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Item 3 of the provisional agenda*

**Review and assessment of options for enhanced voluntary measures
and new or existing international legal instrument**

**Report on financial considerations and possible funding modalities
for a legally binding instrument or voluntary arrangement on
mercury**

Note by the secretariat

1. The Governing Council of the United Nations Environment Programme, in its decision 24/3 IV on chemicals management, established an ad hoc open-ended working group of Governments, regional economic integration organizations and stakeholder representatives to review and assess options for enhanced voluntary measures and new or existing international legal instruments for addressing the global challenges presented by mercury.
2. At its first meeting, the Ad Hoc Open-ended Working Group on Mercury requested the secretariat to undertake intersessional work in a number of areas in preparation for its second meeting.
3. One area was to provide information, in the context of financial considerations and the possible development of a new free-standing convention or of a new protocol under the Stockholm Convention on Persistent Organic Pollutants, and of voluntary arrangements, on:
 - (a) The possible modalities to allow the Global Environment Facility (GEF) to provide financial resources;
 - (b) The elements of the structure of the Multilateral Fund for the Implementation of the Montreal Protocol on Substances that Deplete the Ozone Layer that could serve as a model.

* UNEP(DTIE)/Hg/OEWG.2/1

4. The secretariat requested information from Governments, intergovernmental organizations and non-governmental organizations. Information submitted has been made available on the website of the mercury programme (<http://www.chem.unep.ch/mercury>) and has been used in the preparation of the assessment. The work has also been built, where possible, on work undertaken for other forums that is directly relevant to this context.

5. The report annexed to the present note provides the information requested above. Information on funding currently available through GEF, the Strategic Approach to International Chemicals Management (SAICM) and other funding arrangements for addressing mercury may be found in document UNEP(DTIE)/Hg/OEWG.2/12. Information on implementation options, including legal, procedural and logistical aspects, is presented in document UNEP(DTIE)/Hg/OEWG.2/4.

Suggested actions

6. The Ad Hoc Open-ended Working Group on Mercury may wish, in conjunction with the consideration of the elements required to control mercury:

(a) To consider the adequacy of the current funding arrangements to support implementation of any agreed measures;

(b) To identify any modifications or additional modalities that would be necessary to support measures to address the mercury issue.

Annex**Financial resources for long-term international action on mercury: the Global Environment Facility and the structure of the Multilateral Fund****Contents**

Executive Summary	4
List of Acronyms and Abbreviations	8
I. Introduction	9
A. Background and Purpose.....	9
B. Scope and Structure	9
II. Possible modalities to allow the GEF to provide financial resources.....	10
A. The GEF focal areas, strategic objectives, and strategic programs	10
1. POPs focal area.....	11
2. International waters focal area.....	11
3. Sound chemicals management cross-cutting area.....	12
B. GEF-administered special funds	13
C. Analysis of possible modalities for GEF funding	13
1. Mercury protocol under the Stockholm Convention.....	14
2. Free-standing convention.....	15
3. Voluntary mercury framework	18
D. Additional issue: the resource allocation framework	18
III. The Multilateral Fund of the Montreal Protocol.....	19
A. Background	20
B. Description of the Multilateral Fund.....	20
1. Objective and functions	20
2. Establishment.....	21
3. Administration	21
4. Source of funds	21
C. Elements of the Fund that could serve as a model for mercury	22
1. Dedicated fund.....	23
2. Assessed contributions.....	23
3. A fund under the direct control of the Parties.....	24

Executive Summary

I. Introduction

1. At its first meeting, the ad hoc Open-ended Working Group on mercury began its review and assessment of options for enhanced voluntary measures and new or existing international legal instruments to reduce risks from releases of mercury. For the intersessional period leading up to its second meeting, the Working Group adopted a program for the secretariat that included, inter alia:

“ . . . In the context of financial considerations and the possible development of a new free-standing convention, of a new Protocol under the Stockholm Convention, and of voluntary arrangements, to provide information on:

“1. the possible modalities to allow the Global Environment Facility to provide financial resources;

“2. the elements of the structure of the Multilateral Fund of the Montreal Protocol, that could serve as a model”

2. This paper responds to these two elements of the secretariat’s program. A third element related to financial considerations—to provide information on funding currently available through the GEF, the Strategic Approach to International Chemicals Management and other funding arrangements for addressing mercury—has been undertaken separately by the secretariat. This paper complements that work and the secretariat’s OEWG-2 study, “Further analysis of implementation options for long-term international action on mercury,” and should be read as a companion piece to each.

II. Possible modalities to allow the GEF to provide financial resources

3. This Part of the paper provides information on the possible modalities to allow the GEF to provide financial resources related to implementation of a mercury framework. The paper identifies relevant GEF focal areas, strategic objectives, and strategic programs, including their capacity to support mercury projects at the present time; mentions how the GEF special climate funds might serve as a model; and analyzes how the GEF might serve a mercury protocol, free-standing convention, or voluntary mercury framework.

A. The GEF focal areas, strategic objectives, and strategic programmes

4. The GEF focal areas that are most relevant to the three mercury options that the Working Group identified are the POPs and international waters focal areas. Also relevant is the sound chemicals management (SCM) cross-cutting issue area, which supports integrated projects in the focal areas of biodiversity, climate change, international waters, and land degradation that, among other objectives, may bring co-benefits related to chemicals management.

1. POPs focal area

5. Since its inception, the strategic objective of the POPs focal area has been to assist eligible countries to implement their obligations under the Stockholm Convention; namely, to reduce and eliminate production, use, and releases of POPs. Mercury does not fall within the scope of the Stockholm Convention, as the Convention is currently defined. Accordingly, activities to address mercury are not eligible for funding at this time under the POPs focal area.

2. International waters focal area

6. The GEF Council in 1995 included demonstration projects to reduce releases of persistent toxic substances (PTS), including mercury, as part of the first operational strategy for the international waters (IW) focal area. Mercury projects have continued to be eligible since then. For the fourth GEF replenishment (GEF-4), the Council approved a new IW Strategic Program, “Reducing Persistent Toxic Substances and Testing Adaptive Management of Waters with Melting Ice.” This “limited demonstration program” includes a global component for reducing releases of PTS, including mercury. However, very little has been done with this demonstration component during GEF-4, probably due to the overall shortage of funding in the international waters focal area.

3. Sound chemicals management cross-cutting area

7. The new “sound chemicals management framework strategy” is intended “. . . to promote sound management of chemicals practices in all relevant aspects of GEF programs, for the protection of human health and the global environment, and to contribute to the overall objective of the Strategic Approach to International Chemicals Management” As adopted for GEF-4, the sound management of chemicals (SMC) cross-cutting area includes strategic program 1, “Integrating Sound Chemicals Management into GEF Projects.” This program seeks to integrate sound chemicals management practices into the biodiversity, climate change, international waters, and land degradation focal areas. Particularly relevant to mercury is the intent to identify opportunities for additional global benefits by “reducing mercury releases through measures to reduce greenhouse gas emissions from coal combustion.”

8. The SMC area also includes strategic program 2, “Articulating the Chemicals-related Interventions Supported by the GEF Within Countries’ Frameworks for Chemicals Management.” The program would accomplish this by taking advantage of projects in the international waters focal area “. . . that address land-based sources of pollution, and in particular persistent toxic substances.” However, the funding situation for the international waters focal area makes it unlikely that this strategic program will support much chemicals management capacity related to mercury control during GEF-4.

B. GEF-administered special funds

9. In 2001, Parties to the UN Framework Convention on Climate Change (UNFCCC) established two new, GEF-administered special funds, the Least Developed Countries Fund (LDCF) and the Special Climate Change Fund (SCCF). While these special funds do not represent potential sources of mercury funding, they may serve as models for a voluntary mercury fund.

C. Analysis of possible modalities for GEF funding

10. This section examines the GEF focal and cross-cutting areas and the special climate funds in respect to the three mercury options that the Working Group requested: (1) a new protocol under the Stockholm Convention, (2) a new free-standing convention, and (3) enhanced voluntary arrangements. For each of the two legal options, the scope of the instrument could be comprehensive or narrow; a narrow approach could stand alone or be part of an overarching package of voluntary and legal elements. A voluntary mercury framework could also stand alone or be part of a package of voluntary and legal elements.

1. Mercury protocol under the Stockholm Convention

11. Under this option, Parties to the Stockholm POPs Convention would develop and adopt a free-standing mercury protocol to the Convention. Precedent suggests that a mercury protocol would be able to utilize the existing financial mechanism of the Stockholm Convention, in a manner similar to that used for the Cartagena Biosafety Protocol to the Convention on Biological Diversity. The Biosafety Protocol’s access to GEF funds required neither a new memorandum of understanding with the GEF Council nor an amendment of the GEF Instrument. Instead, the Council approved the COP’s proposal by decision.

12. A similar arrangement could be made for a mercury protocol under the Stockholm Convention. However, access to the GEF through the Stockholm financial mechanism would not ensure that new or additional funding for implementation activities under the mercury protocol would be adequate or even available. If the Stockholm financial mechanism is called on to address the needs of recipient States for their implementation of both the Stockholm Convention and a mercury protocol, then donors will need to commit additional resources to the POPs focal area.

2. Free-standing convention

13. A free-standing mercury convention could facilitate access to GEF resources, but it would not result in any new or additional resources without a concurrent commitment from donor Governments to provide them. Similarly to the Stockholm mercury protocol option, Governments could use a free-standing mercury convention for either a comprehensive legally binding mercury framework or as a narrower, legal component of an overarching “package” of voluntary and legal elements.

