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# Legal and Formal Arrangements with Intermediaries and Implementing Entities<sup>1</sup>

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**GCF/B.08/23**

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**Meeting of the Board**

14–17 October 2014

Bridgetown, Barbados

Agenda Item 19

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<sup>1</sup> The agenda item also refers to “policies on fees and payments”. The policy on fees is covered under agenda item 6 (c) (see GCF/B.08/04).

## Recommended action by the Board

It is recommended that the Board:

- (a) Take note of the information presented in document GCF/B.08/23 *Legal and Formal Arrangements with Intermediaries and Implementing Entities*; and
- (b) Adopt the draft decision presented in Annex I to this document.

# Legal and Formal Arrangements with Intermediaries and Implementing Entities

## I. Introduction

1. By its decision B.07/02, the Board decided that the accreditation process for intermediaries and implementing entities will comprise three main stages. Stage III will include the conclusion of legal arrangements between the accredited entity and the Fund. This document describes these legal arrangements. There are various possible funding arrangements foreseen between the Fund, accredited implementing entities and intermediaries and executing entities, as presented to the Board at its sixth meeting in document GCF B.06/08 *Initial Proposal Approval Process, Including the Criteria for Programme and Project Funding (Progress Report)*. An overview of the possible arrangements presented to the Board in February is attached to this document as Annex II.

