

Legal Personality and the Green Climate Fund

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Introduction

1. The related concepts of legal personality and legal capacity are often of relevance in the UNFCCC negotiations. Of particular current relevance is the status of the Green Climate Fund ("GCF"). This issue arises in the following context

- (1) The Cancun Agreement (LCA text § 102-112, Appendix III) decided to establish the GCF and made certain provision for its establishment and operation;
- (2) The Transitional Committee ("TC"), tasked by Cancun § 109 with the design of the GCF, made recommendations on 18 October 2011 for details of the GCF. These included the provision of a draft governing instrument and followed a note dated 1 September 2011 by way of explanation of its work;
- (3) The draft governing instrument provided (§ 2.2. paragraph 7)

"2.2 Legal status

7. In order to operate effectively internationally, the Fund will possess juridical personality and will have such legal capacity as is necessary for the exercise of its functions and the protection of its interests."

- (4) A draft, dated 5 December 2011, of text for a decision of COP17¹ provided

"Decides that the GCF shall possess international juridical personality and legal capacity, and shall enjoy such privileges and immunities as are necessary for the fulfilment of its functions in accordance with paragraphs 7 and 8 of the Governing Instrument";

- (5) A revised text dated 7 December contains this wording as one alternative for paragraph 13, with an alternative of *"Stresses the need to confer the legal status to the GCF as*

¹ This issue is being addressed outside the main text of the LCA draft, the latest (7 December) version being at <http://unfccc.int/resource/docs/2011/awglca14/eng/crp38.pdf>

foreseen in paragraph 7 and 8 of the governing instrument”. Paragraph 14 also refers to juridical personality and capacity but in the specific context of the arrangements with the host country, which will be concerned with domestic law personality as well as international personality.

- (6) The adoption of the TC recommendations has been supported in the COP 17 negotiations by a large majority of States. However a question has been raised, in the context of whether recipient states can have direct access to the GCF, as to whether it has or will have (sufficient) legal personality for this purpose.
2. This paper begins by introducing the concept of international legal personality and legal capacity. It describes the legal status of an international organisation and briefly discusses the manner in which an international organisation is attributed international legal personality and legal capacity. It then discusses the key issue relating to the Green Climate Fund, namely whether the Fund has international legal personality, with reference to the draft governing instrument and proposed wording of the COP decision as set out in a text dated 5 December 2011.

Legal Status of International Organisations

3. The legal status of an international organisation (IO) determines the rights, privileges, duties, and powers of the IO at the international level. This is also the case with international funds and financing institutions, such as the Green Climate Fund. The issue of status has been considered in detail by the TC in the course of its work, and its conclusions are set out in its paper of 29 June 2011.²
4. The legal status of a fund determines the extent to which the fund or funding institution can operate independently to achieve its purposes and objectives and fulfil its functions. As a result, international legal status is functional in nature. Funds and funding institutions are empowered to exercise only those rights, privileges, duties, and powers which have been conferred on them explicitly or implicitly by their Member States.³
5. As discussed in the June 2011 paper, there are precedents for an international fund or funding institution to acquire or be conferred with legal status in a number of ways:
- (a) on the basis of its constituent instrument(s) (for example a treaty or international agreement) – this is the most commonly used means;⁴
 - (b) pursuant to a decision of the supreme organ of an intergovernmental body (e.g. a COP decision);
 - (c) under the national laws of one or more Member States; or

²See *Workstream II: Governance and Institutional Arrangements, Background note: Review of the Legal Status of Select International Funds and Financial Institutions*, June 29, 2011 available at:

http://www.google.com/url?q=http://unfccc.int/files/cancun_agreements/green_climate_fund/application/pdf/tc2_ws2_2_290611.pdf&a=U&ei=Bg2TTqPWIsPm0QHRqpAc&ved=0CBwQFjAD&usg=AFQjCNFKCtKgLtiFQ9yKJUztiiKfHliWwQ. This paper has no formal legal status as such, and does not constitute independent legal analysis, but sets out generally accepted principles of International Law

³ *Ibid.*

⁴ Thus The International Development Association (IDA), the International Monetary Fund (IMF) and the International Bank for Reconstruction and Development (The World Bank) derive their international legal status, privileges and immunities from the treaties or constituent instruments of these three institutions. The Articles of Agreement of the IDA, IMF and The World Bank state that each of these institutions “shall possess full juridical personality, and, in particular, the capacity (i) to contract; (ii) to acquire and dispose of immovable and movable property; (iii) to institute legal proceedings.”