14. Subject to their availability, the GEF could provide resources to assist eligible countries in their implementation of commitments under a free-standing convention through three distinct approaches. Regardless which approach were used, it would still require the provision of new resources. The approaches are:

(a) Formally established financial mechanism

15. If Governments were to invite the GEF to operate a new mercury convention's financial mechanism, the convention's Conference of the Parties and the GEF Council would need to execute a memorandum of understanding between themselves, and the GEF Assembly would probably need to approve an amendment of the GEF Instrument to allow the GEF to operate the new convention's financial mechanism. A formally established financial mechanism operated by the GEF could provide resources through the existing international waters focal area, a new focal area, or the sound management of chemicals cross-cutting area. If Governments preferred a new focal area, then they could amend the GEF Instrument to establish one dedicated exclusively to mercury or one that more broadly addressed sound management of chemicals. Alternatively, the SMC cross-cutting area could be used, provided that the GEF Council agreed to a broad interpretation of Article 3 of the GEF Instrument.

16. Regardless of which focal area approach Governments used, donor States would need to allocate sufficient resources in the GEF replenishment to comply with their commitments to provide such resources under the new mercury convention.

(b) Voluntary approach using existing GEF focal areas and strategic objectives

17. If the scope of the mercury convention was narrow (as may be the case under a mercury "package" of voluntary and legal elements), then there may be less need for it to include a formally established financial mechanism. In that case, Governments could utilize the voluntary situation that currently prevails. The GEF could continue to consider mercury-related projects under its international waters focal area. However, for that focal area to serve as an effective source of mercury funding, donor Governments would first need to increase its overall resource envelope and include a specific earmark for mercury. The GEF could also explore supporting mercury projects through the sound management of chemicals cross-cutting area, especially as co-benefits from measures to reduce greenhouse gas emissions from coal combustion under the climate change focal area.

(c) Special mercury fund

18. The GEF-administered special climate funds mentioned above could serve as potential models for a voluntary, GEF-administered fund under a free-standing mercury convention. Because it would not be part of the GEF Trust Fund, such a fund may be desirable if Governments are unable to achieve consensus to include expanded resources for mercury in the GEF replenishment, but a sizeable bloc of donors is nevertheless willing to commit resources to a multilateral mercury fund.

3. Voluntary mercury framework

19. A voluntary mercury framework could stand alone or be part of an overarching package of voluntary and legal elements. In either case, two of the approaches described above in respect to a free-standing convention—namely, a voluntary approach using existing GEF focal areas and strategic objectives and a special GEF-administered mercury fund—could also be available under a voluntary mercury framework. Under these approaches, the GEF could provide assistance through its international waters focal area or donors could request the GEF to administer a special mercury fund, similar in concept to the one described above.

20. The SAICM's Quick Start Programme (QSP) may provide another opportunity for funding under a voluntary mercury framework. The QSP could potentially be adapted to serve as a medium through which donors could channel financial resources for mercury, especially if the SAICM assumed a prominent role in a voluntary mercury framework.

III. The Multilateral Fund of the Montreal Protocol

21. This Part of the paper responds to the Working Group's request for the secretariat to identify elements of the Multilateral Fund for the Implementation of the Montreal Protocol (MLF) that could serve as a model for a mercury financial mechanism. The MLF is the only global financial mechanism that requires assessed contributions from developed countries and is dedicated to providing financial assistance to developing countries in their implementation of a single multilateral environmental agreement (MEA). Since the MLF's inception, Governments have not replicated the MLF model for additional MEAs, and have instead relied upon the GEF to operate the financial mechanisms for multiple MEAs.

22. After providing a short background section on the Montreal Protocol and the historical context of the MLF, the paper describes the basic features of the MLF and then discusses the three key elements of the MLF that could serve as a model for a mercury financial mechanism and fund. If Governments chose to apply the model of the MLF to a mercury agreement, these would be the three most important elements to consider. These key elements are possible because the MLF functions under a legally binding instrument. Accordingly, they are primarily relevant to a mercury framework that includes such an instrument. The key elements are interrelated and include:

- (a) A dedicated fund that focuses on a single multilateral environmental agreement;
- (b) Requirements for donor Parties to contribute on the basis of the United Nations scale of assessments; and
- (c) The Fund is under the direct control of the Montreal Protocol's Meeting of the Parties.

A. Dedicated fund

23. The fact that the MLF is a fund dedicated exclusively to implementation of the Montreal Protocol has been advantageous to Parties in several ways. Eligibility of projects to receive MLF funding is determined solely under the rules of the Protocol and the MLF, all of which are ultimately decided under the authority of the Meeting of the Parties. The MLF secretariat's focus on project and financial management and monitoring that relate only to the Montreal Protocol has allowed it to develop deep, comprehensive expertise in ozone depletion issues. That, along with the decision-making practices of the MLF Executive Committee and the relatively non-bureaucratic structure of the MLF, has supported a reasonably efficient and timely process for project development and approval. By fully integrating the MLF into the Montreal Protocol, Parties have also been able to utilize the MLF as a tool to facilitate greater compliance with the Protocol's commitments.

B. Assessed contributions

24. The Montreal Protocol provides that "... [t]he Multilateral Fund shall be financed by contributions from [donor] Parties . . . in convertible currency or, in certain circumstances, in kind and/or in national currency, on the basis of the United Nations scale of assessments. . . ." This arrangement has resulted in a sustained, high level of contributions throughout the life of the MLF. The amount of each replenishment is based on a needs assessment and then agreed by the Parties themselves. By specifying that the contributions of individual Parties are assessed according to the UN assessments scale, the Protocol helps to de-politicize the question of burden sharing among donors.

C. A fund under the direct control of the Parties

25. This element of the Multilateral Fund may be the most distinctive, because it ensures that the MLF operates under the authority of, and is directly accountable to, the Montreal Protocol's Meeting of the Parties (MOP). The MOP is effectively the MLF's governing body. While the MLF Executive Committee manages the Fund, it does so under the direct supervision of the MOP. The MOP sets the terms of reference for the Committee and each year selects its members equally from among developed and developing country Parties to the Protocol. Executive Committee meetings are usually held in conjunction with other meetings related to the Protocol. Because the MLF is a creation of the Protocol and exists only to serve the Protocol, it is accountable and responsive to the Protocol's Parties in a manner that the GEF's design does not permit it to equal.

List of Acronyms and Abbreviations

ADB	Asian Development Bank
AfDB	African Development Bank
COP	Conference of the Parties
EBRD	European Bank of Reconstruction and Development
FAO	United Nations Food and Agriculture Organization
GEF	Global Environment Facility
IA	Implementing Agency
ICCM	International Conference on Chemicals Management
IDB	Inter-American Development Bank
IFAD	International Fund for Agriculture Development
IW	international waters
LDCF	Least Developed Countries Fund
MEA	multilateral environmental agreement
MLF	Multilateral Fund
MOP	Meeting of the Parties
MOU	memorandum of understanding
NIP	national implementation plan
ODS	ozone depleting substances
OEWG	Open-Ended Working Group
POPs	persistent organic pollutants
PTS	persistent toxic substances
QSP	Quick Start Programme
RAF	Resource Allocation Framework
SAICM	Strategic Approach to International Chemicals Management
SCCF	Special Climate Change Fund
SMC	sound management of chemicals
TAG	Technical Advisory Group
UNCCD	United Nations Convention to Combat Desertification
UNDP	United Nations Development Programme
UNEP	United Nations Environment Programme
UNFCCC	United Nations Framework Convention on Climate Change
UNIDO	United Nations Industrial Development Organization

Financial resources for long-term international action on mercury: the Global Environment Facility and the structure of the Multilateral Fund

I. Introduction

A. Background and Purpose

1. UNEP Governing Council Decision 24/3 IV established an ad hoc open-ended working group (the “Working Group,” or “OEWG”) of Governments, regional economic integration organizations, and stakeholder representatives to review and assess options for enhanced voluntary measures and new or existing international legal instruments to reduce risks from releases of mercury. The Working Group is guided by the global mercury priorities set out in GC 24/3 IV, paragraph 19. Decision 24/3 IV also requested UNEP Chemicals, in its service as secretariat for the Working Group, “. . . to prepare the analytical and summary reports necessary for [the OEWG’s] work. . . .” The first Working Group meeting (OEWG-1) took place in Bangkok, 12-16 November 2007. Among other materials the secretariat prepared for OEWG-1 was a study entitled, “Analysis of possible options to address the global challenges to reduce risks from releases of mercury” (UNEP(DTIE)/Hg/OEWG.1/2) (hereinafter “document OEWG.1/2”).¹ That study included a limited discussion related to the provision of financial resources to assist developing countries and countries with economies in transition in their implementation of the possible mercury options.

2. The Working Group at OEWG-1 adopted a program of intersessional work for the secretariat that included:

“. . . In the context of financial considerations and the possible development of a new free-standing convention, of a new Protocol under the Stockholm Convention, and of voluntary arrangements, to provide information on:

“1. the possible modalities to allow the Global Environment Facility to provide financial resources;

“2. the elements of the structure of the Multilateral Fund of the Montreal Protocol, that could serve as a model”

3. This paper responds to these two elements of the secretariat’s program. The secretariat has separately undertaken a third element related to financial considerations: to provide information on funding currently available through the GEF, the Strategic Approach to International Chemicals Management and other funding arrangements for addressing mercury. This paper complements that third element and the secretariat’s OEWG-2 study, “Further Analysis of Implementation Options for Long-term International Action on Mercury,” and should be read as a companion piece to each of them.

