which is forwarded to the GEF as part of the guidance from the CBD COP.

9. The various funds created in conjunction with the Kyoto Protocol to the UNFCCC are not administered as part of the GEF Trust Fund and are thus mentioned in the analysis only to the extent that they are relevant to the discussion on adaptation under the Climate Convention. Similarly, the UN Convention to Combat Desertification is not included,

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<sup>7</sup> See INSTRUMENT FOR THE ESTABLISHMENT OF THE RESTRUCTURED GLOBAL ENVIRONMENT FACILITY, para. 15 (May 2004) [hereinafter GEF Instrument].

<sup>8</sup> UNITED NATIONS FRAMEWORK CONVENTION ON CLIMATE CHANGE (1992) [hereinafter UNFCCC or Climate Convention]; CONVENTION ON BIOLOGICAL DIVERSITY (1992) [hereinafter CBD]; CARTAGENA PROTOCOL ON BIOSAFETY TO THE CONVENTION ON BIOLOGICAL DIVERSITY (2000) [hereinafter Biosafety Protocol or Cartagena Protocol]; STOCKHOLM CONVENTION ON PERSISTENT ORGANIC POLLUTANTS (POPS) (2001) [hereinafter Stockholm Convention].

because the GEF Instrument has not yet been amended for the GEF to serve as a financial mechanism of the UNCCD.<sup>9</sup>

10. In addressing the core question of whether the RAF is consistent or compatible with the conventions that the GEF serves, the Study does not delve into the negotiations leading to the Council's adoption of the RAF. Neither does it attempt to summarize or characterize motivations that may be ascribed to particular governments or other stakeholders in their support of, or opposition to, the RAF. Instead, the Study examines the numerous authoritative texts that define the RAF and the relations between the GEF and COPs, and other publicly available documents that shed light on those relations.

11. The Study is presented in five Parts:

Part 1 (the present Part) is the Introduction.

Part 2 provides a short overview of the RAF, including its methodology and purpose, application to the GEF focal areas, and effect on Operational Focal Points.

Part 3 reviews and defines the legal relations of the GEF to the multilateral environmental agreements (MEAs) it serves, including the Climate Change, Biological Diversity, and Stockholm POPs Conventions. The Part reviews relevant provisions of the GEF Instrument, the respective convention texts, memoranda of understanding between the GEF and the conventions, and convention guidance decisions from the Conferences of the Parties to the GEF.

Part 4 undertakes a legal analysis of the RAF to address the primary question of whether the RAF is consistent with the conventions that the GEF serves. The Part defines the key term, "in conformity with," and then proceeds by separately examining the RAF as it applies to the financial mechanisms of the UNFCCC and CBD. For each mechanism and focal area, the analysis identifies and characterizes select parts of the convention guidance, determines what impact the RAF may have on the issue to which the guidance pertains, and evaluates whether the GEF's actions in precipitating that impact are in conformity with the selected guidance.

Part 5, the Conclusion, lists those issues identified in Part 4 that raise questions of whether the RAF may prevent the GEF from conforming with COP guidance, and ends by briefly discussing legal and political remedies that may be available.

12. Each Part begins with a "Summary of Key Points" that lists in bulleted form the most important ideas contained in the Part. Additionally, the Study contains a References

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<sup>9</sup> *But see* GEF Council, *Joint Summary of Chairs, Dec 5-8 2006*, at 7, para. 44 (12 Dec. 2006) (stating that GEF Council agrees to recommend to the fourth GEF Assembly that it should amend the GEF Instrument to allow the GEF to serve as a financial mechanism of the UN Convention to Combat Desertification in Countries Experiencing Serious Drought and/or Desertification, particularly in Africa (UNCCD)).

section at the end that lists all of the authorities and documents cited in the Study, including their internet addresses.

## **2. Overview of the Resource Allocation Framework**

### **2.1. Summary of Key Points**

- The RAF is intended to make GEF funding allocations more equitable, transparent, predictable, and effective by assigning eligible countries with numerical scores based on (1) their potential to generate global environmental benefits in a particular focal area (the “GEF Benefits Index,” or GBI) and (2) their capacity, policies, and practices relevant to successful implementation of GEF programs and projects (the “GEF Performance Index,” or GPI).
- At the beginning of each replenishment, the resources available in each focal area will be allocated to GEF-eligible countries through a five-step process of (1) computing a country score based upon the GBI and GPI for each eligible country in each focal area, (2) computing a country share, (3) determining preliminary country allocations, (4) adjusting the preliminary country allocations for minimum allocations and ceilings, and (5) determining indicative allocations to countries and the group, where the highest-ranked countries receive country-specific allocations and the remaining countries are placed in the group for each focal area.
- Countries that receive country-specific indicative allocations are eligible to receive GEF funding in the focal area up to the amount of their indicative allocations, subject to their submission of acceptable project proposals. Countries in the group are eligible to receive a minimum of \$1 million in project funds and may receive additional funds up to the adjusted allocation of the highest-ranked country in the group.
- Commitments to countries during the first two years of the replenishment period may not exceed 50% of their total allocation or upper limit for each focal area. Unused allocations at the end of a replenishment period are not carried over for a country into the next replenishment period.
- For GEF-4, the RAF applies only to the climate change and biological diversity focal areas. Based upon a mid-term review in 2008 and other considerations, the GEF may implement a GEF-wide RAF by 2010.

### **2.2. RAF Methodology**

13. The RAF “is a system for allocating resources to countries in a transparent and consistent manner based on global environmental priorities and country capacity, policies and practices relevant to successful implementation of GEF projects.”<sup>10</sup> The RAF is

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<sup>10</sup> GEF Council, *The GEF Resource Allocation Framework*, 1, GEF/C.27/Inf.8/Rev.1 (2005). Most of the information in this section is derived from this paper.

intended to make GEF funding allocations more equitable, transparent, predictable, and effective by assigning numerical scores to eligible countries based on (i) their potential to generate global environmental benefits in a particular focal area (the “GEF Benefits Index,” or GBI) and (ii) their capacity, policies, and practices relevant to successful implementation of GEF programs and projects (the “GEF Performance Index,” or GPI).

### 2.2.1. GEF Benefits Index (GBI)

14. The GEF Secretariat has developed separate indices for determining the GBI in the focal areas of biodiversity and climate change. For the biodiversity focal area, the “GBI<sub>BIO</sub>” is the weighted average of a country’s scores for terrestrial and marine biodiversity, based on scientific data compiled by various organizations, including the World Wildlife Fund, Conservation International, the World Conservation Union (IUCN), Birdlife International, and FishBase.

15. The *terrestrial score* is derived by (i) identifying the “terrestrial country-ecoregion components” present in a country; (ii) scoring each country-ecoregion component using four indicators, including the number of represented species, number of threatened species, uniqueness of each represented ecoregion, and degree to which each ecoregion may be threatened; (iii) determining a composite terrestrial score for each country-ecoregion component, based on a weighted average of the four indicators;<sup>11</sup> and (iv) adding together the terrestrial scores for each country-ecoregion component present in the country.

16. The *marine score* is developed in a far simpler way, primarily because less relevant data is available. Thus, the marine score is based on the number of represented fish species in a country. To compute the overall GBI<sub>BIO</sub>, the weighted terrestrial and marine scores are added together, with the terrestrial score weighted 80% and the marine score weighted 20%. The GEF states that many of the indices used to determine the GBI<sub>BIO</sub> will be replaced or improved with more precise indicators as comprehensive data become available for all GEF-eligible countries.<sup>12</sup>

17. The GBI for climate (GBI<sub>CC</sub>) is determined by multiplying a country’s *baseline greenhouse gas emissions* for the year 2000 by the relative change in the country’s *carbon intensity* between 1990 and 2000, so that

$$\text{GBICC} = \text{baseline GHG emissions} \times (\text{carbon intensity}_{1990} / \text{carbon intensity}_{2000}).$$

18. According to the GEF, GHG emissions levels provide a broad measure of the scale of mitigation potential of a country. GHG emissions associated with land use changes are not included in the baseline, in keeping with the GEF strategic focus on

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<sup>11</sup> The weighting is: represented species: 0.55; threatened species: 0.20; represented ecoregions: 0.15; and threatened ecoregions: 0.10.

<sup>12</sup> For more details about the GEF Benefits Index for biodiversity, please refer to *The GEF Resource Allocation Framework*, *supra* note 10, annex 1.



carbon emissions from fossil fuel combustion and cement production and emissions of other greenhouse gases listed in the UNFCCC.

19. Carbon intensity measures the tons of carbon equivalent emitted by a country per unit of economic output. Thus, if a country's carbon intensity has improved between 1990 and 2000, the ratio between the 1990 and 2000 intensity numbers will be greater than one, and will raise the GBI<sub>CC</sub> score for a country. The GEF reasons that this is appropriate because reducing emissions should be less costly in countries that have already demonstrated their willingness or ability to reduce carbon intensity, and such countries should be rewarded for having done so.<sup>13</sup>

20. Because up-to-date national communications required under the UNFCCC have not been received from many GEF-eligible countries, the GBI<sub>CC</sub> factors are derived from data available from the Climate Analysis Indicators Tool (CAIT) unit of the World Resources Institute.

### 2.2.2. GEF Performance Index (GPI)

21. The GPI is intended to provide a "relative ranking of each country's capacity to deliver potential global environmental benefits based on its current and past performance."<sup>14</sup> The GPI is the simple weighted average of three uniformly scaled indicators: the project portfolio indicator, the country environment policy institution assessment indicator, and the broad framework indicator.

22. The *project portfolio indicator* (PPI) rates project portfolio performance by equally weighting the average ratings of GEF projects and the average ratings of World Bank environment-related projects. If one of the ratings is unavailable for a country, then the PPI is based on the portfolio rating that is available. The PPI is given a weight of 10% in the GEF Performance Index.

23. The *country environment policy institution assessment indicator* (CEPIA) is weighted 70% in the GPI. The CEPIA is based on the "Policies and Institutions for Environmental Sustainability" indicator from the World Bank's International Development Association (IDA) Resource Allocation Index (previously the World Bank "Country Policy and Institutional Assessment Indicator"). The World Bank develops this indicator for its client countries through separate evaluations of (i) the existence in a country of supportive policies; (ii) the capacity to implement and enforce policies in six environmental management areas; (iii) the ability to perform environmental assessments,

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<sup>13</sup> See *id.* annex 2, at 17, para. 7. Some micro economists might disagree with the GEF Secretariat's reasoning, arguing instead that additional investments in reducing carbon intensity will be more expensive (and thus less economically desirable), because the "low hanging fruit" have already been taken. Under such reasoning, the role of carbon intensity in the GBI<sub>CC</sub> might be "flipped" by reversing the ratio to carbon intensity<sub>2000</sub> / carbon intensity<sub>1990</sub>.

For more details about the GEF Benefits Index for climate change, see *id.* annex 2.

<sup>14</sup> *Id.* at 20.

set priorities, and coordinate across sectors; and (iv) the extent to which the country facilitates public participation.

24. The *broad framework indicator* (BFI), weighted 20% in the GPI, is based on the average rating for a country of the five indicators in the “Public Sector Management and Institutions” cluster of the World Bank IDA Resource Allocation Index. The five indicators in the cluster are: (i) property rights and rule-based governance; (ii) quality of budgetary and financial management; (iii) efficiency of revenue mobilization; (iv) quality of public administration; and (v) transparency, accountability, and corruption in the public sector. The disclosure of the BFI and the CEPIA (discussed in the preceding paragraph), and the GPI developed from them, are subject to the disclosure policies of the World Bank. Thus, while the scores derived from the World Bank’s IDA Resource Allocation Index may be viewed on the world wide web, the actual methodologies and components used to establish the scores are not available to the public.<sup>15</sup>

25. For some GEF-eligible countries, one or more of the three indicators used to compute the GPI may not be available, due to lack of applicable data. In such cases, the GEF Secretariat may: (i) base the GPI only on those indicators that are available by proportionately increasing their weights; (ii) substitute the missing indicator(s) with the rural sector indicator used by the International Fund for Agricultural Development (IFAD) in its Performance Based Allocation System; or (iii) not compute the GPI for that country, in which case the country will be included in the RAF “group” (see discussion in Paragraph 32 below).

### 2.2.3. Determining country allocations

26. At the beginning of each replenishment, the resources available in each focal area will be allocated to GEF-eligible countries through a five-step process:

27. First, a *country score* is computed for each eligible country in each focal area using this formula:

$$\text{Country score} = \text{GBI}^{0.8} \times \text{GPI}^{1.0}$$

28. Second, the *country share* for each focal area is computed by dividing the country score by the sum of the scores of all eligible countries in the focal area:

$$\text{Country share} = \text{country score} / \text{sum of all eligible country scores}$$

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<sup>15</sup> See World Bank, IDA Resource Allocation Index (IRAI), available at <http://web.worldbank.org/WBSITE/EXTERNAL/EXTABOUTUS/IDA/0,,contentMDK:20933600~menuPK:2626968~pagePK:51236175~piPK:437394~theSitePK:73154,00.html>.

29. Third, a *preliminary country allocation* for each country in each focal area is computed by multiplying the country share by the net amount of GEF resources available for the focal area:<sup>16</sup>

Preliminary country allocations = country share X available GEF resources

30. Fourth, the preliminary country allocations are *adjusted for minimum allocations and ceilings*. For each country with a preliminary allocation of less than \$1 million, its allocation is raised to \$1 million. For any country with a preliminary allocation that exceeds the ceiling set for a focal area, its allocation is reduced to the focal area ceiling. The biodiversity ceiling is 10% of the resources available to that focal area. The climate change ceiling is 15% of the resources available to the climate change focal area. The preliminary allocations of all other countries are proportionately adjusted by the amounts used or freed by application of the minimum allocations and ceilings.

31. Fifth, the *indicative allocations to countries and the group* for each focal area are determined by listing all eligible countries in decreasing order of their adjusted allocations. The highest-ranked countries whose cumulative allocations equal 75% of the funds available in the focal area receive country-specific indicative allocations equal to their respective adjusted allocations.

32. The remaining countries are placed in the *group* for each focal area. The indicative allocation for all of the group is the remaining 25% of funds available to the focal area. Individual countries in the group are eligible to an upper limit of GEF projects in the focal area that is equal to the adjusted allocation of the highest-ranked country within the group. Thus, if the adjusted focal area allocation of the highest-ranked country in the group was \$3.25 million, all of the countries in the group would be eligible to a \$3.25 million upper limit for GEF projects in that focal area (pending approval of projects and continued availability of group funds). However, according to the GEF Secretariat, project proposals from group members that are greater than \$1 million will be periodically and collectively reviewed against all other projects from countries in the group to determine which projects will be funded, while projects up to \$1 million will be reviewed within the context of the applicant country's national priorities and without consideration of alternative proposals from other group countries.<sup>17</sup>

33. In summary, countries that receive country-specific indicative allocations are eligible to receive GEF funding in the focal area up to the amount of their indicative allocations, subject to their submission of acceptable project proposals. Countries in the group are eligible to receive a minimum of \$1 million in project funds; they may receive additional funds up to the adjusted allocation of the highest-ranked country in the group,

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<sup>16</sup> For the purpose of the country allocations, the resources available in each focal area are reduced by five percent for global and regional projects, and five percent for the Small Grants Programme and cross-cutting capacity building activities; thus, 90% of the resources available to each focal area will be used for country allocations under the RAF.

<sup>17</sup> GEF Secretariat, *Progress Report on Implementing the RAF*, 6, GEF/C.30/11 (7 Nov. 2006).

but their project proposals must compete against the proposals of other members of the group in order to access these additional funds.

#### **2.2.4. The 50% rule and additional considerations**

34. The indicative allocations available to individual countries, and the upper limits available to countries in the group, are not entitlements to GEF resources, but instead constitute an “envelope” against which countries may request GEF grants. Commitments to countries during the first two years of the replenishment period may not exceed 50% of their total allocation or upper limit for each focal area. At the mid-term of the replenishment, preliminary allocations for all countries in each focal area will be re-calculated by using updated GBI and GPI data and then applying the resulting revised country scores to 50% of the resources available to the focal area during the replenishment period. The re-calculated preliminary allocations, plus any allocated amounts that a country did not use from the first half of the replenishment, become the *revised indicative allocation* for the country for the remainder of the replenishment period.

35. Unused allocations at the end of a replenishment period are not carried over for a country into the next replenishment period. Rather, they are carried over as part of the total funds available for the new RAF allocation in the next replenishment.

36. In discussing the relationship between the GPI and GBI at a GEF sub-regional consultation for the Caribbean, the GEF Secretariat said, “The performance [GPI] distribution is a normal bell curve while the GBI is an exponential distribution. Combining the two, the result is an exponential distribution and so the GBI drives the allocation.”<sup>18</sup> This comment is based on the fact that the GBI ranges over several orders of magnitude, while the GPI may vary between 1 and 6. Thus, the product of the two (the country score) is heavily influenced by the GBI. For example, the GBI<sub>CC</sub> ranges from 8 (Cook Islands) to 2.4 million (China), and the GBI<sub>BIO</sub> ranges from 0.1 (Belarus) to 660 (Brazil).<sup>19</sup> In the country score equation, the GBI is raised to the 0.8 power, which has the effect of compressing the powerful effect of the large GBI numbers (note that this effect is reversed for values less than 1.0.) China’s 2.4 million GBI<sub>CC</sub> thus becomes 127,000, while Burundi’s 3.3 GBI<sub>BIO</sub> is reduced to 2.6. Nevertheless, in practical terms, the indicative allocations strongly reflect the underlying determinants of the GEF benefits indices.

### **2.3. Application to Focal Areas**

37. A Technical Working Group constituted by the GEF Council in 2003 recommended that the RAF should apply initially only to the biodiversity and climate change focal areas, due to the difficulties of developing a GEF-wide GEF Benefits Index indicator and GBI indicators for the other focal areas. Biodiversity and climate change

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<sup>18</sup> GEF Secretariat, *GEF Sub-Regional Consultation for the Caribbean*, 10 (Bridgetown, Barbados, 10-11 July 2006).

<sup>19</sup> RAF Public Disclosure Document, *supra* note 3, annexes 1 and 2.

were believed to be the easiest and most feasible areas for the RAF, because they were the most well-established focal areas accounting for two-thirds of GEF resources.<sup>20</sup>

38. In the biodiversity focal area for GEF-4, 57 countries have individual, country-specific allocations ranging from \$3.5 million to \$63.2 million. The remaining 93 countries are in the group and may seek GEF project financing from a group allocation of \$146.8 million. In the climate change focal area, 46 countries have individual allocations ranging from \$3.1 million to \$150 million, while the remaining 115 countries in the group may seek project financing from a group allocation of \$148.6 million.<sup>21</sup>

39. The GEF Evaluation Office has been asked to undertake an independent mid-term review of the RAF. The Evaluation Office has noted various questions and concerns in respect to the RAF that could potentially be incorporated into the terms of reference for the review. These questions include “the extent to which countries were not consulted in the process, funding to [small island developing states], how the benefits and performance indices were constructed, the effects of the RAF on the [GEF Small Grants Programme], and also whether the RAF is relevant, effective, efficient, and will it produce sustainable results.”<sup>22</sup> The Evaluation Office’s review will be presented to the GEF Council at its December 2008 meeting. The Council may at that time decide whether the Secretariat should implement a GEF-wide RAF for the fifth replenishment, based upon the findings in the mid-term review, the progress of the Secretariat in developing indicators for the other focal areas and, presumably, the views expressed by stakeholders, especially the Conferences of the Parties to the respective multilateral environmental conventions that will be affected.

#### **2.4. Expanded Role of Operational Focal Points**

40. Operational Focal Points (OFPs) are designated government officials concerned with the operational aspects of GEF activities, such as endorsing project proposals to affirm that they are consistent with national plans and priorities. Only recipient member countries eligible for GEF funding have OFPs.

41. The RAF gives OFPs an enhanced role in facilitating the identification of a country’s national priorities for GEF project funding. Working with the Implementing and Executing Agencies, OFPs confirm that project concepts can be financed within the country’s focal area-specific RAF allocation.<sup>23</sup> During regional consultations sponsored by the GEF Secretariat in 2006, numerous OFPs expressed frustration about the low

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<sup>20</sup> GEF Secretariat, *Draft Notes/June 5: GEF Sub-Regional Consultation, North Africa, Middle East, South and West Asia*, 14 (Alexandria, Egypt, 18-19 May 2006) [hereinafter Alexandria Sub-Regional Consultation].

<sup>21</sup> *Progress Report on Implementing the RAF*, supra note 17, at 5.

<sup>22</sup> Comments by David Todd, *GEF Sub-Regional Consultation for the Caribbean*, supra note 18, at 10.

<sup>23</sup> GEF Secretariat, *GEF Resource Allocation Framework: Guidelines for Country Operational Focal Points to Manage GEF Resources*, 1 (undated).

capacity and resources available to fulfill their new roles in driving the RAF process.<sup>24</sup> They also expressed some guarded optimism:

Under the RAF, the focal point will have to ensure the consistency, congruency, and relevance of projects in terms of national priorities. We will have to be more strict and rigorous when we evaluate projects. We will no longer have surprises, for example, projects in the pipeline that we did not know about – this is a benefit of the RAF so it is not all bad.<sup>25</sup>

42. Under the former GEF CEO, the GEF Secretariat instructed each OFP to “over-program” the RAF allocation of their country by “maintaining a list of concepts under development larger than its four-year allocation.”<sup>26</sup> This recommendation was intended to ensure that countries would have enough projects in the GEF pipeline to use their entire allocation during the replenishment period. However, the current GEF CEO announced a change in this policy at the Council meeting of December 2006, out of concern that over-programming could result in funds being unavailable for members of the “group” that did not get their projects into the GEF pipeline early enough. Instead of over-programming, countries should submit project concepts and proposals only when they are well-developed; for members of the group, projects up to \$1 million will be reviewed within the context of the applicant country’s national priorities, while projects over \$1 million will be reviewed periodically against all other such proposals submitted by countries in the group.<sup>27</sup>

### **3. Legal Relations between the GEF and the Conventions**

43. This Part presents relevant excerpts and summaries of the legal instruments and authorities upon which the analysis in Part 4 is based. They include the GEF Instrument; the Climate Change, Biological Diversity, and Stockholm POPs Conventions; memoranda of understanding (MoU) between the GEF and the Conferences of the Parties to each convention; and convention guidance from the COPs to the GEF. As noted in the Introduction, the role of the Stockholm Convention in the analysis is necessarily limited, because the RAF does not apply to the POPs focal area during GEF-4 and no GEF Benefits Index has been prepared for it yet. Thus, it is not possible at this time to evaluate whether the RAF is consistent with the Stockholm Convention and guidance. Nevertheless, the relevant Stockholm Convention instruments have been included in this Part to help illustrate the common features found under all three conventions, and because a compilation of Stockholm instruments in this Study may prove useful for future, additional analysis of the RAF, when and if a decision is made to expand it GEF-wide.