(d) under the national laws of all Member States.⁵

6. In addition to the differing ways a fund can acquire its legal status, there are several key elements of that legal status that define what role the fund can play in the international arena. The fund may have some or all of the following components:

International Juridical or Legal Personality

7. Under international law, a legal person is ‘*an entity capable of possessing international rights and duties and having the capacity to maintain its rights by bringing international claims.*’⁶ In line with this, the TC papers refers to international juridical or legal personality as the capacity to enjoy legal rights, duties and powers on the international plane, and having the capacity to maintain its rights by bringing international claims.⁷ The classical attributes of international juridical or legal personality of an international fund or financial institution are: (1) The right to negotiate and conclude international agreements or treaties; (2) The right to put forth international claims and appear before international courts and international tribunals; (3) The right to entertain bilateral diplomatic relations with States and other international actors.⁸
8. The English term ‘legal person’ which is usually translated as ‘*personnalité juridique*’ in French and ‘*personalidad jurídica*’ in Spanish⁹, means that the entity concerned shall have the right to recognition as a person before the law. Insofar as the term ‘juridical person’ is generally current in English it tends to be used for persons which owe their existence entirely to the operation of the law (for example companies), in distinction to natural persons (not all of whom historically have enjoyed legal personality in all legal systems).
9. However, the term ‘juridical personality’ does appear in a number of international instruments. Article 104 of the Charter of the United Nations merely provides that: ‘The Organization shall enjoy in the territory of each of its Members such legal capacity as may be necessary for the exercise of its functions and the fulfilment of its purposes.’ Here the reference is to legal personality under the national laws of the UN member States. However Article 1 of the Convention on the Privileges and Immunities of the United Nations states that: “*The United Nations shall possess juridical personality. It shall have the capacity: (a) to contract; (b) to acquire and dispose of immovable and movable property; (c) to institute legal proceedings.*” There is no material difference for present purposes between international “legal” and “juridical” personality which are synonymous.
10. It is established in International Law that explicit provision in a constituent treaty is not a prerequisite for a body to have legal status. The ICJ’s *Reparations for Injuries* decision illustrates this. Thus, if an organisation objectively qualifies as an ‘international organisation’ (in that it entails a permanent association of States, equipped with organs, and is endowed with functions exercisable on the international plane, distinct of those of its Member States) it is sufficient if it can be established that its Member States intended for it to have legal personality on the international plane. Even if the final text of the governing instrument does not explicitly confer international legal personality on the Fund, it could still have this status on the basis of the functions attributed to it in the same document.

⁵ *Workstream II Ibid*

⁶ Brownlie, *Principles of Public International Law*, 6th ed: 2003, p. 57

⁷ See *Review of the Legal Status of Select International Funds* available at:

http://www.google.com/url?q=http://unfccc.int/files/cancun_agreements/green_climate_fund/application/pdf/tc2_ws2_2_290611.pdf&a=U&ei=Bg2TTqPWIsPm0QHRqpAc&ved=0CBwQFjAD&usg=AFQjCNFKCtkgLfIFQ9yKJUztiikfHliWwQ

⁸ *Ibid.*

⁹ see, e.g., Article 16, International Convention on Civil and Political Rights, 999 UNTS 171, 1966

11. It does not however follow that any entity created under the UNFCCC process has international legal personality and, for example, the Adaptation Fund Board has international legal capacity but no international legal personality. It has however had legal personality conferred on it expressly by domestic legislation of Germany, its host state.