2. The envisaged legal framework can be outlined as follows:

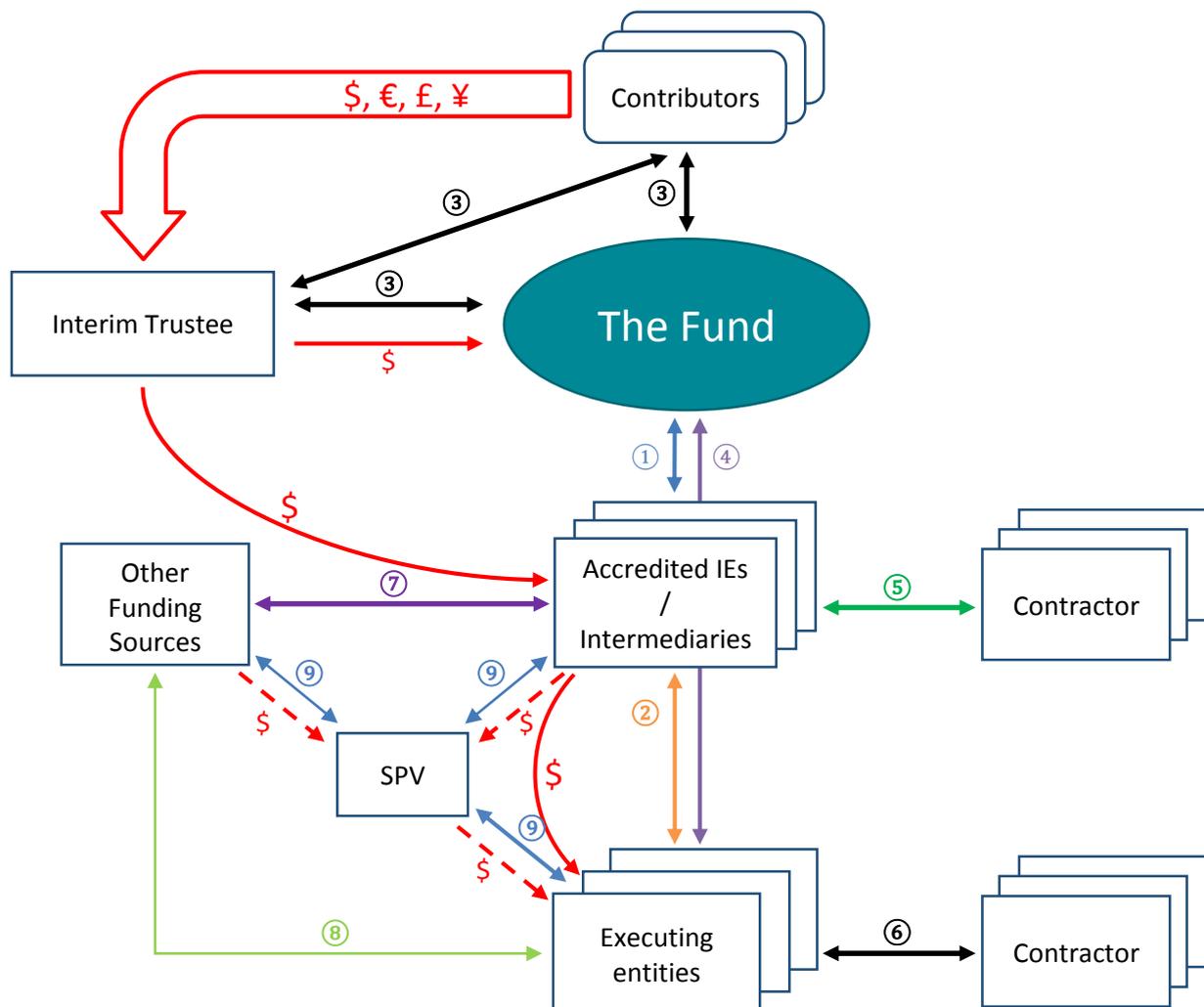


Figure 1. Legal framework

- ① Agreements between the Fund and accredited implementing entities and intermediaries;
- ② Agreements between accredited implementing entities/intermediaries and executing entities;
- ③ Contribution Agreements among Contributors and the Interim Trustee and Fund, as the case may be;
- ④ Agreement between the Fund and an Executing Entity with an accredited Implementing Entity/Intermediary acting as agent for the Fund;
- ⑤ Agreement between accredited implementing entities/intermediaries and contractors (scenario II of Annex II);
- ⑥ Agreement between executing entities and contractors (scenario I of Annex II);
- ⑦ Loan agreements between other funding sources and accredited intermediaries (scenario III of Annex II);
- ⑧ Loan agreements between other funding sources and executing entities (scenario IV of Annex II); and
- ⑨ Loan and other agreements between other funding sources, an accredited intermediary, a Special Purpose Vehicle (SPV) and an Executing Entity.

## II. Agreements between the Fund and accredited implementing entities and intermediaries

### 2.1 Parties and legal capacity

3. The Fund possess juridical personality and will have such capacity as is necessary for the exercise of its functions and the protection of its interests, according to Article 7 of the Governing Instrument. Article 3 of the Headquarters Agreement with the Republic of Korea states that the Fund shall possess such juridical personality and legal capacity as may be necessary to operate effectively internationally, to enter into this Headquarters Agreement, and for the exercise of its official functions and the fulfilment of its purposes, including the capacity to contract, to acquire and dispose of immovable and movable property, and to be party to and to institute judicial proceedings.

4. Based on the provisions referred to above and on general principles of international law, the Fund is a legal entity with the capacity to enter into legal agreements. Once the Board has approved their accreditation:

- (i) The Fund may enter into legal agreements with implementing entities and intermediaries; and
- (ii) the Executive Director is deemed to be authorized to enter into such legal agreements on behalf of the Fund, although it would for the avoidance of doubt be preferable to have the authority of the Executive Director confirmed by the Board.

5. Legal due diligence in Phase II of the accreditation process must establish the legal capacity of the applicant entity to enter into a legal agreement with the Fund. The person authorized to enter into a legal agreement on behalf of the applicant entity, the necessary internal approval and other required action must also be established in order that the entity may legitimately enter into the agreement and be bound to perform its obligations thereunder.

6. If the accredited entity will be acting as an agent for the Fund at the project/programme of activities level, a direct legal link will be established between the Fund and the Executing Entity and legal due diligence will be necessary for the Executing Entity. It is likely that such legal due diligence may only be possible during the project implementation phase and will need to be part of the project approval process.

## 2.2 Form of agreement

7. Depending on the type of accredited entity, the relationship between the Fund and such entity would take the form of either a legal agreement (contract governed by private law) or a legal arrangement (arrangement governed by international public law). A contract is typically entered into with a private sector entity or state-owned enterprise, a legal arrangement with another international organization (e.g. UN organization, multilateral development banks (MDB) or International financial institutions (IFI)). In this document, the term agreement or contract will be used and includes for the purpose of this document any other form of legal arrangement.

8. It is the intention that the Fund should standardize the legal documents where possible and develop general conditions applicable to all grants and loans. However each legal agreement must take into account specifics, such as the type of accredited entity and/or Executing Entity (if applicable), the country in which it will be operating and the scope of the accreditation.

9. In view of the fit-for-purpose-accreditation, the Fund may also wish to develop a number of templates in order to reflect the type of projects for which an entity is accredited. For certain projects, the Fund may require stricter covenants and reporting requirements.

## 2.3 Structure of agreement

10. Upon accreditation, it is proposed that the Fund shall enter into a framework agreement with the accredited entity, which shall set out the general terms and conditions of the services to be rendered by the entity for the Fund.

11. Upon the Board's approval of a specific project or programme activity, it is then proposed that the Fund shall enter into a project agreement with the accredited entity in question, either acting for itself or as a pass-through for the Executing Entity (scenario IV of Annex II), which sets out the specific terms and conditions of the services to be rendered by the entity for the Fund in respect of the approved project or programme activity.