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<sup>24</sup> See, e.g., Alexandria Sub-Regional Consultation, *supra* note 20, at 22-23.

<sup>25</sup> GEF Secretariat, Regional Working Group ‘C’ Presentation, in *GEF Sub-Regional Consultation for Latin America*, 22 (Panama City, Panama, 6-7 July 2006).

<sup>26</sup> *Id.* at 2.

<sup>27</sup> See *Progress Report on Implementing the RAF*, *supra* note 17, at 6, para. 25.

### 3.1. Summary of Key Points

- The GEF Instrument requires the GEF to “function under the guidance of, and be accountable to, the Conferences of the Parties” of the conventions it serves, and to “act in conformity with the policies, program priorities and eligibility criteria decided by the Conference of the Parties for the purposes of the convention concerned.”
- The Biological Diversity, Climate Change, and Stockholm POPs Conventions each require developed country Parties to “provide new and additional financial resources” to enable developing country Parties “to meet the agreed full incremental costs of implementing measures which fulfill their obligations” under the applicable convention. The “agreed full incremental costs” are to be agreed between a recipient developing country Party and the GEF. Each convention establishes a mechanism for the provision of financial resources that functions under the authority and guidance of, and is accountable to, the Conference of the Parties.
- As required by the GEF Instrument, the GEF Council has executed memoranda of understanding (MoU) with the COPs of all three conventions. The MoU provide that each COP will determine and communicate guidance to the GEF on the policies, programme priorities, and eligibility criteria for access to, and utilization of, financial resources available through the applicable financial mechanism. The GEF Council ensures that the GEF, in operating the convention financial mechanisms, will do so in conformity with the COP guidance. The MoU contain various, relatively mild provisions for resolving disagreements between the GEF Council and the COPs, should they arise.
- Each of the three convention COPs has issued initial guidance to communicate their instructions regarding the policies, program priorities, and eligibility criteria the GEF shall apply in operating the applicable financial mechanism. The Biodiversity and Climate Change COPs have each issued extensive additional guidance on a range of issues. None of the COPs has provided the GEF with a prioritization or relative ranking of the many activities that they have described as “priorities.”

### 3.2. GEF Instrument

44. The GEF operates “as a mechanism for international cooperation for the purpose of providing new and additional grant and concessional funding to meet the agreed incremental costs of measures to achieve agreed global environmental benefits” in the GEF focal areas.<sup>28</sup> The excerpts below from the GEF Instrument all pertain specifically to the GEF’s activities in respect to the financial mechanisms of the Biological Diversity, Climate Change, and Stockholm Conventions.

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<sup>28</sup> GEF Instrument, para. 2.

45. Paragraph 6 of the GEF Instrument gives the GEF responsibility to operate the financial mechanisms of the three conventions and establishes the basic operational relationship between the GEF and the Conferences of the Parties to those conventions:

In partial fulfillment of its purposes, the GEF shall, on an interim basis, operate the financial mechanism for the implementation of the United Nations Framework Convention on Climate Change and shall be, on an interim basis, the institutional structure which carries out the operation of the financial mechanism for the implementation of the Convention on Biological Diversity, in accordance with such cooperative arrangements or agreements as may be made pursuant to paragraphs 27 and 31.<sup>[29]</sup> The GEF shall be available to continue to serve for the purposes of the financial mechanisms for the implementation of those conventions if it is requested to do so by their Conferences of the Parties. The GEF shall also be available to serve as an entity entrusted with the operation of the financial mechanism of the Stockholm Convention on Persistent Organic Pollutants. *In such respects, the GEF shall function under the guidance of, and be accountable to, the Conferences of the Parties which shall decide on policies, program priorities and eligibility criteria for the purposes of the conventions. . . [emphasis added].*

46. Paragraph 9(a) of the Instrument requires GEF grants to conform with eligibility criteria decided by the COPs. Paragraph 9(e), which is not reproduced here, establishes the same requirement with respect to GEF concessional grants.

GEF funding shall be made available for activities within the focal areas defined in paragraphs 2 and 3<sup>[30]</sup> of this Instrument in accordance with the following eligibility criteria:

- (a) GEF grants that are made available within the framework of the financial mechanisms of the conventions referred to in paragraph 6 shall be in conformity with the eligibility criteria decided by the Conference of the Parties of each convention, as provided under the arrangements or agreements referred to in paragraph 27.

47. Paragraphs 15 and 20(h) of the Instrument set out the responsibilities of the GEF Council to “act in conformity with the policies, program priorities and eligibility criteria decided by the Conference of the Parties”:

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<sup>29</sup> Paragraph 27 requires the GEF Council to enter into cooperative agreements (memoranda of understanding) with the applicable Conferences of the Parties. The relevant textual passages are reproduced in Paragraph 48 of this Study, *infra*. Paragraph 31 of the Instrument covers reporting requirements, including reporting to the Conferences of the Parties.

<sup>30</sup> Paragraphs 2 and 3 of the Instrument identify the six GEF focal areas, state that GEF funding shall be “to meet the agreed incremental costs of measures to achieve agreed global environmental benefits” in those focal areas, and broadly define the types of activities eligible for funding.



15. The Council shall be responsible for developing, adopting and evaluating the operational policies and programs for GEF-financed activities, in conformity with the present Instrument and fully taking into account reviews carried out by the [GEF] Assembly. *Where the GEF serves for the purposes of the financial mechanisms of the conventions referred to in paragraph 6, the Council shall act in conformity with the policies, program priorities and eligibility criteria decided by the Conference of the Parties for the purposes of the convention concerned [emphasis added].*

20. The Council shall:

(h) in accordance with paragraphs 26 and 27, ensure that GEF-financed activities relating to the conventions referred to in paragraph 6 conform with the policies, program priorities and eligibility criteria decided by the Conference of the Parties for the purposes of the convention concerned[.]

48. Paragraph 15 (quoted above) and Paragraphs 5 and 20(f) also give the Council responsibility to develop and adopt operational policies and modalities for GEF-financed activities:

5. The GEF operational policies shall be determined by the Council in accordance with paragraph 20(f) . . . .

20. The Council shall:

(f) approve and periodically review operational modalities for the Facility, including operational strategies and directives for project selection . . . .

49. Paragraphs 26 and 27 of the Instrument reiterate the requirement that the GEF shall act “in conformity with the policies, program priorities and eligibility criteria decided by the Conference of the Parties”; Paragraph 27 requires the GEF Council to enter into cooperative agreements (i.e., memoranda of understanding) with the respective COPs:

26. The Council shall ensure the effective operation of the GEF as a source of funding activities under the conventions referred to in paragraph 6. The use of the GEF resources for purposes of such conventions shall be in conformity with the policies, program priorities and eligibility criteria decided by the Conference of the Parties of each of those conventions.

27. The Council shall consider and approve cooperative arrangements or agreements with the Conferences of the Parties to the conventions referred to in paragraph 6, including reciprocal arrangements for representation in meetings. Such arrangements or agreements shall be in conformity with the relevant provisions of the convention concerned regarding its financial

mechanism and shall include procedures for determining jointly the aggregate GEF funding requirements for the purpose of the convention. . . .

50. Neither the GEF Instrument nor the Rules of Procedure for the GEF Council include any provision concerning the settlement of disputes between members of the Council.<sup>31</sup>

### 3.3. Convention Texts

51. While each of the three conventions served by the GEF—the Convention on Biological Diversity, the Framework Convention on Climate Change, and the Stockholm Convention on Persistent Organic Pollutants (POPs)<sup>32</sup>—is an independent, legally distinct and sovereign entity, the provisions of the three instruments dealing with their respective financial resources and mechanisms have common themes that in most cases employ similar, and often identical, language. Thinking in terms of these common themes facilitates the analysis undertaken in Part 4 of this Study.

52. This section presents these common themes. The themes are grouped in two categories: (i) commitments made by *developed* countries to provide financial resources to assist *developing* countries in their implementation of convention commitments, and (ii) provisions establishing the financial mechanism for each convention. Each theme quotes or summarizes the relevant legal passages, includes citations to the applicable provisions of the individual conventions, and identifies instances in which a convention’s actual language may differ in a notable way from the theme.

#### 3.3.1. Commitments to provide financial resources

53. In all three conventions, developed country Parties agree to “provide new and additional financial resources” to enable developing country Parties “to meet the agreed full incremental costs of implementing measures which fulfill their obligations” under the applicable convention.<sup>33</sup> Other important provisions relating to this commitment include:

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<sup>31</sup> The Instrument does contain provisions for resolving disputes between GEF Implementing Agencies, *see* para. 28, and for project review by the Council when at least four Council members believe the project is inconsistent with the Instrument or GEF policies and procedures. *See* para. 30.

<sup>32</sup> The UN Convention to Combat Desertification will officially join these three conventions when the GEF Assembly amends the GEF Instrument to that effect. *See* discussion *supra* para. 9.

<sup>33</sup> *See* UNFCCC, art. 4.3; CBD, art. 20.2; Stockholm Convention, art. 13.2. Under the Stockholm Convention, Parties with economies in transition are also eligible to receive these financial resources. In this Study, use of the term “developing countries” should be understood to include countries with economies in transition, where applicable. Under the UNFCCC, developing countries shall receive the *full costs* (not just incremental costs) of complying with their commitments to submit national communications under Article 12.1. *See* UNFCCC, art. 4.3; *see also* GEF Instrument, para. 6.

- The “agreed full incremental costs” are to be agreed between a recipient developing country Party and the entity or institutional structure operating the financial mechanism (i.e., the GEF).<sup>34</sup>
- Implementation of the financial resource commitments “shall take into account the need for adequacy, predictability, the timely flow of funds and the importance of burden sharing among the contributing Parties.”<sup>35</sup>
- “The extent to which developing country Parties will effectively implement their commitments under [the conventions] will depend on the effective implementation by developed country Parties of their commitments under the Convention related to financial resources and transfer of technology and will take fully into account the fact that economic and social development and eradication of poverty are the first and overriding priorities of the developing country Parties.”<sup>36</sup>
- The Parties to each convention “shall take full account of the specific needs and special situation of least developed countries in their actions with regard to funding and transfer of technology.”<sup>37</sup>

### 3.3.2. Financial mechanism

54. Each convention establishes a “mechanism for the provision of financial resources to developing country Parties for purposes of this Convention on a grant or concessional basis.”<sup>38</sup> Additionally, the conventions provide that:

- The financial mechanism “shall function under the authority and guidance of, and be accountable to, the Conference of the Parties for purposes of [the applicable] Convention.”<sup>39</sup>

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<sup>34</sup> Stockholm Convention, art. 13.2. In the case of the Climate Convention, the costs are to be agreed in accordance with the provisions of Article 11, which governs the financial mechanism. *See* UNFCCC, art. 4.3. For the CBD, they are to be agreed in accordance with the convention guidance established by the COP. *See* CBD, art. 20.2.

<sup>35</sup> *See* Stockholm Convention, art. 13.2; CBD art. 20.2 contains essentially identical language, while UNFCCC art. 4.3 does not include the reference to “timely flow of funds.”

<sup>36</sup> CBD, art. 20.4; UNFCCC art. 4.7 is virtually identical; Stockholm Convention art. 13.4 contains additionally at its end the clause, “giving due consideration to the need for the protection of human health and the environment.”

<sup>37</sup> CBD, art. 20.5; Stockholm Convention, art. 13.5; UNFCCC, art. 4.9. UNFCCC art. 4.8 identifies additional developing country Parties, including small island countries, whose needs and concerns also warrant “full consideration” in respect to financial resources. Stockholm art. 13.5 includes small island developing states in addition to least developed countries; the “transfer of technology” language is not included in this paragraph because it appears in a separate article on technical assistance. *See* Stockholm Convention, art. 12.5.

<sup>38</sup> CBD, art. 21.1; Stockholm Convention art. 13.6 and UNFCCC art. 11.1 contain essentially identical language, though the UNFCCC also states that the resources are “including for the transfer of technology.”

<sup>39</sup> CBD, art. 21.1; *see also* UNFCCC, art. 11.1 (omitting the “under the authority” language); Stockholm Convention, art. 13.6 (adding that the mechanism shall function under the COP’s authority “as appropriate”).

- Each COP retains the power to decide to what entity or institutional structure(s) it shall entrust the operation of the financial mechanism.<sup>40</sup> In all three conventions, this has been the GEF.
- Each COP shall “determine the policy, strategy and programme priorities, as well as detailed criteria and guidelines for eligibility for access to and utilization of the financial resources.”<sup>41</sup>
- Each COP shall, within a specified time, undertake a review of the effectiveness of the financial mechanism, including the COP’s criteria and guidance to it, and shall take “appropriate” action to improve its effectiveness.<sup>42</sup>

### 3.4. Memoranda of Understanding

55. As this Study quotes in Section 3.2 above, the GEF Instrument at Paragraph 27 requires the Council to “consider and approve cooperative arrangements or agreements” with the three convention COPs. Paragraph 27 further stipulates that those arrangements or agreements must “be in conformity with the relevant provisions of the convention concerned regarding its financial mechanism.” (The “relevant provisions of the convention concerned” are among the convention excerpts identified in Section 3.3, above.) The GEF Council has executed memoranda of understanding (MoU) with the COPs of all three conventions.<sup>43</sup> This section reviews those MoU to identify their common and individual provisions that may be relevant to addressing the core question of whether the RAF is consistent or compatible with the conventions that the GEF serves.

#### 3.4.1. Purpose

56. The purpose of each MoU is to memorialize a common understanding of the relationship between the COP and the GEF Council, in order to give effect to the relevant provisions of the convention (i.e., those provisions dealing with the financial mechanism)

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<sup>40</sup> See CBD, art. 21.1; UNFCCC, art. 11.1; Stockholm Convention, art. 13.6.

<sup>41</sup> CBD, art. 21.1-2; UNFCCC, art. 11.1 and 11.3(a) (omitting the word “strategy”); Stockholm Convention, art. 13.7(a) (including additional details of what shall be addressed under the COP’s guidance to the financial mechanism).

<sup>42</sup> CBD, art. 21.3; Stockholm Convention, art. 13.8 (including additional details for the review, such as the ability of the mechanism to address changing needs of developing country Parties and the “effectiveness of the performance of the institutional entities entrusted to operate the financial mechanism”); UNFCCC, art. 11.4 (stating simply that, within four years after its first session, the COP “shall review the financial mechanism and take appropriate measures”).

<sup>43</sup> See CBD Conference of the Parties, Decision III/8, *Memorandum of Understanding Between the Conference of the Parties to the Convention on Biological Diversity and the Council of the Global Environment Facility*, 61, UNEP/CBD/COP/3/38 (Feb. 1997) [hereinafter CBD MoU]; Stockholm Convention Conference of the Parties, Decision SC-1/11, *Memorandum of Understanding Between the Conference of the Parties and the Council of the Global Environment Facility*, 61-62, UNEP/POPS/COP.1/31 (May 2005) [hereinafter Stockholm MoU]; UNFCCC Conference of the Parties, Decision 12/CP.2, *Memorandum of Understanding Between the Conference of the Parties and the Council of the Global Environment Facility*, 55, FCCC/CP/1996/15/Add.1 (July 1996) [hereinafter UNFCCC MoU].

and the GEF Instrument (i.e., those provisions establishing the obligations of the GEF in respect to the conventions it serves, especially Paragraph 26).<sup>44</sup>

### 3.4.2. Guidance from the Conference of the Parties

57. The MoU provide that the COPs will determine, and communicate guidance to the GEF on, “the policy, strategy, programme priorities and eligibility criteria for access to and utilization of financial resources available through the financial mechanism.”<sup>45</sup> The GEF Council will ensure that the GEF, in operating the convention’s financial mechanism, will do so in conformity with the COP guidance.<sup>46</sup> Regarding funding decisions for specific projects, they “should be agreed between the developing country Party concerned and GEF in accordance with policy, strategy, programme priorities and eligibility criteria established by the Conference of the Parties.”<sup>47</sup>

### 3.4.3. Reporting and accountability

58. Each MoU requires the GEF Council, in order to meet the GEF’s obligations of accountability to the COPs, to prepare and submit periodic reports to each COP covering all GEF-financed activities carried out for purposes of the applicable convention.<sup>48</sup> The reports must include, among other things, “specific information on how GEF has applied the guidance determined by the Conference of the Parties, as well as any other decision of the Conference of the Parties communicated to GEF” in respect to the financial mechanism.<sup>49</sup>

### 3.4.4. Resolution of disputes

59. The CBD and Stockholm MoU each contain a paragraph on “Interpretation” providing “[i]f differences arise in the interpretation of the present Memorandum of Understanding, the Conference of the Parties and the Council will reach a mutually

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<sup>44</sup> See CBD MoU, para. 1.1; UNFCCC MoU, para. 1; Stockholm MoU, para. 2.

<sup>45</sup> CBD MoU, para. 2.1; UNFCCC MoU, para. 2 (stating COP will “decide on policies, programme priorities and eligibility criteria related to the Convention for the financial mechanism which shall function under the guidance of and be accountable to the COP”); Stockholm MoU, para. 3 (stating that COP will provide GEF with “appropriate guidance” addressing, *inter alia*, “Determination of the policy, strategy and programme priorities, as well as clear and detailed criteria and guidelines regarding eligibility for access to and utilization of financial resources . . .”).

<sup>46</sup> See UNFCCC MoU, para. 4; CBD MoU, para. 2.1 (stating that the GEF “will finance activities that are in *full conformity* with the guidance” [emphasis added]); Stockholm MoU, para. 4.

<sup>47</sup> CBD MoU, para. 4.2; Stockholm, MoU, para. 6; UNFCCC MoU, para. 5 (stating such decisions “should be agreed between the developing country Party concerned and the GEF in conformity with policy guidance from the COP.”).

<sup>48</sup> See CBD, MoU, paras. 3.1, 3.4; UNFCCC MoU para. 6; Stockholm MoU, paras. 7-9.

<sup>49</sup> Stockholm MoU, para. 8; *see also* CBD MoU, para. 3.2 (requesting specific information on how the GEF has “applied the guidance and implemented the policy, strategies, programme priorities and eligibility criteria determined by” the COP); UNFCCC MoU, para. 7.

acceptable solution.”<sup>50</sup> Although the UNFCCC MoU does not contain this general dispute resolution language, it—like the other two MoU—establishes a procedure for when a convention Party considers that a Council decision regarding a *specific* project was not consistent, or not in compliance with, the policies, program priorities, or eligibility criteria established by the COP in the context of the applicable convention. If, after considering the matter, the COP concludes that the specific project decision does not comply with its guidance, then each MoU allows a somewhat different remedy. In the case of the CBD, the COP “may ask the GEF Council for further clarification on the specific project decision.”<sup>51</sup> The UNFCCC COP “may ask the Council of the GEF for further clarification on the specific project decision and in due time may ask for a reconsideration of that decision.”<sup>52</sup> The Stockholm MoU gives its COP perhaps the strongest recourse, providing that the COP “may decide to request GEF to propose and implement a course of action to address the concern regarding the project in question.”<sup>53</sup>

60. Finally, all three MoU allow either the COP or the GEF Council to withdraw from the respective agreement upon written notification from one to the other, with the withdrawal taking effect six months after notification.<sup>54</sup>

### 3.4.5. Other provisions

61. The three MoU contain several other provisions that may be tangentially germane to this Study. Among these are:

- Provisions that allow the GEF Council to seek additional guidance as needed from the COPs; in the case of the Stockholm MoU, if the Council has difficulties responding to a request from the COP, it may explain its concerns and the two parties “will find a mutually agreed solution.”<sup>55</sup>
- Provisions that require the Council and the CBD and UNFCCC COPs, respectively, to cooperate in the determination of the aggregate funding needs of the applicable convention in respect to the GEF replenishment.<sup>56</sup>
- Provisions that elaborate procedures regarding the effectiveness evaluations of the financial mechanisms, as provided under each convention.<sup>57</sup>

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<sup>50</sup> CBD MoU, para. 9; *see also* Stockholm MoU, para. 23 (containing additional language stating, “If necessary the issue may be referred, as appropriate, to the Conference of the Parties and /or the Council of GEF for consideration.”).

<sup>51</sup> CBD MoU, para. 4.2.

<sup>52</sup> UNFCCC MoU, para. 5.

<sup>53</sup> Stockholm MoU, para. 6.

<sup>54</sup> *See id.* para. 25; UNFCCC MoU para. 15; CBD MoU para. 10.

<sup>55</sup> Stockholm MoU, para. 11; CBD MoU, para. 3.5; *see also* UNFCCC MoU, para. 8 (stating GEF Council may seek guidance from COP on any matter it considers relevant to operation of the financial mechanism).

<sup>56</sup> *See* UNFCCC MoU, para. 9; CBD MoU, para. 5.

<sup>57</sup> *See* CBD MoU, para. 4.3; UNFCCC MoU, para. 12; Stockholm MoU, paras. 14-16.

### 3.5. Convention Guidance

62. The GEF Instrument and each of the conventions and MoU establish convention guidance as the primary vehicle by which the COPs will communicate their instructions regarding the policies, program priorities, and eligibility criteria the GEF shall apply in operating the applicable financial mechanism. The GEF Instrument and the MoU require the GEF to operate the financial mechanisms “in conformity” with that guidance. Thus, the pertinent question of this Study, in respect to convention guidance, is whether implementation of the RAF will impact the GEF’s ability to conform to the guidance on policies, program priorities, and eligibility criteria that it receives from the COPs.