B. Scope and Structure

4. The scope of this paper is defined by the Working Group’s instructions to the secretariat for intersessional work, as quoted above. The approach for the two elements differs, in accordance with those instructions. With respect to the GEF, the paper presents an analysis of how the GEF might provide resources to eligible countries for activities related to mercury, both within today’s existing legal context and within the contexts of the three identified mercury options. Thus, the paper does not focus on the administrative and institutional structures of the GEF, except as may be needed to inform the analysis. In respect to the Multilateral Fund (MLF), the paper does not explore how it might operate in the context of the mercury options, because the MLF has a defined mandate that does not include mercury. Instead, the paper describes the various features of the MLF that could be relevant to development of a new financial mechanism related to mercury.

¹ Available at <http://www.chem.unep.ch/mercury/OEWG/Documents.htm>.

5. The paper is presented in three Parts:

Part 1 (the present Part) is the Introduction.

Part 2 provides information on the possible modalities to allow the GEF to provide financial resources related to implementation of a mercury framework. The Part identifies relevant GEF focal areas, strategic objectives, and strategic programs, including their capacity to support mercury projects at the present time; mentions how the GEF special climate funds might serve as a model; analyzes how the GEF might serve a mercury protocol, free-standing convention, or voluntary framework; and briefly discusses the GEF resource allocation framework (RAF).

Part 3 provides information on the elements of the structure of the Multilateral Fund of the Montreal Protocol that could serve as a model for a mercury financial mechanism. After providing a short background section on the Montreal Protocol and the historical context of the MLF, the Part describes the basic features of the MLF and then discusses the three key elements of the MLF that could serve as a model for a mercury financial mechanism and fund.

II. Possible modalities to allow the GEF to provide financial resources

6. This Part presents an analysis of how the GEF might provide resources to eligible countries for activities related to mercury, both within today's existing legal context and within the contexts of the three mercury options that the Working Group identified.

7. The Global Environment Facility is an independent financial organization that helps developing countries fund projects and programs that protect the global environment. Three implementing agencies—UNEP, the United Nations Development Programme (UNDP), and the World Bank—play key roles in identifying, developing, and managing GEF projects on the ground.² Additionally, seven regional development banks and intergovernmental organizations contribute to the implementation of GEF projects as “executing agencies with expanded opportunities.”³

8. Working with these agencies, the GEF provides eligible countries with new and additional funding to meet the “agreed incremental costs of measures to achieve agreed global environmental benefits.”⁴ The GEF serves the financial mechanisms of the UN Framework Convention on Climate Change (UNFCCC), the Convention on Biological Diversity, the Stockholm Convention on Persistent Organic Pollutants (POPs), and the United Nations Convention to Combat Desertification (UNCCD). The Conference of the Parties (COP) of each of these conventions determines the eligibility criteria for activities that the GEF may fund through their financial mechanisms.⁵ For all other activities within the GEF focal areas, countries are eligible to receive GEF grants if they are eligible to borrow from the World Bank or are eligible to receive UNDP technical assistance.⁶

9. The GEF is funded by contributions to the GEF Trust Fund from contributing participants, through a process called the “replenishment.” Governments negotiate the replenishment on a four-year cycle. Both the total amount of each replenishment and the burden sharing agreement among the contributing participants are subject to the political negotiating process. The GEF is currently in its fourth replenishment period (GEF-4), which began in 2006. Discussions on the fifth replenishment (GEF-5) are expected to begin in November 2008.

A. The GEF focal areas, strategic objectives, and strategic programs

10. The GEF Trust Fund supports measures in six focal areas: biological diversity, climate change, international waters, land degradation, ozone layer depletion, and POPs. Additionally, the GEF can support sound chemicals management activities, provided that they achieve global environmental

² Instrument for the establishment of the restructured Global Environment Facility (hereinafter GEF Instrument), art. 22 (2008), http://www.thegef.org/uploadedFiles/GEF_Instrument_March08.pdf.

³ The seven executing agencies are: the African Development Bank (AfDB), the Asian Development Bank (ADB), the European Bank for Reconstruction and Development (EBRD), the Inter-American Development Bank (IDB), the International Fund for Agricultural Development (IFAD), the UN Food and Agriculture Organization (FAO), and the UN Industrial Development Organization (UNIDO). See GEF website, *Executing Agencies* (undated), <http://www.thegef.org/interior.aspx?id=106>.

⁴ GEF Instrument, art. 2.

⁵ Except for enabling activities, all such funding channeled through the GEF Trust Fund is limited to incremental costs and must achieve global environmental benefits.

⁶ *Id.*, art. 9 (a)-(b).

benefits and relate to one or more of the six focal areas.⁷ The focal areas that are most relevant to the three mercury options that the Working Group has identified are the POPs and international waters focal areas. Also relevant is the sound chemicals management cross-cutting issue area, which supports integrated projects in the focal areas of biodiversity, climate change, international waters, and land degradation that, among other objectives, may bring co-benefits related to chemicals management.⁸

11. In its policy recommendations for the fourth replenishment, the GEF Council asked the secretariat to review and revise as necessary the strategies for the six focal areas. This led the secretariat to replace the old structure of operational programs and strategic priorities with a new structure of long-term strategic objectives and strategic programs. The Council has asked the secretariat to initiate in 2008 the development of revised long-term objectives and strategic programs for GEF-5, for presentation to the Council at its first meeting in 2009.

12. The balance of this section describes the POPs, international waters, and sound chemicals management areas, including their capacity to support mercury projects at the present time.

1. POPs focal area

13. Since its inception, the strategic objective of the POPs focal area has been to assist eligible countries to implement their obligations under the Stockholm Convention; namely, to reduce and eliminate production, use, and releases of POPs.⁹ POPs focal area resources are thus available through the financial mechanism of the Stockholm Convention, which, in turn, is available only to Stockholm Parties or (in the case of enabling activities) to countries that have signed the Convention. As is the case with GEF-financed activities relating to the financial mechanisms of the Climate Change and Biological Diversity Conventions, the GEF's operation of the Stockholm financial mechanism must “. . . conform with the policies, program priorities and eligibility criteria decided by the Conference of the Parties. . . .”¹⁰

14. Mercury does not fall within the scope of the Stockholm Convention, as the Convention is currently defined. Accordingly, activities to address mercury are not eligible for funding at this time under the POPs focal area.

2. International waters focal area

15. The GEF Council in 1995 included demonstration projects to reduce releases of persistent toxic substances (PTS), including mercury, as part of the first operational strategy for the international waters (IW) focal area. Mercury projects have continued to be eligible for funding since then.

16. For GEF-4, the Council approved a new IW strategic program 4, “Reducing persistent toxic substances and testing adaptive management of waters with melting ice.”¹¹ This “limited demonstration program” includes a global component for reducing releases of PTS, including mercury. In developing it, the GEF Secretariat stated that the program would “provide results to inform a potentially much larger program in GEF following the next [fifth] GEF replenishment.”¹² The strategic program further describes its PTS component:

“. . . With regard to PTS, a limited demonstration component beyond POPs will be supported to test effectiveness of policies, innovative instruments, and technologies for reducing releases of these toxic substances and for engaging the business community in developing cost-effective solutions and ‘pollution prevention pays’ strategies in support of the GEF sound chemicals management strategy. A number of economic sectors, especially those with mercury releases, and transboundary river basins with risks from PTS and other toxic substances would be the subject of pilot demonstrations, with the results and experiences compiled for possible future GEF application following replenishment. . . .”¹³

⁷ *Id.* art. 3.

⁸ See GEF Secretariat, *Focal Area Strategies and Strategic Programming for GEF-4*, at 92, paras. 8-9 (Oct. 2007), http://www.thegef.org/uploadedFiles/Focal%20Area%20Strategies_10.04.07.pdf.

⁹ *Id.* At 80, para 18.

¹⁰ GEF Instrument, art. 20(h).

¹¹ See GEF Focal Area Strategies for GEF, *supra* note 8, at 51-52.

¹² *Id.* at 52, para. 35.

¹³ *Id.*, para. 36.

17. Very little has been done with this demonstration component, probably because of the overall lack of funding in the international waters focal area. International waters was the only focal area to receive a decrease in funding from GEF-3 to GEF-4.¹⁴ The focal area's significantly reduced resources limit its ability to undertake new activities such as this PTS demonstration.

