

Issues Brief # 4

The Environmental Dimension of IFSD



UNEP Division of Environmental Law and Conventions (DELIC)

Note on Issues Briefs: The issues revolving around the theme of the Institutional Framework for Sustainable Development (IFSD) are complex and numerous and the information that exists on it is often dispersed and sometimes not easily accessible. The Issues Brief series has been prepared in order to address some of these information and knowledge gaps as well as to assist stakeholders to understand some of the main concerns that have been raised over the course of recent formal and informal meetings concerning the environmental pillar of IFSD. The Issues Briefs in no way represent a position of any stakeholder or the views of the UNEP Secretariat or its member states but are rather intended to be informative and non-prescriptive. The Issues Briefs will be released on a regular basis over the course of the next 12 months leading up to the Rio+20 Conference..

Legal Questions and Answers on IEG Reforms: WEO and UNEO?

Introduction

Two of the most relevant broader reform options to the environmental pillar of IFSD presented in the Nairobi-Helsinki Outcome are: (1) upgrading UNEP and (2) a Specialized Agency such as a World Environment Organization (WEO). In this Issues Brief some of the legal questions surrounding these broader options are posed and short answers are given. It is important to keep in mind that many scenarios are possible under these two broader options and that this brief simply provides one of what could be many interpretations of what a specialized agency such as a WEO would legally entail. This brief also interprets an upgraded UNEP as it becoming a United Nations Environment Organisation (UNEO). Again there are many interpretations of what an upgraded UNEP could entail.

A. Legal questions concerning specialized agencies

In general, what is the function of a specialised agency in the UN System? Does the fact that it is specialised mean that it operates as an exclusive organisation?

A specialised agency is an autonomous intergovernmental organisation that has been created through its own independent legal instrument and is normally mandated to address a specific issue, need or function. Specialised agencies are linked to the United Nations through the UN Charter whereby member states have pledged themselves to “joint and separate cooperation” on social and economic issues including those related to standards of living, economic and social progress, health, human rights, culture and education.¹ So they are specialised in the sense that the agency deals with a specific issue area, but that it is not specialised in the sense that they are exclusively in charge of the issue or that they do not cooperate with the rest of the UN system and other specialised agencies.

What would be the relationship of the Specialised Agency for the Environment to the UN? Does it mean that it would have to operate outside the UN system?

The specialised agency provisions of the UN Charter essentially addressed two concerns at the time the Charter was adopted. Firstly, that the UN itself could not fully address all issues without some degree of specialization that delved more deeply into the unique needs that these issues required. Secondly, that in 1945 at the time the UN Charter was adopted there existed some international organisations that were already working on specific issues for some time. Organisations such as the International Labour Organisation (ILO), the Health Organisation (the predecessor of the World Health Organisation (WHO)), and various committees and commissions had already existed under the League of Nations and these organisations needed to be incorporated within the new UN system. Article 55 of the Charter made such incorporation possible while leaving the door open for future independent specialised agencies to be created that would be linked to the UN system.

The main link the UN Charter provided for was through the

¹ Article 55 and 56 of the UN Charter.

Economic and Social Council (ECOSOC), one of the principle organs of the UN. The UN recognised the autonomy of specialised agencies through their individual basic instruments but also required that the members of specialised agencies be brought into a relationship with the United Nations General Assembly (UNGA) through agreements made between the agency and ECOSOC. All of the agreements were approved by the UNGA and each stipulated that specialised agencies should coordinate their activities through consultations with the UNGA. The agreements also recognised that the UNGA may make recommendations to the specialised agency.² Normally, the agreements with the UN also refer to aspects related to membership, cooperation with other specialised agencies, non-voting participation and budget and finance.

Article 57 and 63 of the UN Charter are the relevant articles for the creation of a specialised agency and distinguishing the terms of interaction of the agency with the UN and its bodies as well as other specialised agencies. There are no standard terms of interaction and therefore the relationship can be customized according to the needs and nature of the agency. Given the fact that environmental issues are cross-cutting, a specialised agency for the environment would be required to work closely with the rest of the UN system in order to promote cooperation and work through other UN bodies and agencies to achieve environmental goals. As such the

terms of reference defining the relationship of the specialised agency for the environment would need to ensure a close relationship and maintain the proximity of the agency to the rest of the UN system. In other issue areas such as health and science or education that are cross-cutting this proximity was made clear under article 63 and both the WHO and UNESCO work integrally with the rest of the UN and coordinate their activities through ECOSOC. Under Articles 58³, 63.2⁴ and 64⁵ of the UN Charter ECOSOC coordinates the activities of the specialised agencies and as necessary reports its observations to the UNGA.