63. At each of their first sessions, the Conferences of the Parties to the Climate, Biodiversity, and Stockholm Conventions agreed upon guidance to their financial mechanisms that covered, *inter alia*: (a) criteria for determining eligibility of countries and activities for funding under the financial mechanism, (b) policies (also referred to as “policies and strategies”) governing how financial resources should generally be allocated, and (c) program priorities upon which the financial mechanism should focus.<sup>58</sup> Since their first sessions, the UNFCCC and CBD COPs have provided the GEF with extensive, additional guidance covering a broad range of issues. It is not necessary for the purposes of this Study to present a detailed summary or synthesis of all the convention guidance. Instead, this section of the Study identifies those aspects of the guidance for each of the conventions that may be relevant for evaluating, in Part 4, whether the RAF may impact the eligibility of Parties to receive GEF project funds, or prejudice the eligibility, priorities, or policies related to certain types of projects within the focal areas, in ways that do not conform to COP guidance.

#### 3.5.1. Climate Convention guidance

64. At its first session, the UNFCCC COP issued guidance on eligibility for countries and activities, policy, and program priorities. In later sessions, the COP has issued additional, general policy guidance regarding operation of the financial mechanism, and specific guidance about activities related to commitments that developing countries are required or invited to undertake under the Convention.<sup>59</sup>

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<sup>58</sup> See UNFCCC Decision 11/CP.1, *Initial guidance on policies, programme priorities and eligibility criteria to the operating entity or entities of the financial mechanism*, 34, FCCC/CP/1995/7/Add.1 (June 1995); CBD Decision 1/2, annex I, *Policy, Strategy, Programme Priorities and Eligibility Criteria for Access to and Utilization of Financial Resources*, 32, UNEP/CBD/COP/1/17 (Feb. 1995); Stockholm Decision SC-1/9, annex, *Guidance to the financial mechanism*, 52, UNEP/POPS/COP.1/31 (Jan. 2005).

<sup>59</sup> Much of the summary information in this section is derived from Subsidiary Body for Implementation, *Synthesis report on the financial mechanism*, FCCC/SBI/2006/7 (2006) and SBI, *Report on the assessment of funding necessary to assist developing countries in fulfilling their commitments under the Convention prepared on the context of the Memorandum of Understanding between the Conference of the Parties and the Council of the Global Environment Facility*, FCCC/SBI/2004/18 (2004).

### 3.5.1.1. Guidance on eligibility

65. In its initial guidance on eligibility, the COP stated that “eligibility criteria shall apply to countries and to activities and shall be applied in accordance with Article 11.1, 11.2 and 11.3” of the Convention.<sup>60</sup> Regarding countries, “only developing country Parties [are] eligible to receive funding through the financial mechanism, in accordance with Article 4.3.”<sup>61</sup> Eligible activities are national communications under Article 12.1 and “[m]easures covered by Article 4.1,”<sup>62</sup> which include: national inventories of greenhouse gases; education, training, and public awareness; information exchange; scientific cooperation; technology transfer; adaptation (as elaborated below in Paragraph 67); minimizing adverse effects of climate change; national programs to mitigate climate change; and conservation and enhancement of sinks and reservoirs.<sup>63</sup> These measures “should be agreed between the developing country Party and the [GEF], in accordance with Article 4.3.”<sup>64</sup>

### 3.5.1.2. Policy guidance

66. The COP’s general policy guidance has contained various recommendations related to GEF’s performance and approach. Perhaps the most important areas of general policy guidance relevant to this Study are:

- Consistency of GEF activities with national priorities. “Projects funded through the financial mechanism should be country-driven and in conformity with, and supportive of, the national development priorities of each country.”<sup>65</sup>
- Sustainability. “As far as possible . . . activities should be supportive of the national development priorities which contribute to a comprehensive national response to climate change [and should be] sustainable and lead to wider application.”<sup>66</sup>

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<sup>60</sup> Decision 11/CP.1, *supra* note 58, para. 1(c). The referenced Convention provisions deal with establishment of the financial mechanism.

<sup>61</sup> Article 4.3 states that developed country Parties shall provide financial resources “needed by the developing country Parties to meet the agreed full incremental costs of implementing measures that are covered by paragraph 1 of this Article and that are agreed between a developing country Party and the [GEF].”

<sup>62</sup> Decision 11/CP.1, para. 1(c)(ii). Eligibility for adaptation activities is covered in paragraph 1(d) of the guidance.

<sup>63</sup> *See* UNFCCC, art. 4.1. Articles 5 (research and systematic observation, including capacity building in developing countries) and 6 (education, training, and public awareness) provide more detailed instructions as to how commitments under Article 4.1(g) and 4.1(i) may be carried out.

<sup>64</sup> Decision 11/CP.1, para. 1(c)(ii).

<sup>65</sup> *Id.* para. 1(a)(ii). By its decision 5/CP.8, the COP subsequently invited the GEF to strengthen efforts to promote consistency of GEF activities with national priorities and to integrate them into national planning frameworks, such as national sustainable development strategies and poverty reduction strategies.

<sup>66</sup> Dec. 11/CP.1, para. 1(a)(iv).



### 3.5.1.3. Guidance on program priorities

67. In respect to specific guidance on program priorities, the COP has stated that “[p]riority should be given to the funding of agreed full costs (or agreed full incremental costs, as appropriate) incurred by developing country Parties in complying with their obligations under Article 12.1 [concerning national communications] and other relevant commitments under the Convention.”<sup>67</sup> Thus, virtually all commitments that developing countries are required or invited to undertake under the Convention may be deemed to be “program priorities.” More particularly, these activities include:

- National communications. As stipulated by the Convention, the financial mechanism shall meet the “agreed full costs” of these activities (funded as “enabling activities” by the GEF). The COP instructed the GEF also to cover “Stage 1” adaptation activities (see “adaptation,” below) that are undertaken in the context of national communications activities by developing country Parties.<sup>68</sup> Because the GEF committed the current funding for second national communications during GEF-3, these activities are not subject to the RAF in GEF-4. However, that may not be the case for third and subsequent national communications.<sup>69</sup>
- Capacity building. COP guidance has always stressed the importance of financial support for capacity building of developing countries to implement the Convention and deal with the effects of climate change. The guidance has “evolved from [a] focus on capacity to prepare national communications (decisions 1/CP.11 and 11/CP.2) to more detailed guidance relating to other areas, such as systematic observation, technology transfer (decision 2/CP.4) and reinforcement of national focal points and regional networks (decision 5/CP.10).”<sup>70</sup> The GEF reports that its main focus on climate change capacity building is in the areas of mitigation and adaptation.<sup>71</sup>
- Education, training, and public awareness. The COP has repeatedly issued guidance concerning this area. The GEF has supported it under enabling activities in the context of national communications. In response to further guidance it received at COP 10, the GEF has discussed with implementing agencies and Parties “project ideas that enhance public awareness in a cost-effective manner.”<sup>72</sup>
- Development and transfer of technologies. The COP has requested the GEF to provide financial support for a technology transfer framework through the

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<sup>67</sup> *Id.* para. 1(b)(i).

<sup>68</sup> *Id.* para. 1(d)(iv).

<sup>69</sup> See GEF Council, *Focal Area Strategies and Strategic Programming for GEF-4*, 30, para. 16, GEF/C.31/10 (May 2007).

<sup>70</sup> SBI, *Synthesis report*, *supra* note 59, para. 65.

<sup>71</sup> *Id.* para. 70.

<sup>72</sup> *Id.* paras. 79-84.

climate change focal area and the Special Climate Change Fund.<sup>73</sup> “One of the GEF’s major objectives has been to catalyze transfer of climate-friendly technology through its projects. . . . GEF projects have actively supported assessments of the barriers that prevent local markets from using new mitigation technologies and practices and formulation of strategies to remove such barriers.”<sup>74</sup>

- Adaptation. As noted above under “national communications,” COP 1 instructed the GEF to fund “stage 1” adaptation (short-term planning and study) activities as part of its support for national communications of developing countries. The COP further instructed the GEF in subsequent guidance to begin also to support implementation of adaptation response measures (“stage 2” activities).<sup>75</sup> The GEF consequently established a new strategic priority, “Piloting an Operational Approach to Adaptation,” under which it helps countries respond to the adverse impacts of climate change in a manner that generates global benefits under the GEF focal areas. The resources for this new strategic priority are those carried over into GEF-4 from an initial allocation of \$50 million made during GEF-3.<sup>76</sup> During GEF-4, adaptation funds “will be drawn from the five percent of the total climate change resources that have been set aside for regional and global projects under the [RAF].”<sup>77</sup> Thus, in GEF-4, climate focal area funds for adaptation are outside the RAF country allocations system.

Two additional, voluntary funds created under the UNFCCC deal with adaptation. The Special Climate Change Fund and the Least Developed Countries Fund are not part of the GEF Trust Fund or the climate change focal area. Instead of focusing on global benefits, these two funds focus on development.

- Mitigation. The COP has issued guidance instructing the GEF to support activities to mitigate climate change, particularly those activities referred to in Article 4.1, and to prioritize such projects identified in the national communications of developing country Parties. Neither the Convention nor COP guidance establishes a priority among GEF-eligible countries on the basis of the quantity of their emissions. Climate change mitigation projects fall within four operational programs (OPs) approved by the GEF Council. These represent by far the largest share of GEF climate change resources:
  - (a) Removal of barriers to energy conservation and efficiency (OP5);

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<sup>73</sup> *Id.* para. 87. The Special Climate Change Fund is a voluntary trust fund established by COP-7 and operated by the GEF. It is not part of the GEF Trust Fund or the climate change focal area.

<sup>74</sup> *Id.* para. 91.

<sup>75</sup> See, e.g., UNFCCC Decision 2/CP.4, *Additional guidance to the operating entity of the financial mechanism*, 5, para. 1(a), FCCC/CP/1998/16/Add.1; Decision 6/CP.7, *Additional guidance to the operating entity of the financial mechanism*, 40, para. 1(a), FCCC/CP/2001/13/Add.1.

<sup>76</sup> See GEF Council, *Focal Area Strategies for GEF-4: Working Drafts and Proposed Process*, 18, para. 45, GEF/C.30/5 (2006).

<sup>77</sup> See *Summary of Negotiations on the Fourth Replenishment*, *supra* note 2, at 32, para. 42.

- (b) Promotion of the adoption of renewable energy by removing barriers and reducing implementation costs (OP6);
- (c) Reduction of the long-term costs of low-GHG-emitting energy technologies (OP7); and
- (d) Promotion of environmentally sustainable transport (OP11).

While Article 4.1(d) of the Convention promotes sustainable management, conservation, and enhancement of greenhouse gas sinks and reservoirs, including biomass, forests, oceans, etc. (and activities under these areas are technically eligible to receive financial mechanism funding, pursuant to Paragraph 1(c)(ii) of Decision 11/CP.1), GEF climate change operational programs do not cover activities under these areas, nor has the COP instructed the GEF to fund them through the climate change focal area.<sup>78</sup> Instead, carbon sequestration projects may be eligible for GEF support under OP12, “integrated ecosystem management,” which is a multi-focal area intended to bring “synergy between three of the GEF focal areas (i.e. Biological Diversity, Climate Change, and International Waters) and land degradation to optimize multiple benefits.”<sup>79</sup>

### 3.5.2. Convention on Biological Diversity guidance

68. The Conference of the Parties to the CBD at its first session issued broad, initial guidance to the GEF on eligibility, policies and strategies, and program priorities.

#### 3.5.2.1. Guidance on eligibility

69. For activities related to implementation of the Convention, only developing country Parties are eligible to access funding from the financial mechanism. Eligible projects are those “that seek to meet the objectives of conservation of biological diversity and sustainable use of its components.”<sup>80</sup> While these original project eligibility criteria referred to two of the objectives identified in Article 1 of the Convention, they did not mention the third, “fair and equitable sharing of the benefits arising out of the utilization of genetic resources” (access and benefit-sharing). The COP provided the GEF with guidance requesting support for projects addressing access and benefit-sharing in Decision V/13 and subsequent decisions.

70. In May 2003, the GEF Council approved capacity building for implementation of the Cartagena Biosafety Protocol as a strategic priority of the GEF Biodiversity

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<sup>78</sup> However, in UNFCCC Decision 2/CP.12, the COP requested the GEF to “explore options for undertaking land use and land-use change projects within the climate change focal area of the Global Environment Facility, in light of past experience.” UNFCCC Decision 2/CP.12, *Review of the Financial Mechanism*, 7, para. 1(c), FCCC/CP/2006/5/Add.1 (Jan. 2007).

<sup>79</sup> GEF Secretariat, *Operational Program #12: Integrated Ecosystem Management*, 2 (2000). Additionally, COP 11 asked GEF to consider whether carbon capture and storage would be consistent with GEF strategies and objectives. See Decision 5/CP.11, *Additional guidance to an operating entity of the financial mechanism*, 1, para. 3, FCCC/CP/2005/5/Add.1 (Mar. 2006).

<sup>80</sup> CBD Decision I/2, *supra* note 58, annex I, part II.

Program.<sup>81</sup> The Protocol's Conference of the Parties serving as the Meeting of the Parties (COP/MOP) forwards its financial mechanism guidance to the CBD COP, which in turn includes it as part of its own guidance to the GEF. Thus, COP 7 conveyed eligibility criteria for the Cartagena Protocol to the GEF: "All developing countries, in particular the least developed and small island developing States among them, and countries with economies in transition, including countries amongst these that are centres of origin and centres of genetic diversity, which are Parties to the Protocol, are eligible for funding by the Global Environment Facility in accordance with its mandate." Additionally, such countries that are Convention Parties not yet Party to the Protocol, but which have demonstrated a "clear political commitment towards becoming Parties to the Protocol," are eligible to receive GEF biosafety funding.<sup>82</sup>

71. In respect to the RAF and its possible impact upon GEF funding related to the Cartagena Protocol, COP 8 requested the GEF:

to provide an assurance that the introduction of the Resource Allocation Framework will not in any way jeopardize eligible Parties' access to funding for biosafety-related activities including regional activities where appropriate . . . [and] to base their allocation of resources to support the implementation of the Protocol on country needs and priorities, and as a priority to support the establishment of a base level of capacity in all eligible developing country Parties, in particular the least developed and the small island developing States, and Parties with economies in transition.<sup>83</sup>

72. This request pertains to all three areas of COP guidance, including eligibility, policies and strategies, and program priorities. The GEF will presumably respond to the request in its next report to COP 9.

### **3.5.2.2. Guidance on policies and strategies**

73. For its initial guidance on policies and strategies, the COP determined that:

Financial resources should be allocated to projects that fulfil the eligibility criteria and are endorsed and promoted by the Parties concerned. Projects should contribute to the extent possible to build cooperation at the sub-regional, regional and international levels in the implementation of the Convention. Projects should promote utilization of local and regional expertise. The [GEF] should over time assist all eligible countries to fulfil

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<sup>81</sup> See GEF Council, *Joint Summary of the Chairs, GEF Council Meeting, May 14-16, 2003*, para. 9.

<sup>82</sup> Decision VII/20, *Further guidance to the financial mechanism*, 317, para. 21, UNEP/CBD/COP/7/21 (Apr. 2004).

<sup>83</sup> Decision VIII/18, *Guidance to the financial mechanism*, 262, paras. 9-10, UNEP/CBD/COP/8/31 (June 2006).

their obligations under the Convention. Policy and strategy may be revised, as necessary, by the Conference of the Parties.<sup>84</sup>

74. The COP subsequently instructed the GEF to provide these financial resources “taking into account the special needs of the least developed countries and the small island developing States amongst them, for country-driven activities and programmes, consistent with national priorities and objectives, recognizing that economic and social development and poverty eradication are the first and overriding priorities of developing countries. . . .”<sup>85</sup>

### 3.5.2.3. Guidance on program priorities

75. COP 1 identified an extensive list of “programme priorities” in its initial guidance. The list included priorities related to: conservation and sustainable use of biodiversity, ecosystems, and habitats; identification and monitoring of biodiversity components; capacity building to facilitate preparation and implementation of national strategies and plans; technology transfer and access; sustainability of project benefits; scientific and technical cooperation; innovative economic incentives; involvement of local and indigenous people; conservation and sustainable use in coastal and marine resources and arid, semi-arid, mountainous areas; and “[p]rojects aimed at the conservation of biological diversity and sustainable use of its components which integrate social dimensions including those related to poverty.”<sup>86</sup>

76. The Third Overall Performance Study of the GEF (OPS3) noted that this “initial guidance provided to the GEF was ‘so broad and general that it was difficult to respond to it in operational terms’”; however, “subsequent guidance has become more focused and detailed.”<sup>87</sup> This subsequent guidance has pertained to numerous Convention areas, including biological diversity of dry and sub-humid lands, the global taxonomy initiative, access and benefit-sharing, implementation of the Convention’s Strategic Plan and 2010 target, scientific and technical cooperation, transfer of technology, national reporting, forest biodiversity, agricultural biological diversity, protected areas, alien species, and the cross-focal area issue of biodiversity and climate change.<sup>88</sup>

77. In response, the GEF has established, as part of its operational strategy, four operational programs that cover different ecosystems and a fifth that provides for additional activities more specific to the conservation of agricultural biodiversity:

- (a) Arid and Semi-Arid Zone Ecosystems (OP 1);
- (b) Coastal, Marine, and Freshwater Ecosystems (OP 2);

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<sup>84</sup> Decision I/2, *supra* note 58, annex, part I.

<sup>85</sup> Decision VI/17, *Financial mechanism under the Convention*, 200, para. 10, UNEP/CBD/COP/6/20 Part 2 (May 2002).

<sup>86</sup> Decision I/2, *supra* note 58, annex, part III, para. 4.

<sup>87</sup> Office of Monitoring and Evaluation, *OPS3: Progressing Toward Environmental Results, Third Overall Performance Study of the GEF*, 73 (June 2005) (quoting OPS2).

<sup>88</sup> See CBD Conference of the Parties, Note by the Executive Secretary, *Compilation of previous guidance given to the financial mechanism by the Conference of the Parties*, UNEP/CBD/COP/8/INF/1 (2006).

- (c) Forest Ecosystems (OP 3);
- (d) Mountain Ecosystems (OP 4); and
- (e) Conservation and Sustainable Use of Biological Diversity Important to Agriculture (OP 13).

78. Additionally, the GEF has identified four strategic priorities to guide its approach to biodiversity conservation:

- (a) Protected Areas (SP 1), intended to conserve biodiversity through the establishment and expansion of protected areas. Though the COP gave the GEF no direct guidance on protected areas until COP7, protected areas have been a prominent part of the GEF portfolio;<sup>89</sup>
- (b) Mainstreaming Biodiversity (SP 2), seeking to integrate biodiversity conservation into national priorities, production systems, and sectors to secure national and global environmental benefits;
- (c) Capacity Building (SP 3), which builds national capacity for implementation of the Cartagena Biosafety Protocol; and
- (d) Best Practices (SP 4) to improve analysis, synthesis, and dissemination of best practices, innovative approaches, and new tools.<sup>90</sup>

79. OPS3 found that the GEF has generally been responsive to the COP's guidance, particularly to guidance on forest ecosystems and capacity building in biosafety. It found that the GEF "has not adequately addressed the convention priority on access and benefit sharing."<sup>91</sup> As to the guidance itself, OPS3 concluded that:

guidance from some conventions, in particular the CBD, has proliferated without any prioritization. Thus, to some extent, rather than better aligning the goals of the GEF, this proliferation of guidance appears to have defined a sufficiently vast area that GEF entities may find whatever direction they seek in it . . . . [This] has, in part, resulted in focal area programs that do not have strategic focus and coherence.<sup>92</sup>

### 3.5.3. Stockholm Convention guidance

80. Because the Stockholm Convention entered into force much more recently than did the Biological Diversity and Climate Change Conventions, its body of convention guidance to the GEF is much smaller.<sup>93</sup>

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<sup>89</sup> *See id.* at 20.

<sup>90</sup> *See* GEF Secretariat, *Biodiversity in the GEF Operational Strategy*, available at [http://www.gefweb.org/Projects/Focal\\_Areas/bio/bio\\_ops.html](http://www.gefweb.org/Projects/Focal_Areas/bio/bio_ops.html).

<sup>91</sup> OPS3, *supra* note 87, at 73.

<sup>92</sup> *Id.* at 186.

<sup>93</sup> The discussion in this section does not include guidance from the Third Conference of the Parties, which took place 30 April to 4 May, 2007.

### 3.5.3.1. Guidance on eligibility

81. Regarding eligibility, developing countries and countries with economies in transition that are Party to the Convention are eligible to receive funding. The “entity or entities entrusted with the operation of the financial mechanism” (i.e., the GEF) are instructed to “take full account of the specific needs and the special situation of the least developed countries and small island developing States in their actions with regard to funding.”<sup>94</sup> Eligible activities are those that seek to meet the objectives of the Convention by assisting eligible Parties to fulfill their Convention obligations.<sup>95</sup>

82. In additional guidance, the COP subsequently requested the GEF “to exercise any necessary flexibility in applying its criteria for access in order to ensure compatibility with the country eligibility criteria established . . . in decision SC-1/9 in accordance with the specific priorities and needs of eligible countries.”<sup>96</sup>

### 3.5.3.2. Guidance on policy and strategy

83. In respect to policy and strategy, the initial guidance called on the GEF to allocate financial resources to meet the agreed full incremental costs of implementing eligible activities that, *inter alia*, are country-driven, conform with and support the priorities identified in the national implementation plans of eligible Parties, conform with the program priorities reflected in relevant guidance and guidelines adopted by the COP, build capacity, and promote sustainable national socio-economic development and poverty reduction.<sup>97</sup>

### 3.5.3.3. Guidance on program priorities

84. The initial guidance listed program priorities that include the various activities that developing country Parties may or must undertake to implement their commitments under the Convention.<sup>98</sup>

85. At the time this Study was written, the GEF’s operational program on POPs (OP#14) still existed only in draft form. Because it was released nearly two years before COP 1, the draft does not reflect any of the guidance the GEF has since received from the COP. The draft states that it “will be finalized in light of the guidance from the Conference of the Parties of the Stockholm Convention expected to be received following

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<sup>94</sup> Decision SC-1/9, *Guidance to the financial mechanism*, 53, annex, para. 1(a), UNEP/POPS/COP.1/31 (May 2005). For preparation of their initial national implementation plans, developing countries and EITs that are signatories or in the process of becoming Parties “should also be eligible.” *Id.*

<sup>95</sup> *Id.* para. 1(b).