3. Sound chemicals management cross-cutting area

18. The new "sound chemicals management framework strategy" is an attempt to give effect to the chemicals management provisions of Article 3 of the GEF Instrument. The strategic objective of this cross-cutting area is "... to promote sound management of chemicals practices in all relevant aspects of GEF programs, for the protection of human health and the global environment, and to contribute to the overall objective of the Strategic Approach to International Chemicals Management ..."¹⁵

19. In developing its recommendations for the new area, the GEF Technical Advisory Group (TAG) for sound management of chemicals (SMC) debated whether to recommend a narrow or broad approach. Under the broad approach, the SMC area would allow:

"... support to sound management of chemicals (SMC) activities directly and for themselves where they are deemed to bring global environmental benefits in the focal areas in the long run. The TAG discussed proposing a program that would support, on a pilot basis, SMC projects that generate global environmental benefits. Such a program could have a dedicated, yet limited, budgetary envelope and be independently evaluated. It could help GEF agencies, project proponents, etc., gain experience in the design and implementation of SMC projects that bring global environmental benefits. ... Activities supported could include projects to address: mercury use in products. ..."¹⁶

20. In effect, this broad approach would have placed the SMC area more on a par with the six existing GEF focal areas by earmarking dedicated resources and allowing their primary purpose to be sound chemicals management. The approach would have allowed the GEF to consider funding most SAICM implementation projects, including mercury projects, provided they could achieve global environmental benefits. Instead, the TAG ultimately chose (and the GEF Council approved) a limited interpretation of GEF Instrument Article 3, so that SMC cross-cutting projects must be "directly related to the achievement of global environmental benefits in a particular project in one of the six focal areas."¹⁷

21. As adopted for GEF-4, the SMC cross-cutting area includes strategic program 1, "Integrating sound chemicals management into GEF Projects." This program seeks to integrate sound chemicals management practices into the biodiversity, climate change, international waters, and land degradation focal areas. The GEF will operationalize it through a "chemicals proofing" exercise that will assess the most relevant types of projects during their preparation and appraisal for the purpose of integrating SMC practices into them. Particularly relevant to mercury is the intent to identify opportunities for additional global benefits by "reducing mercury releases through measures to reduce greenhouse gas emissions from coal combustion."¹⁸

22. The SMC area also includes strategic program 2, "Articulating the Chemicals-related Interventions Supported by the GEF Within Countries' Frameworks for Chemicals Management." The objective of this program includes ensuring that GEF interventions to support PTS management are sustainable, "... because they build upon and strengthen the general capacity of recipient countries for sound chemicals management."¹⁹ The program would accomplish this by taking advantage of projects in the international waters focal area "... that address land-based sources of pollution, and in particular

¹⁴ The GEF-3 IW focal area allocation was \$430 million, while the GEF-4 allocation is \$355 million. With further reductions to support the GEF Small Grants Program, the net available to the focal area in GEF-4 is \$335 million. See GEF Secretariat, "International waters focal area strategy and strategic programming for GEF-4," at 4, para 6 (Oct. 2007), http://www.thegef.org/uploadedFiles/Focal_Areas/International_Waters/GEF-4%20strategy%20IW%20Oct%202007.pdf.

¹⁵ GEF Focal Area Strategies for GEF-4, *supra* note 8, at 90, para. 4.

¹⁶ *Id.* at 90-91, footnote 50.

¹⁷ *Id.*

¹⁸ *Id.* At 93, para. 14. For a brief overview of potential co-benefits between greenhouse gas emissions mitigation and mercury abatement, please refer to document OEWG.1/2, Part 3.2.5, "Potential Synergies with the UN Framework Convention on Climate Change," pages 53-54.

¹⁹ GEF Focal Area Strategies for GEF-4, *supra* note 8, at 94.

persistent toxic substances.”²⁰ However, as Paragraph 17 above observes, the funding situation for the international waters focal area makes it unlikely that this strategic program will support much chemicals management capacity related to mercury control during GEF-4.

B. GEF-administered special funds

23. In 2001, Parties to the UN Framework Convention on Climate Change (UNFCCC) established two new, GEF-administered special funds, the Least Developed Countries Fund (LDCF) and the Special Climate Change Fund (SCCF).²¹ While these special funds do not represent potential sources of mercury funding, they may serve as models for a voluntary mercury fund.

24. The LDCF and the SCCF allow the GEF to fund a broader range of climate change-related activities than would be possible under the climate change focal area served by the GEF Trust Fund. As its name suggests, the LDCF is tailored to the special needs of least developed countries (especially in respect to their national action plans for adaptation to climate change), while the SCCF supports climate change activities that “are complementary” to those funded through the regular GEF climate change focal area.²² As part of the political deal on the package of rules for the Kyoto Protocol, the two special funds allowed financial support for implementation of the Protocol to be separated from that for the underlying Convention, and they responded to complaints from some developing countries and countries with economies in transition that the GEF’s normal procedures for the climate change focal area were too cumbersome and restrictive.

25. The GEF manages the SCCF and LDCF based on guidance it receives from the UNFCCC COP.²³ For both funds, the GEF Council meets as the “LDCF/SCCF Council.” Decisions or actions directly affecting only the LDCF and the SCCF are delegated to the LDCF/SCCF Council, as appropriate. The LDCF/SCCF Council uses the rules of procedure for the GEF Council, slightly modified to reflect the LDCF/SCCF Council’s specific mandate.²⁴

26. Resources in the LDCF and the SCCF come from voluntary contributions from developed, “Annex II” country Parties to the UNFCCC. While the LDCF/SCCF Council agreed to schedule pledging meetings of donors on a two-year cycle,²⁵ resource mobilization for the two funds has been continuous, in practice. The COP directed the GEF in 2006 to create a co-financing scale for both special funds for projects that could not be fully financed.²⁶

27. Because the two special funds are not part of the GEF Trust Fund, some rules and principles that apply to the focal areas, such as the incremental cost rule and its relation to the generation of global environmental benefits, do not apply to the special funds. The resource allocation framework (RAF), discussed in Section 0 below, is also inapplicable to these funds.

C. Analysis of possible modalities for GEF funding

28. This section examines the GEF focal and cross-cutting areas and the special climate funds in respect to the three mercury options that the Working Group identified: a new protocol under the Stockholm Convention, a new free-standing convention, and enhanced voluntary arrangements. The section includes a discussion of the possible modalities by which the GEF might provide financial resources under each option.

²⁰ *Id.*, para. 18.

²¹ UNFCCC Conference of the Parties, Decision 7/CP.7, *Funding under the Convention*, paras. 1-2, FCCC/CP/2001/13/Add.1 (2002), <http://unfccc.int/resource/docs/cop7/13a01.pdf>.

²² *See id.*, paras. 2, 6.

²³ LDCF/SCCF Council, “Decision on Agenda Item 7: Approach to mobilization of resources,” *Joint Summary of the Chairs*, para 2 (Jan. 3, 2007), available at http://www.thegef.org/Documents/Council_Documents/LDCF_SCCF_1/documents/JointSummaryFinal.pdf.

²⁴ LDCF/SCCF Council, *Rules of Procedure for the LDCF/SCCF Council*, Introduction, GEF/LDCF.SCCF.1/3/Rev.1 (2006), http://www.thegef.org/Documents/Council_Documents/LDCF_SCCF_1/documents/LDCF.SCCF.1.3.Rev.1RulesofProcedurefortheLDCF.SCCFCouncil.pdf.

²⁵ LDCF/SCCF Council, “Approach to Mobilization of Resources,” *supra* note 23 (endorsing proposed approach to mobilizing resources for the LDCF and SCCF outlined in document GEF/LDCF.SCCF.1/6).

²⁶ UNFCCC Conference of the Parties, Decision 3/CP.11, *Further guidance for the operation of the Least Developed Countries Fund*, FCCC/CP/2005/5/Add.1 (2006), <http://unfccc.int/resource/docs/2005/cop11/eng/05a01.pdf>.

29. These options are considered within the contexts of legally binding and voluntary frameworks, as applicable, and also the context of an overarching “package” that could contain both voluntary and legal elements. For each of the two legal options, the scope of the instrument could be comprehensive or narrow. A comprehensive instrument would include many elements intended to address most or all of the global mercury priorities, while a narrow instrument might address only one or two priorities or include relatively few elements.

30. In the case of enhanced voluntary arrangements, the section considers the GEF within the context of the voluntary mercury framework described in Part 3.3 of the companion paper, “Further Analysis of Implementation Options for Long-term International Action on Mercury.” A voluntary mercury framework could stand alone or be part of an overarching package of voluntary and legal elements. In the latter case, a Stockholm mercury protocol, free-standing convention, or other instrument could contain some or all of the legal elements.

31. Two important points are common to the analysis of each option and bear restatement here. First, the amount of resources that may be required to implement a mercury framework will depend on the ambition, scope, and legal nature of its commitments, including whether any legal element is comprehensive or narrow. In other words, an ambitious framework with broad and exacting legal elements will likely require greater resources than will a largely voluntary framework with few or no legal elements.

32. Second, while the mechanism under which the GEF may deliver resources is important, the fundamental prerequisite is that donors must provide the resources. The GEF system is flexible enough to support mercury projects through several different approaches. Yet the GEF cannot accept unfunded mandates. The ability of the GEF to support mercury work is limited not by GEF policies, but by a lack of dedicated funds.

1. Mercury protocol under the Stockholm Convention

33. Under this first option, Parties to the Stockholm POPs Convention would develop and adopt a free-standing mercury protocol to the Convention. The protocol would be a separate, independent treaty from the Convention, but would be part of the Stockholm Convention framework. It would have a legally separate governance body and would not alter the existing obligations of Parties under the Convention. For an in-depth description of this option, please refer to Part 3.1 of the “Further Analysis” companion paper, and to Part 3.4.1 of document OEWG.1/2.

34. Precedent suggests that a mercury protocol would be able to utilize the existing financial mechanism of the Stockholm Convention. Under the Cartagena Biosafety Protocol to the Convention on Biological Diversity, the “financial mechanism established in Article 21 of the Convention shall, through the institutional structure entrusted with its operation, be the financial mechanism for this Protocol.”²⁷ In May 2003, the GEF Council approved capacity building for implementation of the Biosafety Protocol as a strategic priority of the GEF biodiversity program.²⁸ Thus, the Biosafety Protocol’s access to GEF funds required neither a new memorandum of understanding with the GEF Council nor an amendment of the GEF Instrument (as were needed in 2002 when the GEF added the new POPs focal area and agreed to operate the Stockholm Convention financial mechanism). Instead, the Council approved the COP’s proposal by decision. The Protocol’s COP/MOP now forwards its financial mechanism guidance to the Convention COP, which in turn includes it as part of its own guidance to the GEF.