Legal Capacity

12. Legal capacity usually refers to specific acts that the institution can undertake in the discharge of its functions. Legal capacity is distinct from international legal personality. International legal personality encompasses certain rights, privileges, duties and powers on the international plane. Legal capacity, on the other hand, is limited to only those specific legal acts that the institution is empowered to undertake. These acts normally include the legal capacity to: (1) contract; (2) acquire and dispose of immovable and movable property; and (3) institute legal proceedings.¹⁰

Privileges and Immunities

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

The Legal Personality of the GCF

14. The extent of the Green Climate Fund's international juridical or legal personality, legal capacity, and privileges and immunities depend on the source of its legal status and the status of the instrument(s) establishing it. As it has been created by a Conference of Parties decision rather than by treaty, its authority will derive from the text of the decision. The personality of the Fund is separate and distinct from that of its Trustee.
15. As set out above, the TC recommendations for the governing instrument expressly provides for the GCF to have "*juridical personality*" in order to "*operate effectively internationally*".¹¹ This provision indicates that the Fund is intended to have international legal personality to the extent necessary to perform its functions.
16. Were the legal status of the Fund left undefined by the governing instrument, it appears to be the case, on the basis of the precedent of the Montreal Protocol Multilateral Fund and Decision VI/16 (see below), that a COP decision, such as paragraph 13 of the Draft decision proposed by the Chair xxx/CP.17, which decided that "the GCF shall possess international juridical personality and legal capacity" would be effective in order to confer international juridical personality.¹²

¹⁰ *Ibid.*

¹¹ UNFCCC/CP/2011/6, *Report of the Transitional Committee for the design of the Green Climate Fund*, November 2011, paras 7 and 8.

¹² The authority of the COP is limited to matters within its mandate, which includes under UNFCCC § 7(2)(i), a mandate to "establish such subsidiary bodies as are deemed necessary for the implementation of the Convention", and, under § 7(2)(m) a mandate to "exercise such other functions as are required for the achievement of the objective of the Convention". Whilst the GCF is not a subsidiary body, but rather a financial mechanism with Art 11 of the Convention, Appendix III of the LCA Cancun Agreement envisages the approval at COP 17 of the legal and institutional arrangements for the establishment of the GCF. Although it might be argued that the general mandate does

17. A similar decision was proposed by the Meeting of the Parties and relied upon to clarify the legal status of the Multilateral Fund established under the Montreal Protocol.¹³
18. Decision VI/16 [of 1994 covers the ‘[j]uridical personality, privileges and immunities’ of the Multilateral Fund for the Implementation of the Montreal Protocol and was intended to ‘clarify the nature and *legal status of the Fund as a body under international law*’ [italics added]. The Decision, in relevant part, provides:
- Juridical personality:* The Multilateral Fund shall enjoy such legal capacity as is necessary for the exercise of its functions and the protection of its interests, in particular the capacity to enter into contracts, to acquire and dispose of movable and immovable property and to institute legal proceedings in defence of its interests. [Italics in original]
19. Where an entity is located in a state other than the seat of the host organisation, it will be necessary to conclude an agreement with the state concerned, as was done in the case of the Montreal Protocol Fund where an agreement was made with the Government of Canada.

Conclusion

20. The proposed governing instrument of the GCF and the accompanying COP text paragraph 13, option 1¹⁴, are together effective to confer legal personality on the Fund. This is separate from (but relevant to) the issue of the status created by domestic legislation, or by any type of “Headquarters Agreement” which could be concluded with the host State and/or under the law of that State.

not suffice for present purposes, this argument is unattractive, and when the COP has power to establish subsidiary bodies the better view is that it also has power to confer legal personality on the GCF. This is especially so as this is required for the achievement of the Art 2 objective (the GCF being concerned with mitigation as well as adaptation).

¹³ In addition, Resolution 6.9 of the Conference of the Parties to the Convention on the Conservation of Migratory Species of Wild Animals was entitled the ‘Juridical Personality of, and the Headquarters Agreement for, the Convention Secretariat’. By it, the COP sought to ‘clarify the nature and legal status of the Convention Secretariat as a body’. In particular, under the heading ‘juridical personality’ the COP decided that: ‘*The Convention Secretariat should possess in the host country such legal capacity as is necessary for the effective discharge of its functions under the Convention, in particular to contract, to acquire and dispose of movable and immovable property and to institute legal proceedings. This appears to be a direction by the COP to the host country to take appropriate domestic measures under its municipal law.*’

¹⁴ Option 2 of the text would appear to envisage that further action is necessary in order to confer legal “status” .