<sup>96</sup> Decision SC-2/11, *Additional guidance to the financial mechanism*, 46, para. 2, UNEP/POPS/COP.2/30 (May 2006).

<sup>97</sup> Decision SC-1/9, para. 2.

<sup>98</sup> To review the list, *see id.* para. 3.

its first meeting.”<sup>99</sup> The GEF is undertaking a review of all of its operational programs, including OP#14.

#### **4. Legal Analysis of the RAF**

86. Based on the information compiled in Parts 2 and 3, this Part undertakes an analysis to address the question of whether the RAF is consistent or compatible with the conventions that the GEF serves. For the reasons described in the Introduction and in Paragraph 43 of Part 3, the analysis focuses on the GEF’s operation of the financial mechanisms of the Climate and Biological Diversity Conventions.

87. The GEF Instrument and the memoranda of understanding all require the GEF to operate the financial mechanisms “in conformity with” guidance received from the COPs. Therefore, the main thrust of the Study’s inquiry will be to determine whether the RAF may prejudice or impair the ability of the GEF to operate the financial mechanisms in conformity with the relevant policies, program priorities, and eligibility criteria that the COPs have issued as convention guidance to the GEF. If the RAF causes the GEF to fail to act in conformity with COP guidance, then the Council’s adoption and the GEF’s implementation of the RAF may be considered to breach Paragraphs 15, 20(h), and 26 of the GEF Instrument. Moreover, they may violate the terms of the applicable MoU. Thus, the precise meaning of “in conformity with” is critical to the analysis.

88. The analysis will begin by defining this key term. The analysis will proceed by separately examining the RAF as it applies to the two financial mechanisms. For each mechanism and focal area, the analysis will identify and characterize select parts of the convention guidance, determine what impact the RAF may have on the issue to which the guidance pertains, and then evaluate whether the GEF’s actions in precipitating that impact are in conformity with the selected guidance.

89. An important point should be recognized before the analysis begins. The RAF uses various criteria to determine the allocation “envelope” against which countries may request GEF grants. It does not prioritize project types at the portfolio level. In considering the potential impacts of the RAF, the analysis must consequently focus primarily on whether the criteria are appropriate for determining how much GEF funds a country may be eligible to receive in a focal area, and not on what types of projects a country and the GEF may undertake after the allocations have been determined.<sup>100</sup>

90. That said, the analysis will take into account the fact that the RAF criteria, when applied, have the effect of rewarding (or not rewarding) certain countries by giving them a relatively large or small country allocation based on their GBI and GPI-related

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<sup>99</sup> GEF Secretariat, *Operational Program on Persistent Organic Pollutants [Draft] (OP#14)*, note 1, GEF/C.22/Inf.4 (2003).

<sup>100</sup> But consider that compliance with the 50% rule may require a certain amount of “gaming” of the system, insofar as the amount and timing of project proposals are concerned. For additional consideration of this question, please see Section 4.5.3, *infra*.



attributes. Although the RAF criteria purport to reflect GEF strategic priorities and needs within the focal areas, they are based on certain assumptions, and they disproportionately benefit those countries with attributes that have the greatest potential (as measured by the criteria) to respond to those assumptions. Countries that have fewer of those attributes will be eligible to receive a smaller share of GEF resources in the focal area. That should not present a legal problem, provided that GEF strategic priorities and needs, as they may be reflected in the RAF criteria and assumptions, conform with those in COP guidance. However, if there are inconsistencies between the GEF strategic priorities and needs (as reflected in the criteria and assumptions) and those identified in COP guidance, then implementation of the RAF could cause the GEF to fail to be “in conformity with” COP guidance, because countries with certain kinds of needs identified by the COP as priorities for the financial mechanism may receive allocations under the RAF that are too small to allow them to address those needs in the way the COP intended.

#### 4.1. Summary of Key Points

- The GEF and GEF Council must act “in conformity” with COP guidance, which means they must obey the guidance and comply with it. Failure to do so constitutes a breach of the GEF Instrument and MoU.
- The practice of the GEF and COPs over the years suggests that the GEF Council’s adoption of the RAF and imposition of it upon the financial mechanisms—without first receiving explicit pre-authorization to do so from the COPs—should not be viewed as a *per se* violation of the MoU or the GEF Instrument. While the Council holds the exclusive power to develop and adopt GEF operational policies and modalities, the impacts of those policies and modalities must fully conform with COP guidance.
- For both the Climate and Biological Diversity Conventions, the RAF appears to be “in conformity with” COP guidance on country eligibility, because it ensures a minimum allocation for every eligible country. However, the fact that the GEF has, *sua sponte*, established an allocation ceiling that may prevent countries from pursuing certain projects under otherwise eligible activities may raise a viable question as to whether the GEF has acted in conformity with COP guidance. The COPs should provide clear instructions specifying how they expect the GEF to proceed in the matter.
- Because the RAF contains no apparent means of measuring or reflecting country-driven-ness or national priorities, it may not reflect the national development priorities of some Parties, as required by COP guidance. At the project portfolio level, however, the RAF may enable countries to prioritize their projects more effectively.
- UNFCCC guidance on policy and program priorities:
  - If it becomes the intention of the GEF, in response to COP guidance, to devote significant resources under the climate focal area to addressing market failures and barriers to carbon finance in LDCs and SIDS, then the GEF may need to re-consider the feasibility of using

the RAF criteria as they presently exist, because these countries will likely tend to receive the lowest climate country scores and allocations under the current RAF.

- The RAF should be seen as conforming with COP guidance in respect to the program priorities of energy and transport-related mitigation and enabling activities.
- If the COP requests the GEF to begin funding land use and land-use change and forestry projects within the climate change focal area, then the GBI<sub>CC</sub> criteria will need to be modified to accommodate that change in focus. Similarly, the GBI<sub>CC</sub> criteria might need to be modified to take into account, and give credit for, the geological carbon sequestration potential of countries.
- The fluid situation regarding adaptation funding renders it impossible to determine at this time whether the RAF will prevent or allow the GEF and Council to act in conformity with COP guidance on adaptation in future replenishment periods.
- CBD guidance on policy and strategies and program priorities:
  - Because the GBI<sub>BIO</sub> heavily favors countries with high terrestrial biodiversity and disfavors those with lower terrestrial biodiversity and high marine biodiversity, the RAF apparently requires the GEF to discriminate against many SIDS in a manner that fails to conform with COP guidance.
  - It is not clear at this time whether the RAF will promote or hinder cooperation among GEF-eligible Parties at the sub-regional, regional, and international levels.
  - The RAF as presently designed results in resource allocations that have little or nothing to do with the country needs and priorities of developing country Parties to the Cartagena Protocol. In light of COP 8's admonishment that the GEF should "base their allocation of resources to support the implementation of the Protocol on country needs and priorities . . .," the GEF should promptly revise the RAF in respect to its application to the Protocol, to bring itself back into conformity with COP guidance.
  - Because only areas that remain currently uncleared for agriculture or urban settlement are considered in the computation of a country's terrestrial biodiversity score, countries with significant needs related to the preservation of agricultural biodiversity—especially LDCs—will not receive RAF allocations that reflect those needs.
  - By focusing on ecosystems and species, without any consideration of the human relationship to them, the GBI<sub>BIO</sub> criteria and the RAF do not reflect the interests of countries that wish to focus on access and

benefit sharing and other human dimensions of biodiversity, particularly insofar as poverty alleviation is concerned.

- Neither the UNFCCC nor CBD COP has issued guidance to the GEF regarding how the Small Grants Program should be managed. Accordingly, while the GEF's new approach of shifting support for the SGP from GEF core funding to individual countries could have serious, negative implications for the future of the program, it does not raise a question at this time of whether it is in conformity with COP guidance.
- The "50% rule" introduces a burdensome degree of complexity that endangers the functionality of the RAF during GEF-4. As such, its inclusion by the GEF Council should be viewed as a failure to conform with COP guidance to further simplify and improve the efficiency of the process under which developing countries receive GEF project funding.

#### 4.2. Defining "in Conformity with"

91. The GEF Instrument and MoU to which the GEF Council is party require the GEF and Council to act "in conformity with" COP guidance. The term "in conformity with" thus establishes a legal standard of behavior in respect to actions the GEF and Council may take concerning the financial mechanisms of the conventions.

92. "Conformity" is a noun defined as "action or behavior in correspondence with socially accepted standards, conventions, rules, or laws," and "acting according to certain accepted standards."<sup>101</sup> As a legal term it is synonymous with "compliance," which in turn means "obedience" and "conformity with the law."<sup>102</sup> In international treaty law, "conformity" is used synonymously with "compliance" or "comply." Failure to conform or comply with a treaty provision constitutes a breach of an international obligation:

The International Law Commission (ILC), Articles on Responsibility of States for Internationally Wrongful Acts (GA Res. 56/83, 12 December 2001), article 12, defines the existence of a breach of an international obligation as occurring '*when an act of that State is not in conformity with what is required of it by that obligation, regardless of its origin or character.*' The International Court of Justice has asserted that such breach includes '*failure to comply with treaty obligations.*' (*Gabcikovo-Nagymaros Project* (Hungary/Slovakia) 1997 ICJ Reports 7, para. 57). Whether there has been such failure is determined by asking whether the behaviour in question '*was in conformity*' with the treaty requirements (J.

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<sup>101</sup> See "conformity," WordNet 1.7.1. (Princeton University 2001), at Answers.com, <http://www.answers.com/topic/conformity> (visited 29 Mar. 2007); "conformity," THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE, 4th ed. (Houghton Mifflin Company 2003), <http://www.thefreedictionary.com/conformity>.

<sup>102</sup> See "compliance," WEST'S ENCYCLOPEDIA OF AMERICAN LAW (The Gale Group, Inc. 1998), at Answers.com, <http://www.answers.com/topic/compliance> (visited 30 Mar. 2007); "Definitions," Alberta Environment (Canada), <http://www3.gov.ab.ca/env/air/Info/definitions.html#AC>.

Crawford, *The International Law Commission's Articles on State Responsibility. Introduction, Text and Commentaries* (Cambridge University Press, 2002) 125) [emphases in original].<sup>103</sup>

93. Thus, in order to act “in conformity with” convention guidance, the GEF and Council must obey the guidance and comply with it. Failure to do so would constitute a breach of the GEF Instrument and the MoU.

#### 4.2.1. “Gap filling”

94. The inquiry does not, however, end with the definition alone. Statutes, rules, and other legally binding standards that delegate authority may be very broad, vague, or imprecise. They may invite interpretation or “gap filling” on the part of the entity that must conform with them. Sometimes, standards may be explicit in stating whether and to what extent such gap filling is acceptable. More often (as has generally been the case with the convention guidance), they are not. An important consideration in determining whether an entity’s “gap filling” actions conform or comply with a legal standard is whether the standard is intended to give the entity permission or authority to do something that might impose a burden on, or infringe the rights of, a third party. In such cases, the authorized entity may be constrained from exercising its authority in ways that are not explicitly authorized by the standard, because filling in gaps or acting beyond the explicit bounds of the standard could result in a greater burden or harm to a third party than the law-making body envisioned.

95. On the other hand, if the authority in question was intended to allow the entity to bestow some benefit on the third party that does not result in harm to another party, then there may be less concern about whether and to what extent the entity fills in gaps in the standard. In fact, there may be an expectation that the entity will take the initiative to fill in gaps, if doing so is necessary to accomplish the standard’s objectives. The main difference depends on whether the standard was intended to constrain or stimulate the entity’s actions.

96. In the case of the GEF and its role as the institution operating the financial mechanisms of the conventions, the guidance issued by the COPs indicates that each COP has generally expected the GEF to respond proactively to their instructions by taking whatever initiative may be required to accomplish the objectives of the guidance. Accordingly, where the GEF and the Council have taken the initiative to devise mechanisms or approaches related to the financial mechanisms that may not have been explicitly defined in the convention guidance, but which are taken to accomplish the COP’s objectives, then that initiative would likely be deemed in compliance or conformity with the guidance, provided that it did not contradict the guidance in any material way.

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<sup>103</sup> Rabinder Singh et al., *Mutual Defence Agreement and the Nuclear Non-Proliferation Treaty: Joint Advice*, para. 14, in DISARMAMENT POLICY (No. 78, July/Aug. 2004).

97. These observations go to the threshold question of whether the GEF Council’s adoption and imposition of the RAF upon the financial mechanisms—without first obtaining explicit authorization from the COPs to do so—may constitute a *per se* violation of the MoU and, in turn, the GEF Instrument. As suggested in Paragraphs 89 and 90 above, the RAF may impact the amount of project funds a country will be eligible to receive in the focal areas. These impacts could have an effect upon the extent to which a country may be able to participate in certain activities supported by the financial mechanisms. Because COP guidance has often been very broad, the GEF has generally responded to it by taking various initiatives that have not been explicitly defined in the guidance. The COPs have not objected to this general approach. Thus, the practice of the GEF and COPs over the years suggests that the MoU would not prohibit the GEF from developing a system for allocating resources to countries solely because the COPs had not explicitly pre-authorized it in their guidance.

#### **4.2.2. GEF operational policies and modalities**

98. An additional, related question is whether the RAF may be a purely internal operational modality of the GEF and thus exempt from any regulation by the COPs through their guidance. If not, might the COPs have the power to issue guidance that would have prohibited the Council from adopting the RAF in the first place?

99. Paragraphs 5, 15, and 20(f) of the GEF Instrument (quoted in Part 3.2, *supra*) give the Council responsibility to determine, develop, and adopt operational policies and modalities for GEF-financed activities. Neither the Instrument nor the various MoU suggest that the Council must, or even may, share this responsibility with any other entity, including the COPs of the conventions it serves. Therefore, the COPs are not empowered to prohibit the Council’s development or adoption of the RAF, *to the extent that the RAF constitutes an operational policy or modality*.

100. However, even if (for the sake of argument) the RAF is deemed to be exclusively an operational modality of the GEF, its implementation will have impacts on the policies, program priorities, and eligibility criteria decided by the COP and conveyed to the GEF through COP guidance. In such cases, the Council will be obliged under the explicit terms of the Instrument and MoU to ensure that those impacts fully conform with the COP’s guidance, because the Council is required to act in conformity with that guidance “where the GEF serves for the purposes of the financial mechanisms of the conventions.”<sup>104</sup> Thus, the analysis of this Part must turn to whether the impacts of the RAF may be in conformity with COP guidance.

#### **4.3. Guidance from the Climate Convention**

101. This section analyzes that question—whether the impacts of the RAF may be in conformity with COP guidance—in the context of the UNFCCC. First, it examines the RAF in respect to COP guidance on the eligibility of countries and activities. It then

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<sup>104</sup> GEF Instrument para. 15; *see also id.* paras. 20(h), 26; UNFCCC MoU para. 4; CBD MoU para. 2.1; Stockholm MoU para. 4.

evaluates policy guidance. Finally, the section discusses guidance on program priorities. Please note that a number of the arguments made in this section also apply to the analysis of guidance from the Biological Diversity Convention undertaken in Section 4.4, *infra*.

### 4.3.1. Eligibility

#### 4.3.1.1. Eligibility of countries

102. The guidance from the UNFCCC COP in respect to country eligibility is straightforward: Any developing country Party is eligible to receive funding under the financial mechanism. The guidance does not contain any specific instructions as to how much funding a developing country Party is eligible to receive. By establishing a \$1 million minimum allocation for every eligible country, the RAF ensures that all developing country Parties to the UNFCCC may apply for, and reasonably expect to receive, project funding in the climate focal area.<sup>105</sup> Thus, on its face, the RAF appears to be “in conformity with” COP guidance on country eligibility, because it provides every eligible country access to the financial mechanism.

103. Nevertheless, the question has been raised as to whether “the new allocation system establish[es] a new system of eligibility when it goes in the direction of an *ex ante* allocation system based on criteria that have not been explicitly expressed by Parties to the Convention?”<sup>106</sup> As discussed above in Paragraph 97, the practice of the GEF and the COPs over the years suggests that adoption of the RAF should not be considered a *per se* violation of COP guidance or the respective MoU. In the specific context of country eligibility to the UNFCCC financial mechanism, there is no provision of the Convention, MoU, or COP guidance stating that some developing country Parties should receive more GEF funding in the focal area than other Parties; nor is there any provision of those instruments stating that *all* developing country Parties must receive equal amounts. The practice of the GEF has been generally to channel the largest share of focal area funds to those countries with the largest energy-related GHG emissions.<sup>107</sup> While the COP has sometimes called on the GEF to recognize additional priorities (for example, “stage 2” adaptation activities), it has never implied that the GEF should allocate focal area funds equally to all eligible Parties.<sup>108</sup> In light of that history, the RAF should be seen as adhering to COP guidance for country eligibility, because it codifies prior GEF practice to which the COP has long acquiesced.

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<sup>105</sup> For most GEF-eligible countries, the \$1 million minimum allocation may be supplemented through the Small Grants Programme (SGP) and global and regional projects.

<sup>106</sup> Luis Gomez-Echeverri, Implementation Programme, UNFCCC Secretariat, Comments to GEF submitted in response to GEF Seminar on Resource Allocation Framework, September 2004, Paris, France, at 2 (8 Oct. 2004), *available at* [http://www.gefweb.org/Whats\\_New/UNFCCC.doc](http://www.gefweb.org/Whats_New/UNFCCC.doc).

<sup>107</sup> *See* OPS3, *supra* note 87, at 37 (finding that, in general, higher levels of GEF funding have been allocated to countries with the highest potential for GHG mitigation, but that there were inconsistencies in the relationship between GHG emissions levels and GEF funding in other countries, particularly in middle emitters).

<sup>108</sup> This statement applies to projects funded under the Operational Programs and Strategic Priorities for the focal area. It does not apply to national communications, for which the agreed full compliance costs are to be met, and for which a specific allocation per national communication is available.

#### 4.3.1.2. Eligibility of activities

104. As this Study has already noted, the RAF does not prioritize project types for countries at the portfolio level. Accordingly, the RAF will not have a direct impact on the types of activities that eligible countries may pursue in the focal area, up to the amounts of their country allocations, and it similarly does not change the eligibility of those types of activities that the COP has identified through its guidance as being eligible for funding under the financial mechanism. That said, the RAF could prevent some countries, especially those in the group, from pursuing specific projects within a particular type of activity if the GEF-eligible costs of the project exceed the country's allocation and the country is not able to make up the shortfall by identifying sufficient co-finance.<sup>109</sup> In light of the fact that the incremental costs of pursuing activities under Article 4.1 must be *agreed* between a developing country Party and the GEF, COP guidance has never purported to establish a requirement that the GEF must approve and finance the full incremental costs of *all* proposed, eligible project activities.<sup>110</sup> This effect of the RAF may thus be viewed as being consistent with COP guidance because, practically speaking, it does not substantially diverge from the GEF's pre-RAF approach.

105. However, even if the COP generally acquiesced to the GEF's pre-RAF allocation approach for activity eligibility by not calling upon the GEF to correct it, the fact that the GEF has, *sua sponte*, established an allocation ceiling that may prevent countries from pursuing certain projects under otherwise eligible activities may raise a viable question as to whether the GEF has acted in conformity with COP guidance, because the COP has never suggested that such a formal restriction should exist. As a legal matter, the question does not have a clear answer. If the COP concludes that the GEF, in adopting and implementing the RAF, has *not* conformed with COP guidance in respect to eligibility of activities, then the COP should state as much in its guidance to the GEF, and it should provide clear instructions specifying how it expects the GEF to proceed in the matter.

#### 4.3.2. Policy guidance

106. Policy guidance from the COP to the GEF stresses that projects funded through the financial mechanism should be country-driven and should conform with the national development priorities of each recipient country. As noted by the GEF Third Overall Performance Study (OPS3):

Several strategic tensions are associated with the will and the way for achieving and sustaining benefits. . . . [G]lobal environmental priorities, as advanced by the GEF, may not necessarily be consistent with country priorities (for example, of poverty alleviation). . . . In such cases, political will and, therefore, sustainability is undermined.

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<sup>109</sup> In some situations, countries may be able to circumvent this problem by pooling their GEF resources in regional projects.

<sup>110</sup> See UNFCCC, art. 4.3. As stated above in footnote 108, this does not apply to national communications.

To achieve sustainable benefits, it is critical that the GEF focus on those countries where political will exists above those where it does not exist. In those countries where political will is not sufficient, efforts should be spent on building political will, not on actual projects.<sup>111</sup>

107. Thus, OPS3 identified the tension that exists in both the climate and biological diversity focal areas between the need to achieve global benefits and the need to conform with national development priorities. This tension is inherent in the GEF Instrument, which states that the GEF shall operate “for the purpose of providing new and additional grant and concessional funding to meet the agreed incremental costs of measures to achieve agreed global environmental benefits,”<sup>112</sup> while also requiring it to “fund programs and projects which are country-driven and based on national priorities designed to support sustainable development.”<sup>113</sup> Although it is frequently said of the GEF that it “is not a development agency,” both the Instrument and the COP guidance the GEF is obliged to obey establish an expectation among many developing countries, including least-developed countries and small island developing states, that the GEF can and should provide focal area funding that responds to the needs articulated by recipient countries, rather than those articulated primarily by the GEF or its implementing agencies. Historically, true “country-driven-ness” for GEF projects in LDCs and SIDS has been elusive. Yet OPS3 recognized that, where GEF priorities are inconsistent with country priorities, including poverty alleviation, then the global benefits achieved by a project may not be sustained.

108. The GEF Benefits Index for climate is intended to capture the potential of countries to achieve global benefits related to greenhouse gas mitigation in the energy and transport sectors. Moreover, as discussed in Paragraph 36, *supra*, the relative characteristics of the GBI and GPI as components of the country score ensure that the GBI drives the allocation. Thus, for those UNFCCC developing country Parties whose national priorities and poverty alleviation strategies include a focus on greenhouse gas mitigation in the energy and transport sectors, and that have high GHG emissions and rising GHG efficiency, the priority factors in the RAF for climate will align with their national priorities and situations and reward them with a proportionately high country allocation in the focal area. Conversely, a small island developing state with low GHG emissions, whose national development priorities in the climate change area center on adaptation and whose needs in this area may be very high, will receive a proportionately low GBI<sub>CC</sub> under the RAF, and thus a proportionately low country allocation.<sup>114</sup>

109. In both of these situations, the RAF should not restrict whether the countries can pursue GEF *projects* that may reflect their national priorities up to the ceiling of their

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<sup>111</sup> OPS3, *supra* note 87, at 101.