35. A similar arrangement could be made for a mercury protocol under the Stockholm Convention. However, it is important that the OEWG consider two points. First, the scope of mercury projects that would be eligible for GEF support through the Stockholm financial mechanism would depend on the terms approved by the GEF Council, which in turn would depend on political discussions between Governments in their respective capacities as Parties to the Stockholm Convention and members of the Council. Under the Biosafety Protocol precedent, GEF support is limited to capacity building for implementation of the Protocol. In contrast to that precedent, the Council would likely be amenable to

²⁷ CARTAGENA PROTOCOL ON BIOSAFETY TO THE CONVENTION ON BIOLOGICAL DIVERSITY, art. 28.2 (29 Jan. 2000), <http://www.cbd.int/biosafety/protocol.shtml>.

²⁸ See GEF Council, *Joint Summary of the Chairs, GEF Council Meeting, May 14-16, 2003*, para. 9, http://www.thegef.org/Summary_of_the_Chairs.pdf. During GEF-4, such capacity building activities are supported through Strategic Program 6, “Building capacity for the implementation of the Cartagena Protocol on Biosafety.” GEF Secretariat, *Biodiversity Focal Area Strategy and Strategic Programming for GEF-4*, http://www.thegef.org/uploadedFiles/Focal_Areas/Biodiversity/GEF-4%20strategy%20BD%20Oct%202007.pdf.

extending mercury funding to the full range of required interventions, if Parties to the Stockholm Convention and the mercury protocol requested that it do so.

36. Second, and of fundamental importance, is the fact that *access to the GEF through the Stockholm financial mechanism would not ensure that new or additional funding for implementation activities under the mercury protocol would be adequate or even available*. That would depend on the amount of future GEF replenishments and their allocation between the various GEF focal areas and strategic programs. If the Stockholm financial mechanism is called on to address the needs of recipient States for their implementation of both the Stockholm Convention and a mercury protocol, then donors will need to commit additional resources to the POPs focal area. Without supplementary funding, existing GEF resources would need to be diverted to meet the needs of the mercury protocol. The prospect of that situation could make some Stockholm Parties reluctant to allow the protocol to use the Stockholm financial mechanism.

37. Some stakeholders may have the perception that eligible countries currently do not fully utilize the available resources in the GEF POPs focal area for implementation of their Stockholm Convention commitments. Therefore, according to that perception, there may be excess, un-programmed funds in the focal area that could be diverted towards implementation of a Stockholm mercury protocol, while the remaining funds would still be sufficient to meet demand for implementation of the underlying Convention.

38. This misperception could be based on the fact that during GEF-3, eligible Parties and signatories to the Stockholm Convention focused on preparing their national implementation plans (NIPs) and were not yet ready to seek GEF support for major POPs projects. Now, during GEF-4, activities are “characterized by a shift from preparation to the *implementation* of NIPs” (emphasis added).²⁹ In fact, the GEF is on track to program fully all of the POPs focal area resources for GEF-4 by its end, if not earlier.³⁰

39. The contrary view has also been expressed that the current level of funding for POPs will be inadequate to assist eligible Parties in meeting their obligations. For example, one of the most difficult—and potentially expensive—challenges of the Stockholm Convention is to address releases from unintentionally produced POPs. During GEF-4, projects addressing unintentional POPs are mostly directed towards planning and strategy development, not actual implementation. Implementation of these types of projects should begin on a large scale during GEF-5, which will likely result in a dramatic increase of demand for POPs focal area resources. Accordingly, it is exceedingly unlikely that the focal area will have excess resources that may be available for implementation of a mercury protocol during GEF-5, unless donors agree to increase the allocation to the POPs focal area significantly.

2. Free-standing convention

40. The option of a free-standing mercury convention could facilitate access to GEF resources, but it would not result in any new or additional resources without a concurrent commitment from donor Governments to provide them. Similarly to the Stockholm mercury protocol option, Governments could use a free-standing mercury convention for either a comprehensive legally binding mercury framework or as a narrower, legal component of an overarching “package” of voluntary and legal elements.³¹ A comprehensive legal framework would include many elements intended to address most or all of the global mercury priorities, while a narrow instrument may address only one or two priorities or include relatively few elements. The extent to which new resources may be needed would depend on the ambition and scope of commitments under the convention, and would be influenced especially by whether the convention represented a comprehensive, legally binding mercury framework or whether it was part of a package of voluntary and legal elements.

29 GEF Focal Area Strategies for GEF-4, *supra* note 8, at 81, para. 20.

30 30 June 2008 is the mid-point of GEF-4. As of 20 March 2008, the GEF had programmed 42.6% of all the resources available to the POPs focal area. See GEF Council, *Work Program Submitted for GEF Council Approval*, p. 3, table 2, GEF/C.33/9 (20 Mar. 2008). [http://www.gefweb.org/uploadedFiles/Documents/Council_Documents__\(PDF_DOC\)/GEF_33/Work%20Program%20Cover%20Note%20April%202008-C33-9Final\(1\).pdf](http://www.gefweb.org/uploadedFiles/Documents/Council_Documents__(PDF_DOC)/GEF_33/Work%20Program%20Cover%20Note%20April%202008-C33-9Final(1).pdf).

31 Please refer to the “Further Analysis” companion paper for a more thorough discussion of these variations of the free-standing convention option.

41. Developing countries and countries with economies in transition may be reluctant to agree to a free-standing convention, particularly a comprehensive one, unless they are confident that it will include significant, additional financial resources dedicated to mercury. Thus, in developing and adopting a free-standing convention, Governments would need to negotiate the terms of how these resources would be provided, including whether the GEF may be invited to be the entity to administer them.

42. Subject to their availability, the GEF could provide resources to assist eligible countries in their implementation of commitments under a free-standing convention through three distinct approaches: (1) a formally established financial mechanism with a binding commitment to contribute resources, which provides access to the GEF Trust Fund through either the international waters focal area, a new focal area, or the sound management of chemicals cross-cutting area; (2) a non-binding approach that utilizes the existing GEF focal areas and strategic objectives; or (3) a new, GEF-administered fund that is not part of the GEF Trust Fund. Regardless which approach was used, it would still require the provision of new resources. Discussion of these three approaches follows.

(a) Formally established financial mechanism

43. Within the chemicals cluster of multilateral environmental agreements (MEAs), the Stockholm Convention establishes a formal financial mechanism with a binding commitment to contribute resources.³² The Basel Convention and Rotterdam Convention do not, though each has taken steps to assist developing countries and countries with economies in transition in resource mobilization. Historically, the chances of an MEA having a formal financial mechanism are highest when the problem addressed by the MEA is one that (a) directly impacts the strategic, environmental, or public health interests of donor states³³ and (b) cannot be solved without the active participation of developing countries (e.g., Montreal Protocol, Climate Convention, POPs Convention).³⁴ Because mercury pollution is toxic, persistent, and can bioaccumulate and travel long distances in the environment, mercury arguably presents such a problem.

44. The implications of a formally established financial mechanism might differ from country to country. For developing countries and countries with economies in transition, such a financial mechanism could:

- (a) Allow them to tie their compliance with their convention commitments to the effective implementation by donor States of their commitments relating to financial resources;
- (b) Make the commitment of donor States to provide financial resources legally binding;
- (c) Give financial resource issues prominence within the convention and the agenda of its Conference of the Parties, including through periodic, formal review of the financial mechanism's effectiveness and adequacy; and
- (d) Strengthen the ability of environmental ministries to advocate within Government that their countries should ratify and implement the convention.

45. For developed countries, a formally established financial mechanism could:

- (a) facilitate their domestic appropriations processes related to implementing their convention commitments to provide financial resources; and
- (b) increase the likelihood that developing countries will agree to the inclusion of strong commitments during treaty negotiations, be willing to ratify the adopted instrument, and successfully implement their commitments.

³² These contributions are "mandatory" in the sense that the Convention requires developed country Parties to provide new and additional financial resources to assist eligible countries in meeting the agreed full incremental costs of implementing their convention obligations. See Stockholm Convention art. 13.2, 13.6. However, the Convention does not specify how the amounts of those contributions are decided or the specific modalities by which they should be made.

³³ See Jeffrey L. Dunoff, *From Green to Global: Toward the Transformation of International Environmental Law*, 19 HARV. ENVTL. L. REV. 241 (1995); Raymond Cléménçon, *Financing the Protection of the Global Commons: The Case for a Green Planet Contribution*, 11 (GEF Working Paper No. 17, July 2000), available at http://www.thegef.org/Outreach/outreach-Publications/WP17-Financing_Protection.pdf.

³⁴ See Mark A. Drumbl, *Poverty, Wealth and Obligation in International Environmental Law*, 76 TUL. L. REV. 843, 853-58 (2002), <http://ssrn.com/abstract=283204>.

46. If Governments were to invite the GEF to operate a new mercury convention's financial mechanism, the convention's Conference of the Parties and the GEF Council would need to execute a memorandum of understanding (MOU) between themselves, and the GEF Assembly would probably need to approve an amendment of the GEF Instrument to allow the GEF to operate the new convention's financial mechanism. Among other things, the MOU and amendment would normally require the GEF and GEF Council to use GEF resources related to funding activities under the mercury convention "in conformity with the policies, program priorities and eligibility criteria decided by the Conference of the Parties" of the new convention.³⁵ This requirement that the GEF must adhere to COP guidance is essential for ensuring that the GEF operates the financial mechanism in a manner that is consistent with the wishes of the convention's Parties.