## 2.4 Contents of framework agreement

12. The framework agreement containing general terms and conditions will include the following provisions:

- (a) Definitions;
- (b) Duration of contract;
- (c) Conditions precedent;
- (d) General services to be rendered;
- (e) Procedures for stakeholders' input;
- (f) Involvement NDA/focal point;
- (g) Project cycle inc. approval process;
- (h) Procedure for project agreements specifying specific services, projects or programme activities and measurable results;

- (i) Adherence to guidelines from the Fund, inc. the fiduciary standards, the environmental and social safeguards and, if applicable, the financial procedures agreement;
- (j) Restriction to operate only in countries that have accepted:
  - (i) the privileges and immunities of the Fund and its staff; and
  - (ii) not to impose tax on the projects and/or programme activities funded by the Fund.
- (k) Fees and payments;
- (l) Conflicts of interest;
- (m) Administration, record keeping and reporting requirements;
- (n) Periodic reviews/spot checks by the Secretariat, the Independent Evaluation Unit and the Independent Integrity Unit, inc. access to documents, data, premises and project locations;
- (o) The right of the Fund to revise or revoke accreditation or amend the applicable terms and conditions on the basis of the outcome of the periodic or ad hoc review;
- (p) Events of default;
- (q) Remedies in the event of default, inc. suspension of payments, termination of contract, liability for costs and damages and repayment of funds;
- (r) Evaluation after termination/implementation of a project or programme activity;
- (s) Branding;
- (t) Ownership of equipment, industrial property rights;
- (u) Notices/communication;
- (v) Confidentiality/(Interim) disclosure policy;
- (w) Independent Redress Mechanism;
- (x) No waiver of privileges and immunities;
- (y) Applicable law: for contracts with private sector companies and state-owned enterprises (SOEs), the application of New York, English, Hong Kong or Singaporean law is most likely as these are generally and widely accepted legal systems. For arrangements with international organizations, international public law is the preferred law; and
- (z) Dispute resolution: if disputes cannot be settled amicably, the dispute will be submitted to arbitration in accordance with the arbitration rules of a reputable institution (e.g. United Nations Commission on International Trade Law (UNCITRAL), International Chamber of Commerce (ICC), and Permanent Court of Arbitration (PCA)). Some international organizations may be unwilling to include an arbitration clause in the agreement.

## 2.5 Contents of project agreement

13. The project agreement will set out provisions for a specific project or programme activity—including the payment/fee schedule and measurable results—after Board approval of the specific project or programme activity.

14. If the accredited entity acts as an agent for the Fund, the project agreement will establish a direct legal link between the Fund and the Executing Entity. At this stage, legal due diligence must be performed on the Executing Entity. A large proportion of the contents of the framework agreement must be reflected in the project agreement in addition to project specific terms and conditions.

15. If the proposed project involves other funding sources, additional agreements may be necessary, such as an intercreditor agreement.

### **III. Agreement between accredited implementing entities/ intermediaries and executing entities**

16. In most cases, these agreements are principally between the accredited entities and the executing entities. The Fund will not be a party thereto.

17. If the accredited entity is acting as an agent for the Fund, a direct legal relationship will be established between the Fund and the Executing Entity. It must be verified that all terms and conditions of the framework agreement are correctly reflected in the project agreement.

### **IV. Agreement between accredited implementing entities/ intermediaries and Contractors**

18. These agreements are between the accredited entities and Contractors. The Fund will not be a party thereto.

### **V. Agreement between accredited implementing entities/ intermediaries and other funding sources**

19. These agreements are between the accredited entities and other funding sources. The Fund will not be a party thereto.

### **VI. Agreement between executing entities and Contractors and other funding sources**

20. These agreements are between the executing entities, the Contractors and other funding sources. The Fund will not be a party thereto.

### **VII. Agreement between accredited implementing entities/ intermediaries, other funding sources, an SPV and executing entities**

21. In this structure, the accredited Intermediary will together with other funding sources, incorporate an SPV, through which financing the executing entities will be structured. The Fund will not be a party thereto. See documents GCF/B.08/13 *Potential Approaches to Mobilizing Funds at Scale* for a further description.

## **VIII. General remarks on chapters III, IV, V, VI and VII of this document**

22. While the Fund will as a general rule not be a party to these legal agreements, the accredited entity must ensure that all of the agreements comply with the framework agreement between the Fund and accredited entity in question. The Fund must also have the right to review all agreements, correspondence and other communications between the accredited entity and the Executing Entity, contractor or other source of funding and to meet with them. Similar access and inspection rights are to be granted to Independent Evaluation Unit and the Independent Integrity Unit.

23. In scenarios where the accredited entity acts as an agent for the Fund, direct legal relationships will be created between the Fund and the other entities involved in the project or programme activities. Special consideration needs to be given to the protection of the interests of the Fund, such as its privileges and immunities. These will be dealt with in the due diligence phase at the project level and will be part of the project approval process by the Board.

24. In the event of co-financing, intercreditor agreements may be necessary among all funding sources involved, including the Fund, the accredited entity and the SPV.

## **Annex I: Decisions of the Board**

The Board, having considered document GCF/B.08/23 *Legal and Formal Arrangements with Intermediaries and Implementing Entities*:

- (a) Decides that the Fund shall enter into a framework agreement with implementing entities and intermediaries upon their accreditation by the Board; and
- (b) Authorizes the Executive Director – or her designee – on behalf of the Fund to negotiate and agree on the terms and conditions of such framework agreements with accredited implementing entities and intermediaries and to enter into such framework agreements, perform such acts and enter into other such agreements as may be required or deemed desirable in connection with the implementation of such framework agreements.

## Annex II: Possible Funding Arrangements