<sup>112</sup> GEF Instrument, para. 2.

<sup>113</sup> *Id.* para. 4.

<sup>114</sup> As noted in “adaptation,” Paragraph 67, *supra*, GEF trust funds for adaptation during GEF-4 are “carry over” funds from GEF-3 and not subject to the RAF. However, no similar arrangement exists at this time for GEF-5, when “the Secretariat will implement a GEF-wide RAF by 2010, if feasible.” *Summary of Negotiations on the Fourth Replenishment*, *supra* note 2, at 8, para. 14.



respective country allocations. In fact, according to the GEF, knowing their country allocations will enable countries better to prioritize projects, and should allow each country to integrate GEF projects into its normal development operational cycle on the basis of the expected GEF resources.<sup>115</sup> However, the country whose national priorities and situation correspond to the priorities reflected in the RAF criteria will receive the higher RAF allocation, while the country whose national priorities and needs do not will receive a far lower one.

110. Complicating this analysis is the evolving relationship of the GEF to the carbon financing mechanisms of the Kyoto Protocol, particularly its Clean Development Mechanism. These mechanisms are becoming increasingly active in channeling public and private sector resources to GHG mitigation projects in developing countries, and they have begun to compete with similar GEF projects, undercutting the rationale for many of them. As the GEF role of underwriting GHG mitigation projects in energy and transport is supplanted by carbon finance, an increasingly important emerging alternative for the GEF is to focus on market transformation in sectors, regions, or countries where market failures or barriers are preventing access to private sector carbon finance.

111. Assuming the GEF desires to increase its activities in this area, the question remains as to whether the RAF GBI<sub>CC</sub> favoring large GHG emitters, rising GHG efficiency, and strong project portfolio performance and environmental governance will also be conducive to programmatic strategies seeking to address these kinds of market failures and barriers. Such market failures and barriers are perhaps most prevalent in LDCs and SIDS which, to date, have had little success attracting investment through the Kyoto mechanisms. These are also the countries that will likely tend to receive the lowest climate country scores and allocations under the RAF as it is currently structured. If it becomes the intention of the GEF, in response to convention guidance, to devote significant resources under the climate focal area to addressing market failures and barriers to carbon finance in LDCs and SIDS, then the GEF may need to re-consider the appropriateness of using the RAF criteria as they presently exist.

112. In its initial guidance to the GEF, the UNFCCC COP said that activities under the financial mechanism should be sustainable and should lead to wider application. OPS3 observed that the goal of sustainability—a product of political will associated with projects that are consistent with country priorities—can be in tension with the desire to achieve global environmental benefits. In the RAF country score equation, GBI measures the potential for achieving global benefits, while GPI—which purports to rank “each country’s *capacity* to deliver potential global environmental benefits” (emphasis added)<sup>116</sup>—may be viewed as a proxy for measuring sustainability. However, even if GPI is seen as a proxy for sustainability, it contains no apparent means of measuring or reflecting country-driven-ness or national priorities, which OPS3 identifies as key criteria for sustainability.

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<sup>115</sup> See *id.* at 31, para. 31; SBI, *Synthesis Report*, *supra* note 59, at 26, para. 156.

<sup>116</sup> *The GEF Resource Allocation Framework*, *supra* note 10, annex 2, at 20.

113. In fact, where capacity building is a primary prerequisite for ensuring sustainable project results, as it is in many LDCs and SIDS, the RAF is not designed to respond to that need, because the GPI tends to credit those countries that already have the capacity to host sustainable projects. The RAF guarantees that each country will receive at least a minimum allocation against which it can apply for project grants, and it does not restrict the types of projects that may be approved against the allocation “envelope.” But it all but ensures that, for those countries (especially LDCs and SIDS) whose fossil fuel consumption is low and whose national priorities include capacity building to enhance their abilities to deliver sustainable global benefits in the climate focal area, such countries will be eligible to receive only the minimum country allocation under the RAF.

114. The RAF did not create the tension between the GEF’s need to achieve global environmental benefits and its need to ensure that activities under the financial mechanisms conform with the national development priorities of each recipient country. However, it may be fair to say that, by formalizing and drawing attention to the GEF’s approach towards resource allocation, the RAF’s development and adoption have made the tension more apparent. At one of the sub-regional consultations in 2006, the GEF Secretariat stated that,

The change to RAF reflects the result of a three-year evolution in international development thinking whereby funds should go to countries that have appropriate policies and institutions in place to ensure funds are properly used. This began with [the World Bank International Development Association’s] performance-based allocation framework and is now the norm for many other international development banks.”<sup>117</sup>

115. The shortcoming of this justification, and the reason it may not assuage the concerns of some parties to the conventions, is that the GEF is not a development bank and, unlike the development banks, it is required to serve the conventions and act in conformity with their guidance.

116. As to whether the RAF conforms with the COP’s policy guidance, the answer would likely be “no” if the present RAF criteria applied not only to determination of a country’s allocation, but also to the nature of the projects for which it would be eligible to apply. However, that is plainly not the case: working with the implementing agencies and the GEF Secretariat, UNFCCC developing country Parties are free to apply for any type of project activity that is eligible under the financial mechanism, and the GEF and IAs can, in that context, respond to the national development priorities of those Parties, thereby complying with the relevant policy guidance of the COP.

117. Stating it another way, at the macro level, the RAF may not reflect the national development priorities of some Parties. But at the project portfolio level, the RAF may enable countries to prioritize their projects more effectively, because it may allow them

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<sup>117</sup> GEF Secretariat, *Draft Notes: GEF Sub-Regional Consultation for the Pacific SIDS*, 6 (Nadi, Fiji, 3-4 Aug. 2006).

better to integrate GEF projects into their normal development operational cycles on the basis of the expected GEF resources. As such, it should have little negative impact on national development priorities, other than to the extent that it may result in some Parties receiving more or less GEF funds with which to pursue them.

### 4.3.3. Program priorities

118. As reported in Paragraph 79 above, OPS3 found that guidance from some conventions had “proliferated without any prioritization.”<sup>118</sup> Although OPS3 singled out the CBD as the most pronounced example of this situation, the UNFCCC has similarly identified nearly all activities that developing countries may pursue under the Convention as “program priorities,” without actually giving the GEF any instructions as to whether or how it should give preference to one activity over another. This section examines whether the RAF may establish a *de facto* prioritization system or implicitly disfavor some priorities that the COP has identified in its guidance, in ways that may not conform with the guidance.

#### 4.3.3.1. GEF prioritization of COP program priorities

119. A “priority” is something with a “status established in order of importance or urgency”; to “prioritize” means “to put things in order of importance.”<sup>119</sup> In the absence of the UNFCCC COP providing the GEF with an actual, ordered prioritization of activities that are eligible for funding under the financial mechanism, the GEF over time has evolved an approach to prioritization that the COP has implicitly, and sometimes explicitly, approved.<sup>120</sup> The GEF responded in 1996 to the COP’s initial guidance by adopting the *Operational Strategy*: “The *Strategy* outlined several basic principles including an initial emphasis on enabling activities, with the largest share of resources going to long-term mitigation measures, and a small share committed to short-term mitigation projects.”<sup>121</sup> This approach provided the basis for the three operational programs identified in the *Strategy* (OP5, 6, and 7), and later to a fourth (OP11), all of which are still used to support mitigation activities.<sup>122</sup>

120. In 2003 the GEF Council established seven “strategic priorities” to guide GEF programming of resources. This was the first time that allocations and aggregate targets

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<sup>118</sup> OPS3, *supra* note 87, at 186.

<sup>119</sup> See “priority,” WordNet 1.7.1 (Princeton University 2001), <http://www.answers.com/priority>; “prioritize,” THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE, 4th ed. (Houghton Mifflin Company 2004), <http://www.answers.com/topic/prioritize>.

<sup>120</sup> The COP has periodically expressed concern over the difficulties that many developing country Parties have encountered in receiving financial assistance from the GEF. See, e.g., Decision 11/CP.2, preambular para. 5; Decision 2/CP.4, preambular para. 4. These concerns have focused on the impacts of GEF policies on eligibility criteria, disbursement, project cycle, incremental costs, etc. They have not criticized the GEF’s priorities in programming of resources.

<sup>121</sup> GEF Council, *Strategic Business Planning: Direction and Targets*, annex 2, para. 1, GEF/C.21/Inf.11 (2003).

<sup>122</sup> See *id.* For a list of the four operational programs, please see “mitigation,” *supra* para. 67.

were set for the GEF focal areas.<sup>123</sup> Throughout this “pre-RAF” era, “[p]roject proposals prepared by countries with agency support were approved on a first come-first served basis as long as funds still existed within the focal area.”<sup>124</sup>

121. Now (at the time of this Study’s preparation), the GEF is revising its focal area strategies for GEF-4 to “provide the basis for a simplified approach to GEF’s operational programs and strategic objectives.”<sup>125</sup> The Secretariat has proposed that a structure of strategic objectives and strategic programs should replace the previous structure of GEF operational programs and strategic priorities. For the climate change focal area, the strategy would establish five strategic objectives for mitigation and one for adaptation. The intent of the mitigation objectives is to “develop and transform the markets for energy and mobility in eligible countries so that over the long term they will be able to grow and operate efficiently toward a less carbon intensive path.”<sup>126</sup> The strategy would focus on four of the seven mitigation objectives initially defined for GEF-4, with an additional, special program on biomass energy.

122. The adaptation sub-focal area is essentially the strategic priority on adaptation adopted by the Council in 2003 as one of the seven strategic priorities for the climate change focal area. As noted in Paragraph 67, *supra*, the resources for this strategic priority are those carried over into GEF-4 from an initial allocation of \$50 million made during GEF-3. “Once these remaining funds (approximately US\$23 million) are allocated, an evaluation will be undertaken to draw initial lessons from adaptation funding for the GEF, to evaluate the potential for mainstreaming adaptation into GEF’s focal areas and to recommend, if appropriate, allocating more resources from the GEF Trust Fund to adaptation, consistent with UNFCCC guidance . . . to the GEF on adaptation.”<sup>127</sup>

123. The preceding paragraphs demonstrate that the GEF has responded to the COP’s inaction in providing an ordered set of program priorities by progressively developing over time its own system of prioritization. This system is now being formalized—to a much greater degree than was previously the case—through development of the revised focal area strategies and results-based management framework, and implementation of the RAF. This GEF response to COP inaction may be viewed as a case of “gap filling,” in which the GEF has developed particularized mechanisms and approaches that are intended to realize the objectives of COP guidance while also operating within its limited budget and adhering to the GEF Instrument requirement that focal area resources must be directed towards measures to achieve global environmental benefits.

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<sup>123</sup> SBI, *Report on the assessment of necessary funding*, *supra* note 59, at 13. Strategic priorities 1 through 6 deal with energy and transport. SP7 deals with adaptation. A chart listing the seven strategic priorities, their future targets and funding for GEF 3 is available at *id.*

<sup>124</sup> *Sub-Regional Consultation for the Pacific SIDS*, *supra* note 117, at 6.

<sup>125</sup> GEF Council, *Focal Area Strategies and Strategic Programming for GEF-4*, 1, para. 1, GEF/C.31/10 (May 11, 2007).

<sup>126</sup> *Id.* annex 2, at 26, para. 4.

<sup>127</sup> *Id.* at 35, para. 32.

124. The question remains, however, as to how, in a legal sense, the COP's inaction should be characterized. Should its failure to prioritize the many program "priorities" it has identified in COP guidance be understood as an intentional act indicating that it has not wished to establish a literal ranking of program priorities? Possible reasons why the COP has not prioritized the various strategic objectives in its guidance are obvious. First, the COP has adopted a sizeable body of cumulative guidance over many years. The breadth of this cumulative guidance makes it difficult to consider every aspect in its entirety and in a comprehensive manner, which would be necessary if the COP were continually to update and communicate what the priority order of the individual components should be. Thus, for practical reasons, the COP at each session adds to the cumulative guidance, but does not attempt to re-prioritize all of it.

125. Second, the consensus-driven decision-making procedures of the COPs mitigate against such a prioritization, because formally deciding that one country's "priority" is more important than another's could create clear winners and losers among the developing country Parties. The COP would likely be unable to come to a consensus agreement that did that. In this respect, guidance on program priorities that does not contain a specific ranking need not be seen as a "failure" of the COP to prioritize; rather, it demonstrates that the consensus of the COP has been *not* to provide such a ranking, but instead to leave the ranking up to the GEF.

126. The important point here is that, to date, the COP has not indicated that the GEF should be prevented from devising or implementing approaches that effectively establish rankings of the various program priorities. Rather, its acquiescence to the GEF's increasingly active and formal prioritization systems suggests that it approves them, or at least does not object to them. If, in the future, this proves no longer to be the case, then the COP should instruct the GEF to that effect in its guidance on program priorities.

#### **4.3.3.2. A *de facto* prioritization system**

127. Up to this point, this section has explored whether the GEF might be precluded from undertaking an approach that has the effect of ranking or ordering the program priorities identified in COP guidance, when the COP has not explicitly asked the GEF to do so. Now, the section will briefly discuss whether the RAF may constitute such an approach. Then it will determine whether the RAF may implicitly disfavor any individual priorities that the COP has identified in its guidance, in ways that may not conform with the guidance.

128. As this Study has reiterated several times, the RAF is used to determine a GEF funding "envelope" against which an eligible country may request project grants; it does not directly apply to decision-making at the project portfolio level. Nevertheless, because the GEF Benefits Index for climate is designed to capture the potential of countries to achieve global benefits related to greenhouse gas mitigation in the energy and transport sectors, and because the GBI drives the allocation, the RAF as presently constituted provides the largest allocations in the climate focal area to countries with high GHG emissions in those sectors. Conversely, it generally provides the lowest allocations to countries with low emissions in those sectors.

129. These dynamics are accentuated to some degree by the GPI, which favors countries with higher institutional and governance capacities associated with effective implementation of projects. Developing countries with higher industrial activity, infrastructure, and performance capacity thus tend to receive the highest allocations under the RAF. These countries are also the most likely to pursue and benefit from emissions mitigation projects in the energy and transport sectors. According to the GEF Secretariat, “The RAF basically made past implicit decision-making more explicit and more transparent.”<sup>128</sup> This *de facto* prioritization of such project types is an intended effect of the RAF.

#### 4.3.3.3. RAF impact on program priorities

130. More significant is the question of whether the RAF may disfavor any specific priorities that the COP has instructed the GEF to pursue. Following are brief analyses of some of these priorities.

131. Energy and transport-related mitigation. Because it favors countries with high emissions that can benefit most from energy and transport-related mitigation projects, the RAF plainly supports and prioritizes these project types. These projects also provide (along with adaptation projects) the main opportunity for GEF support of capacity-building in the climate change focal area.<sup>129</sup> Thus, there should be high confidence that the RAF conforms with COP guidance in respect to the program priorities of energy and transport-related mitigation.

132. Land use change and forestry. The RAF’s GBI<sub>CC</sub> is deliberately designed not to take into account GHG emissions associated with land use and land use change and forestry (LULUCF). Consequently, the RAF allocations for developing countries with low levels of industrialization but significant LULUCF needs will not reflect those needs. The GEF climate change operational programs do not cover activities under these areas, and the COP has not, to date, instructed the GEF to fund them through the climate change focal area. The RAF should therefore be seen as conforming with COP guidance insofar as LULUCF is concerned.

133. However, COP 12 requested the GEF to “explore options for undertaking land use and land-use change projects within the climate change focal area of the Global Environment Facility, in light of past experience.”<sup>130</sup> If the COP subsequently requests the GEF to begin funding such projects through the focal area, then the GBI<sub>CC</sub> criteria will need to be modified to accommodate that change in focus.

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<sup>128</sup> *Sub-Regional Consultation for the Pacific SIDS*, *supra* note 117, at 6.

<sup>129</sup> See SBI, *Synthesis Report*, *supra* note 59, at para. 70.

<sup>130</sup> Decision 2/CP.12, *supra* note 78, para. 1(c). The GEF and Scientific and Technical Advisory Panel (STAP) are “to review the experience in undertaking LULUCF related projects in biomass programs, sustainable land management, biodiversity, forestry and OP12.” GEF Council, *Relations with Conventions and Other Institutions*, 8, GEF/C.31/3 (May 11, 2007).

134. Carbon capture and storage. COP 11 asked the GEF to consider whether carbon capture and storage would be consistent with GEF strategies and objectives.<sup>131</sup> At the time of this writing, the GEF has not made such a determination, and the COP has not instructed it to include this type of activity among its program priorities. Because carbon capture and storage is associated primarily with the energy sector, and because developing countries with significant energy sectors will tend to receive larger allocations through the RAF, it is likely that country allocations through the RAF will be adequately sufficient to allow the GEF to conform with such an instruction from the COP, if it is given.

135. This conclusion is accurate, however, only to the extent that carbon capture and storage is undertaken in the same countries that produce the GHGs that need to be captured and stored. If, instead, the potential sequestration sites are remote and in countries with relatively low GBI<sub>CC</sub> scores, then the RAF would not be conducive to supporting a capture and storage priority. Resources to deal with this could probably be obtained through a number of ways, e.g., the Kyoto mechanisms, carbon finance outside those mechanisms, bilateral assistance, pooling of GEF resources from CO<sub>2</sub> producing and sequestering states (assuming they are all GEF-eligible), etc. In the unlikely event that these alternative arrangements were not available, then the GBI<sub>CC</sub> criteria might need to be modified to take into account, and give credit for, the geological sequestration potential of countries.

136. Enabling activities. National communications are funded through enabling activities. Financing includes a significant technical assistance and capacity building component. Under the guidelines for “top-up” capacity-building activities for national communications, the GEF provides, in addition to the funding for national communications, approximately US \$100,000 for enabling activities, which may include technology needs assessment, participation in systematic observation networks, improvement of emission factors, maintenance and enhancement of national capacities to prepare national communications, public awareness and education, and access to information.<sup>132</sup>

137. Although many of the GEF-eligible countries with the greatest needs in these areas are those that will receive relatively low scores under the present GBI<sub>CC</sub> and GPI criteria, the minimum \$1 million allocation ensures that, in at least some cases, they will receive allocations that are larger than the project funds they have been receiving in the pre-RAF period for these areas.<sup>133</sup> The RAF should be seen as supporting these program priorities and thereby conforming with relevant COP guidance.

138. Adaptation. As they are currently designed, the RAF climate indicators take no account of the adaptation needs of developing countries. This is especially the case for

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<sup>131</sup> See Decision 5/CP.11, *supra* note 79.

<sup>132</sup> See SBI, *Synthesis Report*, *supra* note 59, at para. 71.

<sup>133</sup> See, e.g., *Sub-Regional Consultation for the Pacific SIDS*, *supra* note 117, at 8 (stating “if the Pacific SIDS access their maximum allocated ceiling under the RAF, this would represent more funds accessed than under GEF3”).

least developed countries and small island developing states, which will tend to receive the lowest RAF allocations in the focal area while being among those countries that are potentially most vulnerable to the adverse effects of climate change. While the future needs of these countries for adaptation assistance will likely be extremely high, the RAF at present is not intended to make funding allocations that respond to those needs.

139. This situation should not present a problem during GEF-4, because the resources for the pilot phase of the strategic priority for adaptation (SPA) are relatively modest and were allocated during GEF-3; they will be drawn from the five percent of climate resources that have been set aside for regional and global projects; and eligible countries thus do not need to access those resources under their individual RAF allocations. Nevertheless, if it were applied in its present iteration to the focal area during GEF-5, the RAF may appear likely not to conform with the COP's guidance on adaptation.

140. Such a conclusion may be premature. The relationship between the SPA, the RAF, and the adaptation resource needs of developing country Parties is complex for several reasons. First, the SPA is in a pilot phase. After the remaining adaptation resources in the GEF Trust Fund are allocated, "an evaluation will be undertaken to draw initial lessons from adaptation funding for the GEF, to evaluate the potential for mainstreaming adaptation into GEF's focal areas and to recommend, if appropriate, allocating more resources from the GEF Trust Fund to adaptation . . . ." <sup>134</sup> While a number of possible options have been identified, <sup>135</sup> it is difficult to anticipate at this time how the Council will respond to these initial lessons.

141. Second, as a strategic priority of the climate change focal area, the SPA is bound by the GEF's incremental costs and global environmental benefits requirements. This means that a very significant portion of adaptation-related activities required by developing countries will not be eligible for funding under the SPA. Instead, "[i]f the project's focus is primarily on benefits in development sectors—such as health, agriculture, water or infrastructure—the proposed projects will have to access GEF funding through the new funds established under the climate convention: the Least Developed Country Fund (LDCF), the Special Climate Change Fund (SCCF), and eventually the Adaptation Fund." <sup>136</sup> Because these funds are not part of the GEF Trust Fund or the climate change focal area, they are not subject to the RAF.

142. Third, the GEF intends to integrate climate adaptation activities into the other GEF focal areas. "The global benefits required for adaptation activities under the SPA may be generated in any one of the focal areas supported by the GEF, or even in a

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<sup>134</sup> *Focal Area Strategies for GEF-4*, *supra* note 125, at 35, para. 32.

<sup>135</sup> See, e.g., GEF Council, *Operational Guidelines for the Strategic Priority "Piloting an Operational Approach to Adaptation (SPA)"*, 10, para. 39, GEF/C27/Inf.10 (2005).

<sup>136</sup> *Id.* at 2, para. 6. The Adaptation Fund was established pursuant to Article 12 of the Kyoto Protocol, which directs that a share of the proceeds from Clean Development Mechanism (CDM) projects shall be placed in a fund for adaptation. THE KYOTO PROTOCOL TO THE UNITED NATIONS FRAMEWORK CONVENTION ON CLIMATE CHANGE, art. 12 (1998).



combination of focal areas.”<sup>137</sup> At the portfolio level, “it is expected that the largest number of projects will be supported in the Biodiversity focal area. . . . Significant potential for targeted adaptation interventions also exists in the area of Land Degradation.”<sup>138</sup> This means that many climate adaptation projects will likely receive funding through other focal areas, and the project funding may be charged against recipient countries’ RAF allocations (if any) in those other focal areas, which will be subject to different GEF Benefits Index criteria.