47. A formally established financial mechanism operated by the GEF could provide resources through the existing international waters focal area, a new focal area, or the sound management of chemicals (SMC) cross-cutting area. If Governments preferred a new focal area, then they could amend the GEF Instrument to establish one dedicated exclusively to mercury or one that more broadly addressed sound management of chemicals. Alternatively, the SMC cross-cutting area could be used. However, the GEF Council would first need to approve a broad interpretation of Article 3 of the GEF Instrument, along the lines of that considered, but not recommended, for GEF-4 by the Technical Advisory Group for sound management of chemicals.³⁶

48. Regardless of which focal area approach Governments used, donor States would need to allocate sufficient resources in the replenishment to comply with their commitments to provide such resources under the new mercury convention. Depending on the scope of the convention, the allocated amount at first would need to support enabling activities (such as NIPs preparation) in eligible countries. Thereafter, allocations would need to be large enough to support the incremental costs of activities required for eligible countries to comply with the full range of their mercury convention commitments.

(b) Voluntary approach using existing GEF focal areas and strategic objectives

49. If the scope of the mercury convention was narrow (as may be the case under a mercury "package" of voluntary and legal elements), then there may be less need for it to include a formally established financial mechanism. In that case, Governments could utilize the voluntary situation that currently prevails. The GEF could continue to consider mercury-related projects under its international waters focal area. Additionally, it could explore supporting them through the sound management of chemicals cross-cutting area, especially in respect to co-benefits from measures to reduce greenhouse gas emissions from coal combustion under the climate change focal area. Parties to the new mercury instrument could work with the GEF to pursue these opportunities without the necessity of an MOU between the GEF Council and the COP, and without an amendment to the GEF instrument.

50. However, without these formal agreements, the GEF and GEF Council would be under no legal obligation to conform to the priorities or guidance established by the new convention's Conference of the Parties. GEF-supported activities could be driven more by the preferences of donors and the technical judgments of the GEF Secretariat and GEF Agencies than by the preferences of recipient countries. This dynamic could support the complaint sometimes voiced by partner countries that agency and donor-driven projects do not always support the sustainable development objectives of individual countries.

51. By utilizing a cross-cutting or co-benefit approach under, for example, the climate change focal area, sound chemicals management projects that are integrated with measures to reduce greenhouse gas emissions have significant potential to reduce mercury releases. In contrast, Governments should expect few results if they rely on the international waters focal area under its present funding constraints. For that focal area to serve as an effective source of mercury funding, donor Governments would first need to increase its overall resource envelope and include a specific earmark for mercury. That could be accomplished in at least two ways: (1) a donor or group of donors could advocate and provide the needed resources as part of the GEF-5 replenishment negotiations, with the GEF Secretariat responding by developing a mercury strategic program; or (2) a donor or group of donors could contribute the needed resources outside of the replenishment process, and the GEF Secretariat could then develop a strategic program for mercury based upon those resources. In either event, the new strategic program could be endorsed by the GEF Council at the conclusion of the replenishment negotiations.

35 See GEF Instrument, para. 26; see also paras. 6, 9, 15, and 20(h).

36 See discussion and footnote *supra* para. 19.

(c) Special mercury fund

52. The GEF-administered special climate funds described above in Section 0 could serve as potential models for a voluntary, GEF-administered mercury fund. Such a fund may be desirable if Governments are unable to achieve consensus to include expanded resources for mercury in the replenishment for the GEF Trust Fund, but a sizeable bloc of donors is nevertheless willing to commit resources dedicated to mercury. Other considerations in respect to this approach may include:

- (a) Under the GEF's administration of the special fund, partner countries would receive access to the delivery systems of the GEF Secretariat and the GEF implementing and executing agencies;
- (b) Because the special fund would not be part of the GEF Trust Fund, the mercury convention COP could have more latitude in deciding how the fund might be operated, for example, by deciding the extent to which the incremental costs and global environmental benefits rules should apply;
- (c) Replenishment of the special fund would occur under its own terms, and not as part of the four-year GEF replenishments;
- (d) The donor base for the special fund would likely be narrower than for the GEF Trust Fund and its future replenishment amounts potentially less reliable; and
- (e) The special fund would not be subject to the GEF resource allocation framework (RAF) (which is discussed in more detail below in Section 0).

3. Voluntary mercury framework

53. The option of a voluntary mercury framework could stand alone or be part of an overarching package of voluntary and legal elements.³⁷ In either case, two of the approaches described above in respect to a free-standing convention—namely, a voluntary approach using existing GEF focal areas and strategic objectives and a special GEF-administered mercury fund—should also be available under a voluntary mercury framework. Under these approaches, the GEF could provide assistance through its international waters focal area or donors could request the GEF to administer a special mercury fund similar in concept to the special climate funds discussed above. The modalities and considerations for accomplishing either of these two approaches would be similar to those described in Paragraphs 49-52 above.

54. The SAICM's Quick Start Programme (QSP) may provide another opportunity for funding under a voluntary mercury framework. As currently structured, the QSP Trust Fund provides "seed money" for enabling activities, including some aspects of mercury work. The Trust Fund is time-limited: it is open to receive voluntary contributions for five years from the date it was established (1 December 2006), and its funds may be disbursed for a maximum of seven years from that date.³⁸ Governments could potentially adapt the QSP to serve as a medium through which donors could channel financial resources for mercury, especially if the ICCM and SAICM assumed a prominent role in a voluntary mercury framework.

D. Additional issue: the resource allocation framework

55. A discussion of possible modalities to allow the GEF to provide financial resources for a new mercury framework should include mention of the GEF resource allocation framework (RAF). The GEF Council adopted the RAF in 2005 as part of the GEF reforms related to the third replenishment. The stated intent of the RAF is 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 and (2) their capacity, policies, and practices relevant to successful implementation of GEF programs and projects. Based upon these scores, countries receive allocations for each focal area. The allocations serve as ceilings for how much project funding the country may apply for during the replenishment period.

³⁷ Please refer to Part 3.3 of the "Further Analysis" companion paper for a detailed discussion of these approaches.

³⁸ International Conference on Chemicals Management, Decision I/4, "Quick Start Programme," appendix II, para. 3 (2006), <http://www.chem.unep.ch/saicm/ICCM%20decision%20I.4%20QSP%20Eng.pdf>.

56. For GEF-4, the RAF applies only to the climate change and biological diversity focal areas. In adopting the RAF, the GEF Council agreed to conduct a mid-term review of it in late 2008 and asked the GEF secretariat in the meantime to work to develop a “GEF-wide RAF.”³⁹ Based upon the mid-term review and other considerations, the Council may implement a GEF-wide RAF by 2010. Thus, the RAF could possibly be extended to the POPs and international waters focal areas in 2010.⁴⁰

57. A number of issues have arisen regarding implementation of the RAF, including whether it is technically workable, whether the scoring indicators are fair and take into account the sustainable development interests of developing countries, and whether its implementation is consistent with the guidance of the Conferences of the Parties for the financial mechanisms to which it applies.⁴¹ Moreover, the technical challenges that the GEF Secretariat has encountered in implementing the RAF during GEF-4 have raised doubts as to whether the secretariat will be able to develop workable criteria for the other focal areas within the Council’s timeframe. In a GEF report on the RAF from June 2007, the secretariat wrote, “The Secretariat expects to deliver for Council review in November 2008 proposed indicators for the other focal areas, as agreed to in the policy recommendations of the GEF-4 replenishment.”⁴² But the GEF Council has had very little detailed discussion of the RAF since it adopted it, and it is not clear whether the Secretariat has made much progress in developing the indicators that would allow the RAF to be extended to the other focal areas. Accordingly, it is unclear, pending the mid-term review and Council discussions expected in November 2008, whether the RAF will continue its current form and scope in GEF-5, and whether it will be extended to the other focal areas.

58. Governments that are interested in a potential role for the GEF in a future mercury framework may wish to keep themselves informed about the RAF’s status, so that they may consider its possible impact on a financial mechanism for mercury.

III. The Multilateral Fund of the Montreal Protocol

59. This Part of the paper responds to the Working Group’s request for the secretariat to identify elements of the Multilateral Fund that could serve as a model for a mercury financial mechanism. The Multilateral Fund for the Implementation of the Montreal Protocol (MLF) is a stand-alone financial mechanism established by the Parties to the Montreal Protocol on Substances that Deplete the Ozone Layer.⁴³ The MLF is the only global financial mechanism that requires assessed contributions from donor country Parties and is dedicated to providing financial assistance to developing countries in their implementation of a single multilateral environmental agreement. Since the MLF’s inception, Governments have not replicated the MLF model for additional MEAs, and have instead relied upon the GEF to operate the financial mechanisms for multiple MEAs.

60. The reader should note that the key elements of the MLF that make it distinct are possible because it functions under a legally binding instrument. Accordingly, those elements would be primarily relevant to a mercury framework that includes such an instrument. Like the MLF, the SAICM Quick Start Programme and its Trust Fund constitute a “stand-alone” financial mechanism that serves a

³⁹ GEF Council, *Summary of Negotiations on the Fourth Replenishment of the GEF Trust Fund*, 8, para. 14, GEF/C.29/3 (revised 16 Oct. 2006).