143. In conclusion, it is not at all clear at this time what portion of UNFCCC adaptation resources will be channeled through the GEF climate change focal area in future replenishment periods, nor is it clear what the allocation-related rules will be for those resources that *are* channeled through the focal area. Similarly, it is not possible to know what the COP’s expectations for those resources will be. The present iteration of the RAF would likely interfere with the GEF’s ability to conform with COP guidance on adaptation if all, or even most, UNFCCC adaptation resources in the future flowed through the climate change focal area. However, that will certainly not be the case. While the COP has expressed some concern about the pace of the GEF’s implementation of adaptation activities, that concern has had nothing to do with the RAF. This fluid situation renders it impossible to determine at this time whether the RAF will prevent or allow the GEF and Council to act in conformity with COP guidance on adaptation in future replenishment periods.

#### **4.4. Guidance from the Convention on Biological Diversity**

144. This section analyzes whether the impacts of the RAF may conform with COP guidance related to eligibility, policy and strategy, and program priorities under the CBD. A number of the arguments made in the previous Section 4.3 on UNFCCC guidance apply equally here. They should be understood to be incorporated into this section by reference. This section will focus on those arguments that are primarily pertinent to the CBD.

##### **4.4.1. Eligibility**

145. The analysis contained in Section 4.3.1 above regarding UNFCCC guidance on country and activity eligibility applies *mutatis mutandis* to the CBD. The fact that the CBD eligibility guidance is somewhat more complex, due to its additional incorporation of guidance on eligibility for Cartagena Protocol parties and activities, does not make an appreciable difference.

146. However, unlike the UNFCCC COP, the CBD COP at its last session expressed deep disquiet about the RAF. In its Decision VIII/13, the COP stated, in relevant part:

*The Conference of the Parties to the Convention on Biological Diversity,*

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<sup>137</sup> *Id.* para. 9.

<sup>138</sup> *Id.* at 5, para. 19.

[ . . . ]

*Aware* that the Council of the Global Environment Facility has adopted a new system of allocating resources to countries in the focal areas of biodiversity and climate change, known as the Resource Allocation Framework,

*Realizing* that the Conference of the Parties to the Convention on Biological Diversity did not provide guidance on the development of the Resource Allocation Framework,

*Recognizing* the grave concerns expressed by developing countries, in particular the least developed and the small island developing States, as well as countries with economies in transition, about the implications of the Resource Allocation Framework in limiting the allocation of resources to them in support of the implementation of the Convention . . .

[ . . . ]

3. *Decides* to conduct an in-depth review of the availability of financial resources, including through the financial mechanism, at its ninth meeting. This review should:

[ . . . ]

(d) Examine how the Resource Allocation Framework adopted by the Global Environment Facility would affect the availability of resources given the individual and group allocations to developing countries and countries with economies in transition for the implementation of the Convention;

(e) Examine the effectiveness of the GEF Benefits Index for Biodiversity (GBI Bio) for determining the potential of each country to generate the global biodiversity benefits for the purposes of this Convention . . . .<sup>139</sup>

147. While this decision text does not constitute guidance to the GEF and thus is not binding on it, the text does indicate that the COP is skeptical about the way in which the GEF Council adopted the RAF, as well as the possible impacts the RAF may have, especially on LDCs and SIDS. It is not possible to anticipate at this time what the results of COP 9's examination of the RAF will be. However, in light of the sentiments expressed in the decision, it may be fair to anticipate that COP 9 could conclude that the GEF, in adopting and implementing the RAF, has *not* conformed with COP guidance in respect to eligibility, as the question is framed *supra* in Paragraph 105.

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<sup>139</sup> Conference of the Parties, Decision VIII/13, *Review of implementation of Article 20 (Financial resources) and Article 21 (Financial mechanism)*, UNEP/CBD/COP/8 (March 31, 2006).

## 4.4.2. Policies and strategies

### 4.4.2.1. National development priorities

148. COP 6 instructed the GEF to provide financial resources “for country-driven activities and programmes, consistent with national priorities and objectives, recognizing that economic and social development and poverty eradication are the first and overriding priorities of developing countries. . . .”<sup>140</sup> The passages in Section 4.3.2 of this Study describing the tensions between the need to achieve global environmental benefits and the need to conform with national development priorities apply *mutatis mutandis* to this CBD policy guidance, and should be incorporated here by reference (please see Paragraphs 106-107, 109, and 112-115, *supra*).

### 4.4.2.2. Poverty eradication

149. The phrase in the CBD COP 6 guidance, “recognizing that economic and social development and poverty eradication are the first and overriding priorities of developing countries,” could be interpreted to suggest that the COP views economic and social development and poverty eradication as primary objectives of the Convention and thus primary objectives of its financial mechanism. While these are important considerations reflected in various passages of the CBD, such an interpretation would belie the three Convention objectives contained in Article 1, namely, conservation of biological diversity, sustainable use of its components, and fair and equitable access and benefit sharing. Moreover, such an interpretation would give the phrase a different meaning than it has in Article 20.4, which is the Convention context in which it originally appeared in respect to the financial mechanism. In Article 20.4, the Contracting Parties acknowledged that, because “economic and social development and eradication of poverty are the first and overriding priorities” of developing country Parties, those Parties will be able to implement their Convention commitments effectively only if developed country Parties fully honor their commitments related to the provision of financial resources.

150. The COP 6 guidance should accordingly be understood to mean that the GEF, in providing resources under the financial mechanism, should recognize that the overriding priorities of developing countries may not be synonymous with the primary objectives of the Convention, and the ability of developing countries to contribute to achievement of those Convention objectives will depend on the GEF providing them with sufficient resources to do so. Additionally, the guidance indicates that the benefits of GEF projects will likely be more sustainable if GEF funding facilitates synergies between the primary objectives of the Convention and the overriding priorities of developing country Parties, which are economic and social development and poverty alleviation.

151. While the RAF’s GEF Benefits Index for biodiversity (GBI<sub>BIO</sub>) is not designed to take these considerations into account, the RAF has no effect upon the GEF’s ability to

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<sup>140</sup> Decision VI/17, *supra* note 85, at para. 10.

take them into account at the project portfolio level. Thus, the existence of the RAF need not prevent the GEF from acting in conformity with this guidance. On the other hand, if the COP's expectation is that the GEF should respond to this guidance by *increasing* the allocations of certain developing countries, then the RAF's existing biodiversity criteria would prevent the GEF from fulfilling the COP's expectation. Because it is not apparent that such an interpretation was ever intended, it should be avoided, absent an explicit, affirmative clarification from the COP.

#### 4.4.2.3. Least developed countries and small island developing states

152. GEF biodiversity funding has had a “particular value in countries that are not priorities for bilateral funding from developed countries,” especially LDCs and SIDS, where GEF funding has been largely responsible for enabling many of these countries to focus on biodiversity conservation.<sup>141</sup> The COP 6 policy guidance requires the GEF to provide financial resources “taking into account the special needs of the least developed countries and the small island developing States amongst them.”<sup>142</sup> As discussed in the UNFCCC guidance section, the GEF Performance Index (GPI) may tend to lower the allocations of LDCs somewhat, because it tends to credit those countries that have the highest capacity to host sustainable projects, and these may often not be LDCs. However, because the main driver of the country score is the GBI, a country's GBI is the more important factor in influencing its RAF allocation.

153. Under the GEF-4 indicative allocations for biodiversity, numerous LDCs with relatively large land mass and/or especially rich terrestrial biodiversity received fairly high GBI scores and proportionately high allocations, while the majority of LDCs were placed in the group.<sup>143</sup> The GBI<sub>BIO</sub> criteria may slightly downgrade some LDCs because, in computing the “represented species” indicator of the terrestrial biodiversity score, “[o]nly species that have been evaluated in a manner that is comprehensive and meaningful for cross-country comparisons are included.”<sup>144</sup> This policy could have the effect of lowering the GBI of LDCs for which the relevant data may be sparse. Overall, however, the RAF probably tends neither to favor, nor significantly discriminate against, LDCs. While the RAF itself does not demonstrate the GEF “taking into account the special needs of the least developed countries,” it does not prevent the GEF from doing so at the project portfolio level.

154. The situation may be less benign for LDCs that are also small island developing states. The respective compositions of the terrestrial and marine scores that collectively comprise the GBI<sub>BIO</sub> reflect the relative scarcity of relevant data for marine biodiversity, compared to terrestrial biodiversity. Thus, the marine score is based only on the number of represented fish species in a country, while the terrestrial score is derived from species of mammals, birds, amphibians, reptiles, freshwater fish, and vascular plants; threatened

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<sup>141</sup> OPS3, *supra* note 87, at 27.

<sup>142</sup> *Id.*

<sup>143</sup> See RAF Public Disclosure Document, *supra* note 3, annex 1. Examples of LDCs with high scores include Cameroon, Democratic Republic of Congo, Madagascar, Papua New Guinea, and Tanzania.

<sup>144</sup> *The GEF Resource Allocation Framework*, *supra* note 10, para. 16.

species; represented ecoregions; and threatened ecoregions. In computing the GBI, the marine score is weighted 20% against the terrestrial score's weighting of 80%. While this approach may be necessary in light of the existing data gaps, the result is that it heavily favors countries with high terrestrial biodiversity and disfavors those with lower terrestrial biodiversity and high marine biodiversity.

155. The CBD contains no similar prioritization of terrestrial biodiversity over marine biodiversity, nor similar privileging of countries with high terrestrial biodiversity over those with high marine biodiversity. When the Convention speaks of biological diversity, it does so under the following definition:

“*Biological diversity*” means the variability among living organisms from all sources including, *inter alia*, terrestrial, marine and other aquatic ecosystems and the ecological complexes of which they are part . . . .<sup>145</sup>

156. This definition neither establishes nor implies any prioritization between terrestrial and marine biodiversity. Similarly, COP guidance has never suggested that the GEF should privilege countries with high terrestrial biodiversity over those with high marine biodiversity. One must conclude that the GBI<sub>BIO</sub> approach toward weighting is based on the preferences of the GEF and not on those expressed in the Convention or COP guidance. Yet, because SIDS are prominent among those CBD Parties that may have lower terrestrial biodiversity and high marine biodiversity, many SIDS will receive lower allocations under the RAF than they would if the GBI<sub>BIO</sub> were to account for, and weight, marine and terrestrial biodiversity in a more equivalent manner. In doing this, the RAF can hardly be described as “taking into account the special needs of the least developed countries and the small island developing States amongst them.” Rather, the RAF as designed apparently requires the GEF to discriminate against SIDS, at least in respect to their RAF allocations in the biodiversity focal area.

157. The GEF may be able to compensate for some of this disparate treatment by awarding SIDS biodiversity-related project resources through the international waters focal area, which is presently not subject to the RAF.<sup>146</sup> Whether this option will remain available if and when the RAF is applied to the international waters focal area is unknown.

158. At a GEF “Sub-Regional Consultation for the Pacific SIDS” in Fiji, August 2006, the GEF Secretariat said, “if the Pacific SIDS access their maximum allocated ceiling under the RAF, this would represent more funds accessed than under GEF-3.”<sup>147</sup> While this may be true, it does not demonstrate that the RAF conforms with COP guidance; rather, it may suggest that previous practice by the GEF and IAs did not sufficiently take into account the special needs of SIDS. By unilaterally imposing this aspect of the RAF

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<sup>145</sup> CBD art. 2.

<sup>146</sup> See Conference of the Parties, *Report of the Global Environment Facility*, paras. 24, 73-76, UNEP/CBD/COP/8/10 (Feb. 2006).

<sup>147</sup> *Sub-Regional Consultation for the Pacific SIDS*, *supra* note 117, at 8.

upon the CBD financial mechanism, the GEF and GEF Council may be seen as failing to act in conformity with COP guidance.<sup>148</sup>

#### 4.4.2.4. Regional activities

159. In its initial guidance on policies and strategies, the COP said that “[p]rojects should contribute to the extent possible to build cooperation at the sub-regional, regional and international levels in the implementation of the Convention.”<sup>149</sup> Additionally, in its request to the GEF concerning the impacts of the RAF on Cartagena Protocol funding, COP 8 asked the GEF “to provide an assurance that the introduction of the Resource Allocation Framework will not in any way jeopardize eligible Parties’ access to funding for biosafety-related activities including regional activities where appropriate.”<sup>150</sup> The use of regional activities should be seen as an important aspect of COP guidance.

160. At a GEF Sub-Regional Consultation for the Caribbean in Barbados, July 2006, the GEF Secretariat said,

in the biodiversity and climate change focal areas, regional projects have historically been 10-15%, and at the same time it has been rumored that many of these were IA-driven. At the end of the RAF negotiations, it was decided that 5% or about \$50 million would target global projects that are considered critical and that countries are not undertaking. The rest could be matching resources for regional projects that countries put together. As regional projects emerge, they should have the support of countries which has not always been the case in the past.<sup>151</sup>

161. For SIDS and other small countries, regional projects (other than for enabling activities) have usually been the rule, not the exception. While the Secretariat comments above express optimism that such countries will pool their RAF country allocations to develop regional projects, it is not clear whether that will be the case in practice. On one hand, countries with small allocations may discover that IAs are not interested in working with them to develop individual projects, out of concern that the transaction costs could be too high.<sup>152</sup> On the other hand, the RAF may encourage some countries to prioritize country projects over regional ones if they perceive that contributing to regional projects will cost them their allocations at the expense of projects devoted solely to themselves. This could result in more small projects with proportionately higher administrative and transaction costs and fewer local and global environmental benefits. This collective

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<sup>148</sup> The GEF states that many of the indices used to determine the GBI<sub>BIO</sub> will be replaced or improved with more precise indicators as comprehensive data become available for all GEF-eligible countries. See *The GEF Resource Allocation Framework*, *supra* note 10, annex 1, at 10, para. 6. Whether these improvements will address this problem is unknown.

<sup>149</sup> Decision I/2, *supra* note 84, annex, part I.

<sup>150</sup> Decision VIII/18, *supra* note 83, para. 9.

<sup>151</sup> *GEF Sub-Regional Consultation for the Caribbean*, *supra* note 18, at 14.

<sup>152</sup> In response to this concern, the World Bank, UNDP, and UNEP have stated that they remain committed to serving countries with small RAF allocations. See GEF Secretariat, *Notes on the Sub-Regional Consultation, Pretoria*, 10-11 (Pretoria, 24-25 Apr. 2006).

action problem could be further exacerbated by the “50% rule,” which prevents countries from utilizing more than half of their allocations during the first two years of the replenishment period.

162. If these scenarios come about, then the RAF could make it more difficult for the GEF to encourage regional collaboration, in contradiction to the preferences the COP has expressed in its guidance. To surmount this problem, IAs may need to be proactive in collaborating with country Operational Focal Points to stimulate the development of regional projects among SIDS and similarly situated countries. As before, the challenge in doing this will be to counteract the tendency for the projects to reflect the priorities of IAs, rather than countries, and to ensure that the RAF results in projects that are more, not less, country-driven.

#### **4.4.2.5. Impact on funding for the Cartagena Protocol**

163. In the biodiversity focal area, the GEF’s Strategic Priority 3 is intended to build national capacity for implementation of the Cartagena Biosafety Protocol. This funding is administered under the CBD financial mechanism and governed by guidance from the CBD COP on behalf of the Protocol’s COP/MOP. Beginning in GEF-4, project funds for GEF activities related to the Protocol will be charged against the respective developing country Party’s RAF allocation for biodiversity. While each developing country Party’s biodiversity allocation will likely be more than enough to cover eligible activities it may wish to pursue related to implementation of the Protocol, the funding for those activities will be obtained at the expense of pursuing other activities related to implementation of the Convention, especially if that Party’s RAF allocation is low and places it in the group.

164. The RAF  $GBI_{BIO}$  and GPI criteria determine what portion of GEF biodiversity focal area funds will be allocated to a Protocol Party. However, those criteria bear little apparent relation to the needs or interests of these countries, regarding their participation in the Protocol. A key interest of many developing country Protocol Parties relates to the risks that transboundary movement of genetically modified organisms may pose to the health of their domestic agriculture, including their export of domestically grown food crops. The  $GBI_{BIO}$  is incapable of taking this interest into account; in fact, in the computation of a country’s terrestrial biodiversity score, “only areas that remain currently uncleared for agriculture or urban settlement are considered.”<sup>153</sup> Moreover, for LDCs and SIDS that have high needs for capacity building, weak GPI scores may further lower their overall RAF allocation for the focal area.

165. Concerned about the possible impact of the RAF upon GEF funding access for Protocol Parties, COP 8 requested that the GEF “base their allocation of resources to support the implementation of the Protocol on country needs and priorities . . . .”<sup>154</sup> As demonstrated above, the RAF as it is presently designed results in resource allocations that have little or nothing to do with the country needs and priorities of developing

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<sup>153</sup> *The GEF Resource Allocation Framework*, *supra* note 10, at 12, para. 12.

<sup>154</sup> Decision VIII/18, *supra* note 83, para. 10.

country Parties to the Cartagena Protocol. In light of COP 8's clear admonishment to the GEF, the GEF should promptly revise the RAF in respect to its application to the Protocol, to bring itself back into conformity with COP guidance.

#### 4.4.3. Program priorities

166. As noted earlier, OPS3 found that “guidance from some conventions, in particular the CBD, has proliferated without any prioritization. Thus, to some extent, rather than better aligning the goals of the GEF, this proliferation of guidance appears to have defined a sufficiently vast area that GEF entities may find whatever direction they seek in it.”<sup>155</sup> The lack of prioritization has been further complicated by “the apparent expectation that all COP guidance will be supported by the GEF, at the same level and in perpetuity.”<sup>156</sup>

167. In a similar manner to what it has done as the operational entity for the UNFCCC financial mechanism, the GEF has filled this prioritization void left by the CBD COP by developing its own prioritization practices for the biodiversity focal area.<sup>157</sup> These have culminated in the five Operational Programs and four Strategic Priorities listed in Paragraphs 77 and 78, *supra*, and in the specific decisions that the implementing agencies, GEF Secretariat, and GEF Council have made at the project portfolio level. The COP has not objected to the GEF's prioritization approach, but it has sometimes prodded the GEF to devote new or increased attention to additional priorities.

168. The GBI<sub>CC</sub> allocates the greatest GEF climate resources to the big CO<sub>2</sub> emitters; i.e., those countries with the largest greenhouse gas liabilities. In contrast, the GBI<sub>BIO</sub> favors countries on the basis of the number of biological diversity *assets* they hold. Despite the philosophical incongruity between the two approaches, each GBI has led to a distribution of indicative allocations that roughly tracks the distribution of focal area resources before GEF-4 and, accordingly, appears to follow past GEF practice. Thus, to the extent that the GEF's prior practices have resulted in an allocation of focal area resources that has been satisfactory to the COP, the RAF may be anticipated to be similarly satisfactory, because it apparently is leading to similar allocations.<sup>158</sup>

169. That said, a resource allocation framework for biodiversity that deliberately favors countries with large land mass, numerous eco-regions, and high numbers of qualified species will disfavor countries that do not have those attributes, regardless of what their resource needs under the Convention may be or the program priorities that have been included in COP guidance on their behalf. It warrants repeating here that neither the Convention nor the COP's guidance suggests that eligible countries should receive different treatment from the financial mechanism on the basis of the amount of

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<sup>155</sup> OPS3, *supra* note 87, at 186.

<sup>156</sup> *Id.* at 73.

<sup>157</sup> See discussion in Section 4.3.3, paras. 118-128, *supra*.

<sup>158</sup> The fundamental difference between GEF-4 and earlier periods is that before the RAF, no country had a formal cap in the amount it could receive during a replenishment period.



biodiversity they have. Yet the prior practice of the GEF has long been to deliver the greatest amount of resources to mega-diverse countries.<sup>159</sup>

170. The remainder of this section briefly examines some program priorities from COP guidance that may be more difficult to achieve under the RAF.

171. Implementation of the Cartagena Protocol. As discussed above in Paragraphs 163-165, the RAF GBI<sub>BIO</sub> and GPI criteria bear little apparent relation to the needs or interests of Cartagena Protocol Parties, insofar as their participation in the Protocol is concerned. Any proportionality between the RAF biodiversity allocations and the resource needs of Protocol Parties may be more coincidental than deliberate. In its Cartagena Protocol guidance to the financial mechanism, COP 8 instructed the GEF “as a priority to support the establishment of a base level of capacity in all eligible developing country Parties, in particular the least developed and the small island developing States, and Parties with economies in transition.”<sup>160</sup> It is likely that each developing country Party’s biodiversity allocation will be sufficient to cover a “base level of capacity” for the Protocol. However, such countries—especially LDCs and SIDS—with low allocations may then not be eligible to receive additional focal area funding during the replenishment period for their implementation of the Convention, other than for enabling activities. Thus, they could be required to choose between GEF funding for priorities of the Protocol and priorities of the Convention, unless they can successfully join in regional projects or access adequate co-finance. Because this situation is probably not what the COP envisioned in its guidance on program priorities, the GEF should strive to ameliorate it by making the RAF criteria more responsive to considerations related to implementation of the Protocol.

172. Marine and coastal biodiversity. The GBI<sub>BIO</sub> heavily discounts the presence of marine biodiversity in a country, with the result that SIDS that may have a disproportionate amount of marine biodiversity may receive significantly lower country allocations than if their biodiversity was comprised of terrestrial species (please refer to earlier discussion in Paragraphs 154-158). Under the RAF, developing country Parties that would contribute to the achievement of the Convention’s objectives primarily through this program priority will receive fewer GEF resources than those countries that would contribute through other priority activities. Because allocations under the RAF could have the effect of lessening the ability of the financial mechanism to respond to this program priority, the GEF should conform with COP guidance by correcting the disparity.

173. Agricultural biodiversity. The GEF responded to COP guidance regarding this issue by establishing Operational Program 13, “Conservation and Sustainable Use of Biological Diversity Important to Agriculture.” However, the GBI<sub>BIO</sub> is largely incapable of taking this priority issue into account, because “only areas that remain currently

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<sup>159</sup> See OPS3, *supra* note 87, at 16-17 (stating, “though prioritizing [megadiverse] countries has not been a stated policy of the GEF Biodiversity Program, these countries have received a large percentage of GEF resources for biodiversity conservation.”).

<sup>160</sup> Decision VIII/18, *supra* note 83, para. 10.

uncleared for agriculture or urban settlement are considered” in the computation of a country’s terrestrial biodiversity score.<sup>161</sup> Countries with significant needs related to the preservation of agricultural biodiversity—especially LDCs—will, accordingly, not receive RAF allocations that reflect those needs. This could also have a negative impact on the program priority of access and benefit sharing (ABS) because, in the GEF project portfolio, ABS is often a component of agro-biodiversity projects.<sup>162</sup>

174. Access and benefit sharing. COP guidance related to access and benefit sharing, and numerous other program priorities identified by the COP, stresses the human role in conservation efforts and recognizes that humans are an integral component of many ecosystems. While OPS3 found that the GEF had not adequately addressed the convention priority on ABS, the GEF is developing targets to respond to country requests for support on the priority.<sup>163</sup> Nevertheless, the GBI<sub>BIO</sub> criteria focus on ecosystems and species, without any consideration of the human relationship to them. The RAF does not reflect the interests of countries that wish to focus on this human dimension, particularly insofar as poverty alleviation is concerned. Developing countries, including LDCs, with relatively large land mass, numbers of species, and varied ecosystems may receive large RAF biodiversity allocations and may pursue in their GEF project proposals this human aspect, along with other national priorities. Smaller countries with lower numbers of terrestrial biodiversity will need to be more selective in weighing the activities they wish to pursue, regardless how pressing their needs may be in the human dimension of biodiversity.

175. Alien species. “Species introductions have been considered one of the most important threats to biological diversity, have resulted in the extirpation of many native species, and have caused major changes to the overall structure and processes of many ecosystems around the world.”<sup>164</sup> By giving a weighting of 20% to its “threatened species” indicator, the terrestrial score of the GBI<sub>BIO</sub> can take the threat of alien and invasive species into account to a limited extent. However, it can do so only in regards to the *number* of species in a country that may be at-risk from alien species. Hence, it may be an exceedingly inaccurate indicator of the degree of threat that alien species may pose in specific countries. While those threats could be extreme in some small countries that receive low GBI<sub>BIO</sub> scores, no means exists under the RAF of adjusting their allocations to reflect their needs.

176. Biodiversity and climate change. The earlier discussion about adaptation under the UNFCCC acknowledged that funding related to this program priority may come from the Strategic Priority on Adaptation under the climate change focal area, the biodiversity focal area, the GEF-administered adaptation funds outside of the climate focal area, and possibly other sources. The discussion also noted that the RAF climate indicators, as currently designed, take no account of the adaptation needs of developing countries (see Paragraphs 138-143, *supra*).

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<sup>161</sup> *The GEF Resource Allocation Framework, supra* note 10, at 12, para. 12.

<sup>162</sup> *Report of the Global Environment Facility, supra* note 146, para. 56.

<sup>163</sup> See OPS3, *supra* note 87, at 79; *Focal Area Strategies for GEF-4, supra* note 76, at 11.

<sup>164</sup> *Focal Area Strategies for GEF-4, supra* note 14, para. 35.

177. Through its guidance, the CBD COP has instructed the GEF to provide financial support for developing countries, particularly LDCs and SIDS, for activities related to the impacts that climate change may have on their biological diversity. The threats of climate change may be taken into account in computing terrestrial, but not marine, scores under the RAF, because the terrestrial score includes a “threatened species” indicator, while the marine score does not. Many of the countries most threatened by climate change—small island developing states—may receive disproportionately low GBI<sub>BIO</sub> scores (and RAF allocations) for the reasons cited in Paragraph 172 above. These countries will also tend to receive low RAF allocations in the climate focal area. The GEF, and developed country Parties to the CBD and UNFCCC, should ensure that countries that are among the most defenseless against climate change impacts and, simultaneously, among the least culpable in their cause, are not doubly penalized by RAF indicators that are incapable of taking account of their special situations.

#### **4.5. Additional considerations**

##### **4.5.1. “Agreed full incremental costs”**

178. As discussed in Paragraph 53, *supra*, the UNFCCC and CBD each require developed country Parties to “provide new and additional financial resources” to enable developing country Parties “to meet the agreed full incremental costs of implementing measures which fulfill their obligations” under the applicable convention. The “agreed full incremental costs” are to be agreed between a recipient developing country Party and the entity or institutional structure operating the financial mechanism (i.e., the GEF).<sup>165</sup>

179. In the case of the RAF, the question might arise as to how much discretion is available to the GEF in the process of reaching agreement about these costs, and whether that discretion might be broad enough to include the adoption and implementation of the RAF. However, as the GEF Secretariat makes clear in its 1996 paper, *Incremental Costs*, the phrase “agreed full incremental costs” goes to agreement on the costs of specific projects, not to how much financial resources developed countries are obliged to contribute in compliance with their convention commitments.<sup>166</sup> Similarly, the phrase does not pertain to the overall shares of resources a GEF-eligible country may be allocated under a convention financial mechanism. For these reasons, it would be incorrect to presume that the conventions’ “agreed full incremental costs” provisions may have established a legal mandate for the GEF to adopt and implement the RAF.

##### **4.5.2. Small Grants Programme (SGP)**

180. The GEF Small Grants Programme (SGP) supports activities of non-governmental organizations (NGOs) and community-based organizations (CBOs) that deliver global environmental benefits in the focal areas of biodiversity, climate change, international waters, land degradation (primarily desertification and deforestation), and

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<sup>165</sup> See UNFCCC art. 4.3; CBD art. 20.2.

<sup>166</sup> See GEF Secretariat, *Incremental Costs*, GEF/C.7/Inf.5 (1996).

persistent organic pollutants. Grants are channeled directly to NGOs and CBOs. The maximum grant amount per project is US\$50,000, but averages around US\$20,000.<sup>167</sup>

181. OPS3 found the SGP to be among the most popular and promising GEF programs: “[T]he overall long-term global benefits from SGP activities will be considerable, and are likely to exceed the global benefits generated by most larger projects with financial resources comparable to or even exceeding the entire SGP budget.”<sup>168</sup> The SGP’s smaller-sized projects may hold more promise in achieving sustainability, perhaps “because of the more transparent, participatory, and country-driven approach to planning that characterizes SGP projects,” which may result in a “very high likelihood of sustainability due to their being more manageable and accessible—especially for LDCs and SIDS with very limited capacities—and more in line with their capacity to absorb funds.”<sup>169</sup>

182. In the past, the SGP was financed solely through contributions from the focal areas. For GEF-3, those contributions totaled \$138 million.<sup>170</sup> However, in GEF-4 the Council approved a replenishment for the SGP of \$110 million, “which is insufficient to extend the programme to all the countries that wish to enter, and will probably be insufficient to support the countries that are already in the programme.”<sup>171</sup> To make up the shortfall for this expanding program, the Council agreed to budget an additional, “estimated” amount of \$90 million from country allocations of the RAF, meaning some countries are expected to fund part or all of the SGP activities in their countries through their RAF allocations.<sup>172</sup>

183. The GEF SGP Steering Committee responded to this challenge by agreeing on an approach that “calls upon those countries that have developed significant capacity through the SGP to shift their source of funding from the program’s core budget to their RAF indicative country allocations.”<sup>173</sup> For the climate and biodiversity focal areas, countries in the RAF “group” have preferential access to SGP core funding, with a maximum for LDCs and SIDS of \$600,000 per year and \$400,000 for other countries. Countries with an indicative allocation of up to \$15 million in either focal area can draw up to \$300,000 per year from the SGP core budget with a matching amount expected from their own RAF allocations. Countries with a RAF allocation of more than \$15 million in either focal area are no longer eligible for SGP core funding, and instead must finance their SGP program from their RAF allocations.<sup>174</sup> Finally, countries that have

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<sup>167</sup> GEF Small Grants Programme, *SGP at a Glance* (2006), <http://sgp.undp.org/index.cfm?module=ActiveWeb&page=WebPage&s=AboutSGP>.

<sup>168</sup> OPS3, *supra* note 87, at 194 (quoting Third Independent Evaluation of the GEF Small Grants Programme, 2003).

<sup>169</sup> *Id.*

<sup>170</sup> See GEF Council, *Summary of Negotiations on the Third Replenishment of the GEF Trust Fund*, 21 (Nov 5, 2002).

<sup>171</sup> *GEF Sub-Regional Consultation for Latin America*, *supra* note 25, at 5.

<sup>172</sup> *Summary of Negotiations on the Fourth Replenishment*, *supra* note 2, at 41.

<sup>173</sup> GEF Council, *Information Note on the Management of the Small Grants Program*, 1-2, para. 5, GEF/C.31/Inf.4 (May 2007).

<sup>174</sup> *Id.* at 2, para. 6 (“Guidelines for access to the GEF Small Grants Programme”).

“benefited from the GEF SGP for more than 8 years will be required to present a plan to graduate” from the SGP at the end of GEF-4.<sup>175</sup>

184. Neither the UNFCCC nor CBD COP has issued guidance to the GEF regarding how the SGP should be managed in respect to the relevant focal area.<sup>176</sup> Accordingly, the GEF’s new approach of shifting support for the SGP from GEF core funding to individual countries does not raise a question at this time of whether it is in conformity with COP guidance.

185. Nevertheless, the new approach could have serious, negative implications for the future of this popular and successful program. Much of the appeal of the SGP has been that (1) it provides NGOs and CSOs direct access to GEF funding in pursuit of activities that further the objectives of the conventions, (2) those activities can complement and support the implementation by governments of their convention commitments, and (3) the funding for the activities is additional to the GEF funding that the government may receive through the convention financial mechanisms. With the new approach, NGOs and CSOs operating in countries that have “graduated” from the SGP or that are required to fund all or part of their SGP activities through their RAF allocations will, in effect, need to compete with their governments for GEF resources. Forced to choose between activities that are sponsored and controlled by the government or by NGOs or CSOs, many governments will likely place higher priority on government projects. Such governments may be reluctant to dedicate sizeable amounts of their RAF allocations to the SGP. The resultant shortfall in SGP funding could jeopardize the viability of the program in numerous countries and, in turn, the ability of many NGOs and CSOs to contribute to implementation of the conventions.

#### **4.5.3. The 50% rule**

186. As noted in Paragraph 34, grant commitments during the first two years of the replenishment period may not exceed 50% of a country’s total RAF allocation or upper limit for each focal area. This rule introduces into the RAF a level of complexity and uncertainty that could potentially counter any benefit countries may derive from knowing the amounts of their GEF resource allocations in advance.

187. At the GEF Sub-Regional Consultation for East and Southeast Asia, 2006, a number of participants expressed concern about the 50% rule, especially as it applies to smaller country allocations under the RAF:

A hypothetical example was given where a country has a total GEF4 allocation of USD 2 million. The 50% rule would allow USD 1 million to be utilized in the first two years. Enabling activities or [project

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<sup>175</sup> *Id.* para. 8.

<sup>176</sup> The UNFCCC COP has, in its decisions 1/CP.10 and 8/CP.10, requested the GEF to report on how vulnerability and adaptation activities “have been supported, and on the barriers and obstacles to, and the opportunities for, implementation, through,” *inter alia*, the SGP. SBI, *Synthesis report*, *supra* note 59, para. 102.

development funds] could use up USD 300,000, leaving USD 700,000 for the project itself. This would not even qualify the project as [a medium-sized project]. The result is that the project may not get approved in the first round and that the RAF prevents small allocation countries from accessing any funds in the first two years.<sup>177</sup>

188. The GEF's original advice for dealing with the uncertainty of the rule was to instruct each Operational Focal Point to "over-program" the RAF allocation of their country by "maintaining a list of concepts under development larger than its four-year allocation."<sup>178</sup> However, the current GEF CEO announced a change in this policy in 2006 by asking countries to submit project concepts and proposals only when they are well-developed, out of concern that over-programming could result in funds being unavailable for members of the "group" that did not get their projects into the GEF pipeline early enough.

189. One suggestion the Secretariat has given for dealing with the 50% rule is for countries to "wait until the second period, and get the project in the third and fourth years. It would be better to phase projects, for example, a \$4 million project divided into two phases."<sup>179</sup> The problem with this approach is that it requires the OFPs, IAs, and GEF to try to "game" the system. In doing that, it introduces additional complexity, uncertainty, and risk into the project cycle, and the likelihood that otherwise similarly situated countries may receive unequal treatment.

190. Among their recent guidance to the GEF, both the UNFCCC and CBD COPs have requested the GEF "to further simplify its procedures and improve the efficiency of the process through which developing country Parties receive funding for projects for the implementation of their [convention] commitments."<sup>180</sup> The introduction of the 50% rule into the RAF introduces a burdensome degree of complexity that endangers the functionality of the RAF during GEF-4. As such, it can hardly be described as a mechanism to "further simplify" and "improve the efficiency" of the process under which developing countries receive GEF project funding, and its inclusion by the GEF Council in the RAF should be viewed as a failure to conform with COP guidance.

#### **4.5.4. Additional thoughts on policy implications**

191. Despite the burden of the 50% rule, the knowledge that they will lose any uncommitted portions of their country allocations at the end of the replenishment period may provide an additional incentive to some countries and their OFPs to strive to develop

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<sup>177</sup> GEF Secretariat, *Draft Notes/July 16: GEF Sub-Regional Consultation East and Southeast Asia*, 14 (Kuala Lumpur, Malaysia, 13-14 June 2006).

<sup>178</sup> *GEF Sub-Regional Consultation for Latin America*, *supra* note 25, at 2.

<sup>179</sup> *Id.* at 11.

<sup>180</sup> UNFCCC Conference of the Parties, Decision 3/CP.12, *Additional guidance to the Global Environment Facility*, para. 1(a), FCCC/CP/2006/5/Add.1 (Jan. 2007); *see also* CBD Conference of the Parties, Decision VIII/18, *supra* note 83, para. 3 (requesting the GEF to further simplify and streamline procedures in consideration of the special conditions within developing country Parties, in particular LDCs and SIDS).

timely project proposals. Knowing their allocation ceiling may allow some countries to incorporate GEF-funded activities more effectively into their national planning processes. On the other hand, the ceiling imposed by the RAF may also dissuade some from proposing more ambitious projects.

192. The RAF allocation is not an entitlement; rather, it is a resource window against which countries can propose quality projects. Nevertheless, most countries will inevitably tend to view their allocations as entitlements. In the event that an IA or the GEF does not approve, or downsizes, a grant, and that action leads to a country losing some or all of its allocation for the period, then increasing distrust and resentment against the GEF could become a serious problem. A counter-risk could be that the GEF feels politically pressured to approve projects to ensure that countries can use their full allocations, and in so doing, accepts lower project quality standards and thereby increases the risk of project failure.

193. An additional risk of having fixed country allocations (recognizing that the relatively small allocations of countries in the group are not truly fixed) is that the GEF will lose a certain degree of flexibility during the replenishment period to allocate resources between countries in response to demand and to maximize the possibility that all of the resources in the focal areas are fully utilized during the period. If this loss of flexibility results in a greater level of unused resources at the end of the replenishment, then some donors may be tempted or pressured to lower their contributions during the negotiation for the next replenishment. The GEF can counter this risk by continuing to strive actively to enter projects into the pipeline quickly from many countries, including regional projects.

## **5. Conclusions and Remedies**

194. The GEF Instrument and the various memoranda of understanding all require the GEF to operate the financial mechanisms in conformity with guidance received from the COPs. If the RAF causes the GEF to fail to act in conformity with COP guidance, then the Council's adoption and the GEF's implementation of the RAF may be considered to breach Paragraphs 15, 20(h), and 26 of the GEF Instrument. Moreover, they may violate the terms of the applicable MoU.

### **5.1. Summary of Key Points**

- As a legal matter, several aspects of the RAF are problematic in respect to their conformity with COP guidance and their compliance with the MoU and the GEF Instrument.
- Despite the terms of the various MoU, the GEF is, legally and practically speaking, functionally autonomous from the conventions it serves. No effective sanctions are available to the COPs that would empower them to force the GEF to conform with their guidance. Consequently, the COPs cannot exercise enforceable control over the entity that operates their financial mechanisms.

- In the final analysis, the legal relations between the conventions, the GEF, and the individual states Party to each must be defined and enforced within the political context under which they have been established and maintained.

## **5.2. RAF Conformity with COP Guidance**

### **5.2.1. Climate Change Convention**

195. This Study has concluded that most aspects of the RAF conform with the guidance of the COPs or, at the least, are not clearly inconsistent with the guidance. In respect to the UNFCCC, the Study identifies several areas in which the RAF may need to be adjusted, depending on future decisions of the COP. These include (together with references to where they were discussed in Part 4):

- (i) Eligibility, if low RAF allocations prevent countries from pursuing certain types of eligible activities (Paragraph 105);
- (ii) Potential policy of addressing market transformation and market failures in LDCs and SIDS (Paragraph 110);
- (iii) Land use and land use change and forestry, if the COP determines that it should be a program priority of the financial mechanism (Paragraphs 132-133);
- (iv) Carbon capture and storage, if the COP determines that it should be a program priority of the financial mechanism (Paragraphs 134-135); and
- (v) Adaptation, depending on the extent to which the COP expects UNFCCC adaptation resources to flow through the climate change focal area (Paragraphs 138-143).

196. Additionally, the Study finds that implementation of the 50% rule does not conform to the UNFCCC COP's guidance requesting the GEF "to further simplify its procedures and improve the efficiency of the process through which developing country Parties receive funding for projects for the implementation of their [convention] commitments." (See Paragraphs 186-190.)

### **5.2.2. Biological Diversity Convention**

197. Concerning the CBD, the Study has identified a number of important areas in which adoption and implementation of the RAF do not conform with COP guidance, or in which the COP has expressed significant skepticism about the RAF. These include:

- (i) Country eligibility, depending on the outcome of the in-depth review of the financial mechanism that COP 9 will conduct (Paragraphs 146-147);
- (ii) GEF Benefits Index treatment of marine biodiversity, especially in respect to small island developing states (Paragraphs 154-158, 172);



- (iii) Regional projects, depending on the impact that the RAF has on the ability and willingness of LDCs and SIDS to participate in them (Paragraphs 159-161);
- (iv) Impact on funding for the Cartagena Biosafety Protocol (Paragraphs 163-165, 171);
- (v) Agricultural biodiversity, insofar as its exclusion from consideration under the GBI<sub>BIO</sub> is concerned (Paragraph 173); and
- (vi) Implementation of the 50% rule, which does not conform to the COP's guidance requesting the GEF to further simplify and streamline procedures in consideration of the special conditions within developing country Parties, in particular LDCs and SIDS (Paragraphs 186-190).

198. Additionally, the Study finds that the GEF Benefits Index for biodiversity (GBI<sub>BIO</sub>) fails to take into account the interests of developing countries, especially LDCs and SIDS, which may have national priorities under the CBD related to the COP program priorities of access and benefit sharing (particularly insofar as the human role in conservation efforts is concerned), alien species, and biodiversity and climate change.

### **5.3. Remedies**

199. The fact that the GEF and GEF Council may have failed to act in conformity with guidance from the COPs raises the question of what remedies may be available to address the breach of the GEF Instrument and the respective MoU.

200. Regarding the GEF Instrument, neither it nor the Rules of Procedure for the GEF Council includes any provision concerning the settlement of disputes between members of the Council. Thus, there are no practical, readily accessible *legal* mechanisms by which a member or members of the Council could challenge the role of another member or members believed to bear responsibility for the GEF's—and especially the GEF Council's—failure to act in conformity with the guidance of the respective COPs.

201. Regarding the MoU, each establishes a procedure for when a convention Party believes that a Council decision regarding a specific project was not consistent, or not in compliance with, the policies, program priorities, or eligibility criteria established by the COP in the context of the applicable convention (please refer to summary discussion in Section 3.4.4). But even if one of the COPs concludes that a project decision does not comply with its guidance, the remedy available to the COP is to ask the GEF Council for clarification on the project decision and, in the case of the UNFCCC, to ask “in due time” for a reconsideration of the decision. In light of the fact that the COPs have the power to provide instructions and guidance to the GEF regarding its operation of the financial mechanisms, these dispute resolution provisions do not appear to add appreciably to what the COP would be empowered to do if the provisions did not exist at all.

202. Each MoU also allows either the COP or the GEF Council to withdraw from the respective agreement upon written notification from one to the other. As a practical matter, the use of this sanction would be valueless as a way for a COP to attempt to force

the Council to conform with COP guidance, because the conventions would not be able to function without a financial mechanism, and no viable alternative to the GEF exists or is anticipated at this time.

203. The only realistic remedies available to the COPs in case of the GEF's breach of the MoU are political, not legal. Nevertheless, political positions are often strengthened and more clearly and convincingly articulated when they employ informed, legally sound arguments. If the COPs conclude that the GEF's adoption or implementation of the RAF does not comply with their guidance, then they can, and should, inform the GEF to that effect, and they should include specific, detailed ways in which they would like to see the RAF amended to bring it into compliance with their guidance. Governments should engage with each other through available diplomatic channels to try to convince those with opposing positions to alter them. Moreover, civil society can attempt to educate and persuade government officials on the necessity and value of adhering to COP guidance in the interest of achieving convention objectives and national priorities and interests.

204. These observations assume that individual governments that are party to the conventions and/or the GEF Council are unified and coherent throughout their ministries in their relevant positions and policies. In other words, they assume that a government will not oppose certain aspects of the RAF in one forum while simultaneously supporting them in another. Where the position of a government is, in fact, inconsistent, then the diplomatic and educational tools discussed above may be especially effective in advising the relevant governmental authorities concerned.

205. The potentially conflicting views of the convention COPs and the GEF Council concerning the RAF illustrate the fundamental drawback of relying on the GEF as the single, centralized source of funding to assist developing countries in meeting the incremental costs of implementing the provisions of global environmental agreements.<sup>181</sup> Because the GEF serves several conventions, it is not a subsidiary body of any of them. Despite the terms of the various MoU, the GEF is, legally and practically speaking, functionally autonomous from the conventions it serves. Consequently, the COPs cannot exercise enforceable control over the entity that operates their financial mechanisms.