⁴⁰ In its decision on additional guidance to the financial mechanism, the Second Conference of the Parties to the Stockholm Convention invited the GEF “. . . to consult with the Convention Secretariat with regard to its future work on the Resource Allocation Framework as it relates to the Convention without prejudice to any further decision on the application of the Resource Allocation Framework to the persistent organic pollutants focal area and to report on this issue to the Conference of the Parties at its third meeting.” Decision SC-2/11, *Additional guidance to the Financial Mechanism*, para 8, UNEP/POPS/COP.2/30 (2006). The GEF Secretariat provided cursory information about the RAF in its report to COP-3 on the financial mechanism, and COP-3 gave the RAF little attention. See Stockholm Conference of the Parties, Report of the Global Environment Facility to the Conference of the Parties at its third meeting, 12-13, UNEP/POPS/COP.3/INF/3 (2007), <http://chm.pops.int/Portals/0/Repository/COP3/UNEP-POPS-COP.3-INF-3.English.DOC>.

⁴¹ For a detailed analysis of these and related questions, please see Glenn M. Wiser, *Legal Analysis of the GEF Resource Allocation Framework* (CIEL 2007), http://www.ciel.org/Publications/GEF_RAF_analysis_May07.pdf.

⁴² GEF Council, *Progress Report on Implementing the RAF*, 7, GEF/C.31/Inf.9 (June 4, 2007), [http://www.thegef.org/uploadedFiles/Documents/Council_Documents__\(PDF_DOC\)/GEF_31/C.31.Inf.9%20RAF%20Progress%20Report\(1\).pdf](http://www.thegef.org/uploadedFiles/Documents/Council_Documents__(PDF_DOC)/GEF_31/C.31.Inf.9%20RAF%20Progress%20Report(1).pdf).

⁴³ See THE MONTREAL PROTOCOL ON SUBSTANCES THAT DEplete THE OZONE LAYER, as amended, art. 10 (1987), http://ozone.unep.org/Publications/MP_Handbook/Section_1.1_The_Montreal_Protocol/.

single multilateral chemicals process, the SAICM. However, the QSP, being a voluntary arrangement under a voluntary agreement, does not share the distinct elements of the MLF, nor does it operate on the institutional and financial scale of the MLF.

61. The most prominent elements of the MLF that make it distinct include the facts that it (1) is a dedicated fund that focuses on a single multilateral environmental agreement and issue, (2) requires donor Parties to contribute to it on the basis of the United Nations scale of assessments, and (3) is under the direct control of the Montreal Protocol's Meeting of the Parties. If Governments chose to apply the model of the MLF to a mercury agreement, these would be the three most important elements to consider.

62. After providing a short background section on the Montreal Protocol and the historical context of the MLF, this Part describes the basic features of the MLF. Then, the Part discusses the three key elements of the MLF that could serve as a model for a mercury financial mechanism and fund. That discussion is accomplished in part by briefly comparing and contrasting relevant aspects of the MLF with the GEF.

A. Background

63. The Montreal Protocol establishes strict control measures to reduce and phase out the production and consumption of listed ozone depleting substances (ODS) within specific timeframes. The Protocol gave developing country Parties that consume 0.3 tonnes or less per capita of ODS extended timeframes for complying with its phase-out requirements. These developing country Parties are referred to as "Article 5" countries. Now that the Protocol has entered its "compliance period," all Parties, including Article 5 countries, must adhere to its phase-out schedules. Only Article 5 countries are eligible to access the MLF.⁴⁴

64. Much of the success of the Protocol may be traced to the level of financial resources that have been made available through the Multilateral Fund. Over the years, the Protocol has been able to sustain those resources due in part to the high level of political commitment from donor countries, the strong compliance system that links the availability of funding with a recipient country's compliance, and the mandatory approach for assessing Fund contributions.

65. During the time leading up to the 1992 Rio Earth Summit, many stakeholders argued in favor of North-South financial mechanisms to help southern countries implement the climate and biological diversity Conventions that were then being negotiated. These arguments were based on the model and precedent of the Multilateral Fund. However, most donor countries objected to the notion of creating a new financial mechanism for every convention, in part because they worried about the potential for fragmentation and proliferation of uncoordinated financing institutions and strategies. Proposals for a joint funding mechanism thus emerged, which led to establishment of the GEF.⁴⁵

B. Description of the Multilateral Fund

1. Objective and functions

66. The main objective of the MLF is to assist compliance of Article 5 country Parties by providing them with funding and technology. Financial and technical assistance is in the form of grants or concessional loans delivered primarily through four international implementing agencies.

67. The functions of the Multilateral Fund are to:

- (a) Meet the agreed incremental costs of developing country Parties to implement the Protocol;
- (b) Finance clearing-house functions that—
 - (i) Assist developing country Parties in identifying their needs for co-operation;

⁴⁴ For a list of Article 5 countries, please see Ozone Secretariat, *List of Parties categorized as operating under Article 5 paragraph 1 of the Montreal Protocol* (updated 1 Nov. 2007), http://ozone.unep.org/Ratification_status/list_of_article_5_parties.shtml. Note that some countries with economies in transition are Article 5 countries.

⁴⁵ Second GEF Assembly, *Second Overall Performance Study of GEF*, 3-4, GEF/A.2/4 (2002), http://gefweb.org/participants/Assembly/2nd_Assembly/OPS2_English-final-9602.pdf.

- (ii) Facilitate technical co-operation to meet these identified needs;
 - (iii) Distribute information and relevant materials, and hold workshops and training sessions; and
 - (iv) Facilitate and monitor other multilateral, regional and bilateral co-operation available to parties that are developing countries; and
- (c) Finance operation of the Fund Secretariat and related support costs.

68. Another key function of the Multilateral Fund has been providing the funding to establish and maintain national ozone units in every Article 5 Party.⁴⁶

2. Establishment

69. Parties to the Montreal Protocol recognized the need for a mechanism that could provide financial and technical assistance to Article 5 countries to facilitate their compliance with the Protocol's obligations. In 1990, they amended the Protocol's Article 10 to include the financial mechanism. They also established the Multilateral Fund on an interim basis. Two years later, they agreed to continue the Fund on a permanent basis, and it became fully operational in 1993.

3. Administration

70. Parties to the Montreal Protocol agreed upon terms of reference for the Multilateral Fund and terms of reference for the Fund's Executive Committee when they decided in 1992 to establish the permanent Fund.⁴⁷

71. The Executive Committee manages MLF resources. The Committee is comprised of seven Article 5 and seven non-Article 5 Parties. Committee members are selected each year by the Protocol's Meeting of the Parties. The Committee has a double-majority voting procedure designed to ensure that neither donors nor recipients may dominate decision-making. In practice, however, all decisions are taken by consensus.

72. The *Secretariat of the Multilateral Fund* operates within the UNEP framework, but is separate from the "Ozone Secretariat" that provides secretariat services for the Montreal Protocol and its underlying Vienna Convention. The MLF secretariat currently has twelve professional and eleven support staff. It is responsible for the day-to-day operations of the MLF and for reviewing project proposals; preparing policy, planning, guidance, and financial documents to be sent to the Executive Committee for approval; and arranging for and servicing Executive Committee meetings.

73. Four multilateral implementing agencies serve the MLF by assisting in program and project development. They are UNEP, the United Nations Development Programme (UNDP), the United Nations Industrial Development Organization (UNIDO), and the International Bank for Reconstruction and Development (World Bank). Additionally, UNEP serves as the *Treasurer* of the Fund.

4. Source of funds

74. Pursuant to Article 10.6 of the Protocol (as amended), the MLF is financed by assessed contributions from non-Article 5 Parties. Parties replenish the MLF on a three-year basis at a level based on a needs assessment and agreed by the Parties. The actual contribution shares paid by each donor country are based on the United Nations assessments scale. Contributions from other Parties are also encouraged, but are not required. Up to twenty percent of the financial obligations of contributing Parties can be delivered by them bilaterally in the form of eligible projects and activities.⁴⁸

⁴⁶ UNEP Division of Technology, Industry, and Environment (DTIE), OzonAction Branch, *About Regional Networks of Ozone Units* (2007, updated May 2008), <http://www.uneptie.org/ozonAction/networks/index.htm>.

⁴⁷ *Report of the Fourth Meeting of the Parties to the Montreal Protocol*, UNEP/OzL.Pro.4/15, annexes IX and X (1992), http://ozone.unep.org/Meeting_Documents/mop/04mop/index.shtml.

⁴⁸ UNEP Ozone Secretariat, *Handbook for the Montreal Protocol on Substances that Deplete the Ozone Layer*, 7th ed., sect. 3.6, para. 9 (2006), http://ozone.unep.org/Publications/MP_Handbook/index.shtml.

75. The MLF has been replenished six times. The most recent replenishment (2005) was for \$470.4 million, for the period of 2006-2008.⁴⁹ As of July 2007 total pledges have amounted to US \$2.27 billion. Payments against pledges for the entire period through 2007 stood at 92.67 per cent.

5. Obtaining assistance

76. Any Article 5 Party is eligible to receive assistance from the MLF. (Note that most countries with economies in transition are not considered Article 5 Parties and thus are not eligible for MLF funds. Instead, these countries may apply to the GEF for funding under its focal area for ozone layer depletion.) For initial capacity building and institutional strengthening requests, the Protocol's Ozone Secretariat typically advises the MLF Secretariat that a country has become a Party to the Montreal Protocol and its amendments. An implementing agency begins discussions with the Party to identify its needs and develop project proposals. The time from submission to approval varies by project type.