206. This would likely not present a difficulty if all Parties to the conventions were also members of the Council, and vice-versa, and if all of these governments shared commensurate decision-making powers in all of the fora. But that is plainly not the case, and the "market power" of the large donors on the Council gives them far more weight in Council decision-making than they might otherwise enjoy under the decision-making practices of the conventions. On the other hand, the broad participation in the GEF of all major donors provides a means by which all of them may contribute to the support of each convention the GEF serves, whether they are party to all of those conventions or not. The RAF would likely not be in force if its adoption had depended on prior approval

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<sup>181</sup> The outstanding exception is the Multilateral Fund for the Implementation of the Montreal Protocol, established by the parties to the Montreal Protocol on Substances that Deplete the Ozone Layer on an interim basis in 1990 and on a permanent basis in 1993.

from the COPs; instead, its adoption may be viewed as the price exacted by some donor governments for their continued support of the GEF. This political tension is possible because of the fundamental nature of the GEF and its autonomy from the conventions it is intended to serve. As a legal matter, several aspects of the RAF are problematic in respect to their conformity with COP guidance and their compliance with the MoU and the GEF Instrument. In the final analysis, however, the legal relations between the conventions, the GEF, and the individual states party to each must be defined and enforced within the political context under which they have been established and maintained.



## References

### **Convention on Biological Diversity**

CONVENTION ON BIOLOGICAL DIVERSITY (1992), <http://www.biodiv.org/doc/legal/cbd-un-en.pdf>.

CARTAGENA PROTOCOL ON BIOSAFETY TO THE CONVENTION ON BIOLOGICAL DIVERSITY (2000), <http://www.biodiv.org/doc/legal/cartagena-protocol-en.pdf>.

Conference of the Parties, Decision I/2, *Policy, Strategy, Programme Priorities and Eligibility Criteria for Access to and Utilization of Financial Resources*, UNEP/CBD/COP/1/17 (Feb. 1995), <http://www.biodiv.org/decisions/default.aspx?m=COP-01&id=7062&lg=0>.

Conference of the Parties, Decision III/8, *Memorandum of Understanding Between the Conference of the Parties to the Convention on Biological Diversity and the Council of the Global Environment Facility*, UNEP/CBD/COP/3/38 (Feb. 1997), <http://www.biodiv.org/decisions/default.aspx?m=COP-03&id=7104&lg=0>.

Conference of the Parties, Decision VI/17, *Financial mechanism under the Convention*, UNEP/CBD/COP/6/20 Part 2 (May 2002), <http://www.biodiv.org/doc/meetings/cop/cop-06/official/cop-06-20-part2-en.pdf>.

Conference of the Parties, Decision VII/20, *Further guidance to the financial mechanism*, UNEP/CBD/COP/7/21 (Apr. 2004), <http://www.biodiv.org/doc/meetings/cop/cop-07/official/cop-07-21-part2-en.pdf>.

Conference of the Parties, Decision VIII/13, *Review of implementation of Article 20 (Financial resources) and Article 21 (Financial mechanism)*, UNEP/CBD/COP/8 (March 2006), <http://www.biodiv.org/decisions/default.aspx?m=COP-08&id=11027&lg=0>.

Conference of the Parties, Decision VIII/18, *Guidance to the financial mechanism*, UNEP/CBD/COP/8/31 (June 2006), <http://www.biodiv.org/doc/meetings/cop/cop-08/official/cop-08-31-en.pdf>.

Conference of the Parties, Note by the Executive Secretary, *Compilation of previous guidance given to the financial mechanism by the Conference of the Parties*, UNEP/CBD/COP/8/INF/1 (Feb. 2006), <http://www.biodiv.org/doc/meetings/cop/cop-08/information/cop-08-inf-01-en.pdf>.

Conference of the Parties, *Report of the Global Environment Facility*, UNEP/CBD/COP/8/10 (Feb. 2006), <http://www.biodiv.org/doc/meetings/cop/cop-08/official/cop-08-10-en.pdf>.

### **Global Environment Facility**

INSTRUMENT FOR THE ESTABLISHMENT OF THE RESTRUCTURED GLOBAL ENVIRONMENT FACILITY (May 2004), [http://thegef.org/GEF\\_Instrument3.pdf](http://thegef.org/GEF_Instrument3.pdf).

GEF Council, *Focal Area Strategies and Strategic Programming for GEF-4*, GEF/C.31/10 (May 2007),

[http://www.thegef.org/uploadedFiles/Documents/Council\\_Documents\\_\\_\(PDF\\_DOC\)/GEF\\_31/C.31.10 Focal Area Strategies.pdf](http://www.thegef.org/uploadedFiles/Documents/Council_Documents__(PDF_DOC)/GEF_31/C.31.10 Focal Area Strategies.pdf).

GEF Council, *Focal Area Strategies and Strategic Programming for GEF-4*, GEF/C.31/10 (May 2007),

[http://www.thegef.org/uploadedFiles/Documents/Council\\_Documents\\_\\_\(PDF\\_DOC\)/GEF\\_31/C.31.10 Focal Area Strategies.pdf](http://www.thegef.org/uploadedFiles/Documents/Council_Documents__(PDF_DOC)/GEF_31/C.31.10 Focal Area Strategies.pdf).

GEF Council, *Focal Area Strategies for GEF-4: Working Drafts and Proposed Process*, GEF/C.30/5 (2006),

[http://www.thegef.org/documents/council\\_documents/GEF\\_30/documents/C.30.5FocalAreaStrategies\\_000.pdf](http://www.thegef.org/documents/council_documents/GEF_30/documents/C.30.5FocalAreaStrategies_000.pdf).

GEF Council, *GEF Resource Allocation Framework: Indicative Resource Allocations for GEF-4, for the Biodiversity and Climate Change Focal Areas* (Sept. 2006),

[http://gefweb.org/Documents/RAF\\_Public\\_Disclosure\\_Document\\_15Sep2006.pdf](http://gefweb.org/Documents/RAF_Public_Disclosure_Document_15Sep2006.pdf).

GEF Council, *Information Note on the Management of the Small Grants Program* (May 2007), GEF/C.31/Inf.4,

[http://www.thegef.org/uploadedFiles/Documents/Council\\_Documents\\_\\_\(PDF\\_DOC\)/GEF\\_31/C.31.Inf.4 SGP Information Note.pdf](http://www.thegef.org/uploadedFiles/Documents/Council_Documents__(PDF_DOC)/GEF_31/C.31.Inf.4 SGP Information Note.pdf).

GEF Council, *Joint Summary of Chairs, Dec 5-8 2006* (Dec. 2006 ),

[http://www.gefweb.org/Documents/Council\\_Documents/documents/JointSummaryoftheChairs.pdf](http://www.gefweb.org/Documents/Council_Documents/documents/JointSummaryoftheChairs.pdf).

GEF Council, *Joint Summary of the Chairs, GEF Council Meeting, May 14-16, 2003*,

[http://www.gefweb.org/Summary\\_of\\_the\\_Chairs.pdf](http://www.gefweb.org/Summary_of_the_Chairs.pdf).

GEF Council, *Joint Summary of the Chairs, Special Meeting of the Council, August 31-September 1, 2005* (Oct. 2005),

[http://www.gefweb.org/Documents/council\\_documents/documents/Joint\\_Summary\\_of\\_the\\_Chairs-English\\_000.pdf](http://www.gefweb.org/Documents/council_documents/documents/Joint_Summary_of_the_Chairs-English_000.pdf).

GEF Council, *Operational Guidelines for the Strategic Priority “Piloting an Operational Approach to Adaptation (SPA)”*, GEF/C27/Inf.10 (2005),

[http://thegef.org/Documents/Council\\_Documents/GEF\\_C27/documents/C.27.Inf.10OperationalGuidelinesforStrategicPriority.pdf](http://thegef.org/Documents/Council_Documents/GEF_C27/documents/C.27.Inf.10OperationalGuidelinesforStrategicPriority.pdf).

GEF Council, *Relations with Conventions and Other Institutions*, GEF/C.31/3 (May 2007),

[http://www.thegef.org/uploadedFiles/Documents/Council\\_Documents\\_\\_\(PDF\\_DOC\)/GEF\\_31/C.31.3 Relations with Conventions.pdf](http://www.thegef.org/uploadedFiles/Documents/Council_Documents__(PDF_DOC)/GEF_31/C.31.3 Relations with Conventions.pdf).

GEF Council, *Rules of Procedure for the GEF Council* (2004),

[http://www.gefweb.org/Outreach/outreach-Publications/gef\\_RulesProc\\_ENGLISH.pdf](http://www.gefweb.org/Outreach/outreach-Publications/gef_RulesProc_ENGLISH.pdf).

GEF Council, *Strategic Business Planning: Direction and Targets*, GEF/C.21/Inf.11

(2003), [http://www.gefweb.org/Documents/Council\\_Documents/GEF\\_C21/C21.Inf.11-\\_Strategic\\_Business\\_Planning.pdf](http://www.gefweb.org/Documents/Council_Documents/GEF_C21/C21.Inf.11-_Strategic_Business_Planning.pdf).

GEF Council, *Summary of Negotiations on the Fourth Replenishment of the GEF Trust Fund*, GEF/C.29/3 (revised Oct. 2006),

[http://www.gefweb.org/replenishment/Reple\\_Documents/SummaryofNegotiations\\_Revised\\_October2006.pdf.pdf](http://www.gefweb.org/replenishment/Reple_Documents/SummaryofNegotiations_Revised_October2006.pdf.pdf).

GEF Council, *Summary of Negotiations on the Third Replenishment of the GEF Trust Fund* (Nov. 2002), [http://www.gefweb.org/replenishment/Summary\\_of\\_negotiations\\_-\\_ENGLISH\\_Revised\\_11-5.doc](http://www.gefweb.org/replenishment/Summary_of_negotiations_-_ENGLISH_Revised_11-5.doc).

GEF Council, *The GEF Resource Allocation Framework*, GEF/C.27/Inf.8/Rev.1 (2005), [http://thegef.org/Documents/Council\\_Documents/GEF\\_C27/documents/C.27.Inf.8.Rev.1\\_RAF.pdf](http://thegef.org/Documents/Council_Documents/GEF_C27/documents/C.27.Inf.8.Rev.1_RAF.pdf).

GEF Secretariat, *Biodiversity in the GEF Operational Strategy*, [http://www.gefweb.org/Projects/Focal\\_Areas/bio/bio\\_ops.html](http://www.gefweb.org/Projects/Focal_Areas/bio/bio_ops.html).

GEF Secretariat, *Draft Notes/July 16: GEF Sub-Regional Consultation East and Southeast Asia* (Kuala Lumpur, Malaysia, 13-14 June 2006), [http://www.gefweb.org/Operational\\_Policies/raf/documents/FinalNotesKL\\_July16.pdf](http://www.gefweb.org/Operational_Policies/raf/documents/FinalNotesKL_July16.pdf).

GEF Secretariat, *Draft Notes/June 5: GEF Sub-Regional Consultation, North Africa, Middle East, South and West Asia* (Alexandria, Egypt. 18-19 May 2006), [http://www.gefweb.org/Operational\\_Policies/raf/documents/Draft\\_Notes\\_Alexandria\\_jun5.pdf](http://www.gefweb.org/Operational_Policies/raf/documents/Draft_Notes_Alexandria_jun5.pdf).

GEF Secretariat, *Draft Notes: GEF Sub-Regional Consultation for the Pacific SIDS* (Nadi, Fiji, 3-4 August 2006), [http://www.gefweb.org/Operational\\_Policies/raf/documents/DraftMinutes-FIJIwithKFandCVcomments.pdf](http://www.gefweb.org/Operational_Policies/raf/documents/DraftMinutes-FIJIwithKFandCVcomments.pdf).

GEF Secretariat, *GEF Resource Allocation Framework: Guidelines for Country Operational Focal Points to Manage GEF Resources*, [http://www.gefweb.org/operational\\_policies/raf/documents/RAFguidelinesforOperationalFocalPointsEnglish.pdf](http://www.gefweb.org/operational_policies/raf/documents/RAFguidelinesforOperationalFocalPointsEnglish.pdf).

GEF Secretariat, *GEF Sub-Regional Consultation for Latin America*, (Panama City, Panama, 6-7 July 2006), [http://www.gefweb.org/Operational\\_Policies/raf/documents/PanamaDraftNotes.pdf](http://www.gefweb.org/Operational_Policies/raf/documents/PanamaDraftNotes.pdf).

GEF Secretariat, *GEF Sub-Regional Consultation for the Caribbean* (Bridgetown, Barbados, 10-11 July 2006), [http://www.gefweb.org/Operational\\_Policies/raf/documents/BarbadosDraftNotes.pdf](http://www.gefweb.org/Operational_Policies/raf/documents/BarbadosDraftNotes.pdf).

GEF Secretariat, *Incremental Costs*, GEF/C.7/Inf.5 (1996), <http://www.gefweb.org/COUNCIL/council7/c7inf5.htm>.

GEF Secretariat, *Notes on the Sub-Regional Consultation, Pretoria*, (Pretoria, 24-25 Apr. 2006), [http://www.gefweb.org/Operational\\_Policies/raf/documents/Final\\_minutes\\_Pretoria\\_GEF\\_Sub-regional\\_Consultation.pdf](http://www.gefweb.org/Operational_Policies/raf/documents/Final_minutes_Pretoria_GEF_Sub-regional_Consultation.pdf).

GEF Secretariat, *Operational Program #12: Integrated Ecosystem Management* (2000), [http://www.gefweb.org/Operational\\_Policies/Operational\\_Programs/OP\\_12\\_English.pdf](http://www.gefweb.org/Operational_Policies/Operational_Programs/OP_12_English.pdf).

GEF Secretariat, *Operational Program on Persistent Organic Pollutants [Draft] (OP#14)*, GEF/C.22/Inf.4 (2003),

[http://www.thegef.org/Documents/Council\\_Documents/GEF\\_C22/C.22.Inf.4\\_OP\\_on\\_PO Ps\\_FINAL.doc](http://www.thegef.org/Documents/Council_Documents/GEF_C22/C.22.Inf.4_OP_on_PO Ps_FINAL.doc).

GEF Secretariat, *Progress Report on Implementing the RAF*, GEF/C.30/11 (Nov. 2006), [http://www.gefweb.org/Documents/Council\\_Documents/GEF\\_30/documents/C.30.11ProgressReportonImplementingtheRAF\\_001.pdf](http://www.gefweb.org/Documents/Council_Documents/GEF_30/documents/C.30.11ProgressReportonImplementingtheRAF_001.pdf).

GEF Small Grants Programme, *SGP at a Glance* (2006), <http://sgp.undp.org/index.cfm?module=ActiveWeb&page=WebPage&s=AboutSGP>.

Office of Monitoring and Evaluation, *OPS3: Progressing Toward Environmental Results, Third Overall Performance Study of the GEF* (June 2005), [http://www.gefweb.org/MonitoringandEvaluation/MEPublications/MEPOPS/documents/Publications-OPS3\\_complete\\_report.pdf](http://www.gefweb.org/MonitoringandEvaluation/MEPublications/MEPOPS/documents/Publications-OPS3_complete_report.pdf).

### **Stockholm Convention on Persistent Organic Pollutants (POPs)**

STOCKHOLM CONVENTION ON PERSISTENT ORGANIC POLLUTANTS (POPs) (2001), [http://www.pops.int/documents/convtext/convtext\\_en.pdf](http://www.pops.int/documents/convtext/convtext_en.pdf).

Conference of the Parties, Decision SC-1/9, *Guidance to the financial mechanism*, UNEP/POPS/COP.1/31 (May 2005), [http://www.pops.int/documents/meetings/cop\\_1/meetingdocs/en/cop1\\_31/COP1\\_REPORT.pdf](http://www.pops.int/documents/meetings/cop_1/meetingdocs/en/cop1_31/COP1_REPORT.pdf).

Conference of the Parties, Decision SC-1/11, *Memorandum of Understanding Between the Conference of the Parties and the Council of the Global Environment Facility*, UNEP/POPS/COP.1/31 (May 2005), [http://www.pops.int/documents/meetings/cop\\_1/meetingdocs/en/cop1\\_31/COP1\\_REPORT.pdf](http://www.pops.int/documents/meetings/cop_1/meetingdocs/en/cop1_31/COP1_REPORT.pdf).

Conference of the Parties, Decision SC-2/11, *Additional guidance to the financial mechanism*, UNEP/POPS/COP.2/30 (May 2006), [http://www.pops.int/documents/meetings/cop\\_2/report/K0651526 COP2 report - 30 aug.pdf](http://www.pops.int/documents/meetings/cop_2/report/K0651526 COP2 report - 30 aug.pdf).

### **UN Framework Convention on Climate Change**

UNITED NATIONS FRAMEWORK CONVENTION ON CLIMATE CHANGE (1992) <http://unfccc.int/resource/docs/convkp/conveng.pdf>.

THE KYOTO PROTOCOL TO THE UNITED NATIONS FRAMEWORK CONVENTION ON CLIMATE CHANGE (1998), <http://unfccc.int/resource/docs/convkp/kpeng.pdf>.

Conference of the Parties, Decision 11/CP.1, *Initial guidance on policies, programme priorities and eligibility criteria to the operating entity or entities of the financial mechanism*, FCCC/CP/1995/7/Add.1 (June 1995), <http://unfccc.int/resource/docs/cop1/07a01.pdf#page=34>.

Conference of the Parties, Decision 12/CP.2, *Memorandum of Understanding Between the Conference of the Parties and the Council of the Global Environment Facility*, FCCC/CP/1996/15/Add.1 (July 1996), <http://unfccc.int/resource/docs/cop2/15a01.pdf>.



Conference of the Parties, Decision 2/CP.4, *Additional guidance to the operating entity of the financial mechanism*, FCCC/CP/1998/16/Add.1 (1998), <http://unfccc.int/resource/docs/cop4/16a01.pdf#page=5>.

Conference of the Parties, Decision 6/CP.7, *Additional guidance to the operating entity of the financial mechanism*, FCCC/CP/2001/13/Add.1 (2001), <http://unfccc.int/resource/docs/cop7/13a01.pdf#page=40>.

Conference of the Parties, Decision 5/CP.8, *Review of the Financial Mechanism*, FCCC/CP/2002/7/Add.1 (Nov. 2002), <http://unfccc.int/resource/docs/cop8/07a01.pdf#page=13>.

Conference of the Parties, Decision 5/CP.11, *Additional guidance to an operating entity of the financial mechanism*, FCCC/CP/2005/5/Add.1 (Mar. 2006), <http://unfccc.int/resource/docs/2005/cop11/eng/05a01.pdf>.

Conference of the Parties, Decision 2/CP.12, *Review of the Financial Mechanism*, FCCC/CP/2006/5/Add.1 (Jan. 2007), <http://unfccc.int/resource/docs/2006/cop12/eng/05a01.pdf>.

Conference of the Parties, Decision 3/CP.12, *Additional guidance to the Global Environment Facility*, FCCC/CP/2006/5/Add.1 (Jan. 2007), <http://unfccc.int/resource/docs/2006/cop12/eng/05a01.pdf>.

Gomez-Echeverri, Luis, Implementation Programme, UNFCCC Secretariat, Comments to GEF submitted in response to GEF Seminar on Resource Allocation Framework, September 2004, Paris, France (Oct. 2004), [http://www.gefweb.org/Whats\\_New/UNFCCC.doc](http://www.gefweb.org/Whats_New/UNFCCC.doc).

Subsidiary Body for Implementation, *Report on the assessment of funding necessary to assist developing countries in fulfilling their commitments under the Convention prepared in the context of the Memorandum of Understanding between the Conference of the Parties and the Council of the Global Environment Facility*, FCCC/SBI/2004/18 (2004), <http://unfccc.int/resource/docs/2004/sbi/18.pdf>.

Subsidiary Body for Implementation, *Synthesis report on the financial mechanism*, FCCC/SBI/2006/7 (2006), <http://unfccc.int/resource/docs/2006/sbi/eng/07.pdf>.

### **The World Bank**

Freestone, David, Acting Deputy General Counsel, The World Bank, *Office Memorandum: Would a GEF Performance-Based Framework Be Consistent with the GEF Instrument?*, dated Apr. 20, 2004, in GEF Seminar on Resource Allocation Framework, *GEF Resource Allocation Framework*, annex 7 (Aug. 2004), [http://www.thegef.org/Whats\\_New/GEF\\_Resource\\_Allocation\\_Framework.doc](http://www.thegef.org/Whats_New/GEF_Resource_Allocation_Framework.doc).

World Bank, IDA Resource Allocation Index (IRAI), <http://web.worldbank.org/WBSITE/EXTERNAL/EXTABOUTUS/IDA/0,,contentMDK:20933600~pagePK:51236175~piPK:437394~theSitePK:73154,00.html>.

## **Miscellaneous**

“Compliance,” WEST’S ENCYCLOPEDIA OF AMERICAN LAW (The Gale Group, Inc. 1998), at Answers.com, <http://www.answers.com/topic/compliance> (visited 30 Mar. 2007).

“Conformity,” THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE, 4th ed. (Houghton Mifflin Company 2003), <http://www.thefreedictionary.com/conformity> (visited 29 Mar. 2007).

“Conformity,” WordNet 1.7.1. (Princeton University 2001), at Answers.com, <http://www.answers.com/topic/conformity> (visited 29 Mar. 2007).

“Definitions,” Alberta Environment (Canada), <http://www3.gov.ab.ca/env/air/Info/definitions.html#AC>.

“Prioritize,” THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE, 4th ed. (Houghton Mifflin Company 2004), <http://www.answers.com/topic/prioritize>.

“Priority,” WordNet 1.7.1 (Princeton University 2001), <http://www.answers.com/priority>

Singh, Rabinder, et al., *Mutual Defence Agreement and the Nuclear Non-Proliferation Treaty: Joint Advice*, in DISARMAMENT POLICY (No. 78, July/Aug. 2004), <http://www.acronym.org.uk/dd/dd78/78news02.htm>.

UNITED NATIONS CONVENTION TO COMBAT DESERTIFICATION IN COUNTRIES EXPERIENCING SERIOUS DROUGHT AND/OR DESERTIFICATION, PARTICULARLY IN AFRICA (1994), <http://www.unccd.int/convention/text/convention.php>.