77. Article 5 countries are eligible to request and receive funding for developing their country programs when they indicate their intention to ratify the Montreal Protocol. After ratification, the Party may apply for grants for all eligible activities. The application and approval process for capacity building and institutional strengthening requests can proceed quickly, depending on how proactive the requesting country is. These types of projects can range between US \$30,000 to US \$500,000.

78. The process for larger, more complex project categories such as the performance-based, multi-year agreements similarly depends upon how proactive a country is. Project development is supported with MLF resources and approval can take place in less than one year. The MLF does not usually seek or assist in the arrangement of co-financing; however, there have been projects where resulting savings in energy usage have leveraged funding from other institutions.

6. Accountability, monitoring and evaluation

79. The Multilateral Fund is co-located with UNEP and is UNEP's largest environmental fund. It operates under the authority of the Protocol's Meeting of the Parties. The Executive Committee must report annually to the Meeting of the Parties.

80. The MLF Secretariat took on general Fund monitoring and evaluation functions in 1997.⁵⁰ The Executive Committee oversees these monitoring activities. The implementing agencies submit progress reports to the Executive Committee once a year. Projects that are experiencing delays are monitored more closely and are reported to each Executive Committee meeting.⁵¹ Independent consultants prepare periodic evaluations of the MLF under terms of reference agreed by the Parties.⁵²

C. Elements of the Fund that could serve as a model for mercury

81. Among the key elements of the MLF that make it distinct, and which would be most relevant to a binding mercury agreement, are:

(a) The MLF is a dedicated fund that focuses exclusively on the Montreal Protocol;

(b) The Protocol requires its "non-Article 5" Parties (i.e., developed countries and many countries with economies in transition) to contribute to the MLF on the basis of the United Nations scale of assessments; and

(c) The MLF is a creation of the Montreal Protocol that is under the direct control of the Protocol's Meeting of the Parties.

82. These key elements are interrelated and discussed in greater detail below. If Governments were to adopt a legally binding instrument on mercury that included a financial mechanism patterned after that of the Protocol and its Multilateral Fund, then these would be the essential elements to consider for that mechanism.

⁴⁹ Multilateral Fund, *The Funding Process*, http://www.multilateralfund.org/the_funding_process/1080058887066.htm. Although the current replenishment is the sixth to have taken place, it is known as "Replenishment Five," because the 1990 replenishment is referred to as the "Interim Replenishment."

⁵⁰ Multilateral Fund Secretariat, "Fund Secretariat," http://www.multilateralfund.org/fund_secretariat.htm.

⁵¹ Multilateral Fund Secretariat, "Monitoring," http://www.multilateralfund.org/results_impact.htm.

⁵² Multilateral Fund Secretariat, "Evaluation," <http://www.multilateralfund.org/evaluation.htm>.

1. Dedicated fund

83. The fact that the MLF is a fund dedicated exclusively to implementation of the Montreal Protocol has been advantageous for Parties in several ways. Eligibility of projects to receive MLF funding is determined solely under the rules of the Protocol and the MLF, all of which are ultimately decided under the authority of the Meeting of the Parties. In comparison, the fact that the GEF Instrument establishes eligibility criteria additional to those of the conventions it serves—namely, the requirements of global environmental benefits and incremental costs—has often led to confusion and occasional friction between the GEF and some Parties to those conventions. While the MLF considers incremental costs in its evaluation of project proposals, it can do so in a flexible way that is tailored to the needs of the Protocol and its Parties.

84. The MLF secretariat's focus on project and financial management and monitoring that relate only to the Montreal Protocol has allowed it to develop deep, comprehensive expertise in ozone depletion issues. That, along with the decision-making practices of the MLF Executive Committee and the relatively non-bureaucratic structure of the MLF, has supported a reasonably efficient and timely process for project development and approval.

85. By fully integrating the MLF into the Montreal Protocol, Parties have been able to utilize the MLF as a tool to facilitate greater compliance with the Protocol's commitments. The Executive Committee, working with the Protocol's Implementation Committee, can condition access to MLF funds on a Party's compliance with its Protocol obligations. For example, the Executive Committee at its thirty-seventh meeting decided that it should not approve project proposals in which a country would be in non-compliance with the control measures of the Montreal Protocol until the underlying issue of non-compliance had been dealt with by the Parties, through the Implementation Committee.⁵³

86. Economies of scale could suggest that the costs of administering a joint funding mechanism such as the GEF will be lower than those of a dedicated fund. In the case of the GEF and the MLF, this is true, but not dramatically so. The budgeted costs of administering the GEF for the four years of GEF-4 are about 2.97 percent of the \$3.13 billion replenishment. The budgeted costs of administering the MLF for the three years of its current fifth replenishment are about 3.43 percent of the \$470.4 million replenishment.⁵⁴

2. Assessed contributions

87. Article 10.6 of the Montreal Protocol provides, in part:

The Multilateral Fund shall be financed by contributions from Parties not operating under paragraph 1 of Article 5 in convertible currency or, in certain circumstances, in kind and/or in national currency, on the basis of the United Nations scale of assessments. . . .

88. This arrangement has resulted in a sustained, high level of contributions throughout the life of the MLF. The amount of each replenishment is based on a needs assessment and then agreed by the Parties themselves. Thus, it is immediately apparent in the Meeting of the Parties whether non-Article 5 Parties are collectively honoring their Article 10.1 commitments to “. . . meet all agreed incremental costs of [Annex 5] Parties in order to enable their compliance with the control measures of the Protocol. . . .” This awareness may increase the negotiating leverage of Parties to ensure that the replenishment is fully funded.

89. By specifying that the contributions of individual Parties will be assessed according to the UN assessments scale, the Protocol helps to de-politicize the question of burden sharing among donors.

⁵³ MLF Executive Committee Decision 37/20, para. 48 (a), UNEP/OzL.Pro/ExCom/37/71, *in* Multilateral Fund for the Implementation of the Montreal Protocol, POLICIES, PROCEDURES, GUIDELINES AND CRITERIA 243 (Nov. 2007), <http://www.multilateralfund.org/files/Policy53.pdf>.

⁵⁴ These figures result from (1) totaling the respective corporate and related budgets that were approved for each year of the two replenishments; and (2) dividing the sum of those budgets by the amount of the respective replenishment. The MLF is currently in its fifth replenishment amounting to US \$470.4 million for the triennium of 2006-08. The budgeted costs for administering the MLF and its Executive Committee during that triennium total \$16.1 million. Thus, the budgeted administrative costs are equivalent to about 3.43% of the replenishment. The current fourth GEF replenishment is \$3.13 billion to fund operations for a four-year period between 2006 and 2010. The GEF budgets for fiscal 2006, 2007, 2008, and 2009 (which include funding for the secretariat, Scientific and Technical Advisory Panel, GEF Trustee, GEF Evaluation Office, and various special initiatives) total \$92.9 million, which is about 2.97% of the replenishment.

This, in turn, helps focus the negotiations on the overall amount of the replenishment and whether it will meet the needs assessment.

90. In comparison, GEF replenishments are political negotiations conducted outside of the conventions the GEF serves, leading some countries to believe that the GEF replenishment process is incapable of ensuring that (as Article 13 of the Stockholm Convention states) “. . . [t]he developed country Parties shall provide new and additional financial resources to enable developing country Parties and Parties with economies in transition to meet the agreed full incremental costs of implementing measures which fulfill their obligations under this Convention. . . .” By pooling the financial resources of all of the GEF conventions into a single replenishment, donors are more easily able to cap their overall contributions than if they separately negotiated their contributions under each convention. This “pooling” effect may result in a lower overall amount available to the conventions, and may intensify the competition between the different conventions for their respective shares of the GEF replenishment (as those shares are reflected in the allocations to each focal area). Pooling also may make it easier for some donors to obtain pledged funds through their domestic appropriations processes and ensure that they can fully honor their pledges.

3. A fund under the direct control of the Parties

91. This element of the Multilateral Fund may be the most distinctive, because it ensures that the MLF operates under the authority of, and is directly accountable to, the Montreal Protocol’s Meeting of the Parties. While the MLF Executive Committee manages the Fund, it does so under the direct supervision of the MOP. The MOP sets the terms of reference for the Committee and each year selects its members equally from among Annex 5 and non-Annex 5 Parties to the Protocol. Executive Committee meetings are usually held in conjunction with other meetings related to the Protocol. The Committee’s double majority voting arrangement—required under Article 10 of the Protocol—ensures that neither donors nor recipients dominate the operations of the Fund, which may give recipients a greater role in decision-making than they have in the GEF Council. (In practice, the Committee’s decision-making has always been by consensus. However, the existence of the double-majority voting rule likely influences the ability of Committee members to achieve consensus.)

92. In short, the Protocol’s Meeting of the Parties is effectively the MLF’s governing body.⁵⁵ Because the MLF is a creation of the Protocol and exists only to serve the Protocol, it is accountable and responsive to the Protocol’s Parties in a manner that the GEF’s design does not allow it to equal.

93. As an independently constituted facility, the GEF is, legally and practically speaking, functionally autonomous from the conventions it serves, despite the terms of the various memoranda of understanding between the COPs and the GEF Council. Consequently, the COPs cannot exercise direct control over the entity that operates their financial mechanisms. 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. On the other hand, the broad participation in the GEF of all major donor States 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.

⁵⁵ See Multilateral Fund Secretariat, “Montreal Protocol Parties” (2003), http://www.multilateralfund.org/montreal_protocol_parties.htm.