In order for the specialised agency to work closely with the rest of the UN system and with other UN bodies the constitution/treaty of the specialised agency would include functions that would integrate cooperation with the UN system in its mandate. For example, Article 2 of the WHO Constitution requests that the WHO promote cooperation in the field of health with other specialised agencies. Article 2 of the Constitution of the United Nations Industrial Development Organisation (UNIDO) calls on UNIDO to coordinate all activities of the UN system in the field of industrial development. Article IV B.3 of the Constitution of the United Nations Educational, Scientific and Cultural Organisation (UNESCO) provides that “the General Conference shall advise the United Nations Organisation on the educational, scientific and cultural” matters.

How would a Specialised Agency for the Environment be initiated?

Hypothetically, the Rio+20 Conference which has on its agenda the Institutional Framework for Sustainable Development (IFSD) could provide language in the outcome document the need to strengthen the environmental pillar as a contribution to strengthening IFSD and that such strengthening would be through the creation of a specialised agency. The outcome document could recommend that the Secretary-General of the United Nations, in consultation with the Executive Director of UNEP, is requested to submit to the next session of the UNGA, through ECOSOC, draft statutes of a specialised agency.

For the draft statutes to be negotiated the Secretary-General and UNEP Executive Director would invite countries to organise a conference to negotiate the statutes. These would then be submitted through the Secretary-General and Executive Director to the UNGA as indicated above. The UNGA would then adopt a resolution inviting member states, in accordance with the UN Charter to convene a meeting of countries to establish the specialised agency for the environment.

There could be variations on the procedures but, for example, these were the main steps taken when UNIDO was changed from an UNGA organ to a specialised agency.⁶

² Article 63 UN Charter.

³ Article 58 of the UN Charter states, “The Organisation (UNGA) shall make recommendations for the coordination of the policies and activities of the specialised agencies.”

⁴ Article 63.2 states that ECOSOC “may co-ordinate the activities of the specialised agencies through consultation with and recommendations to such agencies and through recommendations to the General Assembly and to the Members of the United Nations.”

⁵ Article 64 of the UN Charter states “The Economic and Social Council may take appropriate steps to obtain regular reports from the specialised agencies. It may make arrangements with the Members of the United Nations and with the specialised agencies to obtain reports on the steps taken to give effect to its own recommendations and to recommendations on matters falling within its competence made by the General Assembly. It may communicate its observations on these reports to the General Assembly.”

⁶ The Lima Declaration which was adopted by the second General Conference of the UN Industrial Development Organisation in 1975 called for UNIDO to be converted into a specialised agency. “To this end, the Secretary-General of the United Nations, in consultation with the Executive Director of UNIDO, was requested to submit to the seventh special session of the General Assembly, through the ECOSOC, draft statutes of a specialised agency for industrial development.” The seventh special session of UNGA in 1975 then adopted the Lima Declaration in Resolution A/10301 “The General Assembly endorses the Lima Declaration and Plan of Action on Industrial Development Cooperation and requests all Governments to take individually and/or collectively the necessary measures and decisions required to implement effectively their undertakings in the Lima Plan of Action.”

What would be the legal authority of a Specialised Agency for the Environment?

The legal personality and the degree of autonomy of the specialised agency are dependent on the specific provisions in the instrument establishing the agency. The power of decision-making would be provided by the constitution of the specialised agency. The scope of a specialised agency for the environment, however, would contain basic legal powers such as:

- Adoption of decisions within the scope of the agency's core mandate;
- Appointment of the Executive Head of the Organisation, the Director General;
- The supremacy of decisions adopted by the Ministerial Conference without subjection for review by other international bodies;
- Locus *standi* to request advisory opinions from the International Court of Justice, as long as this is within the scope of its activities⁷;

- Entering into agreements with governments and international organisations;
- Creation of subsidiary bodies and committees;
- Coming into effect and administration of treaties negotiated under its auspices in order to further carry out and implement its work without UNGA adoption.

What would be the organs and governance of a Specialised Agency for the Environment?

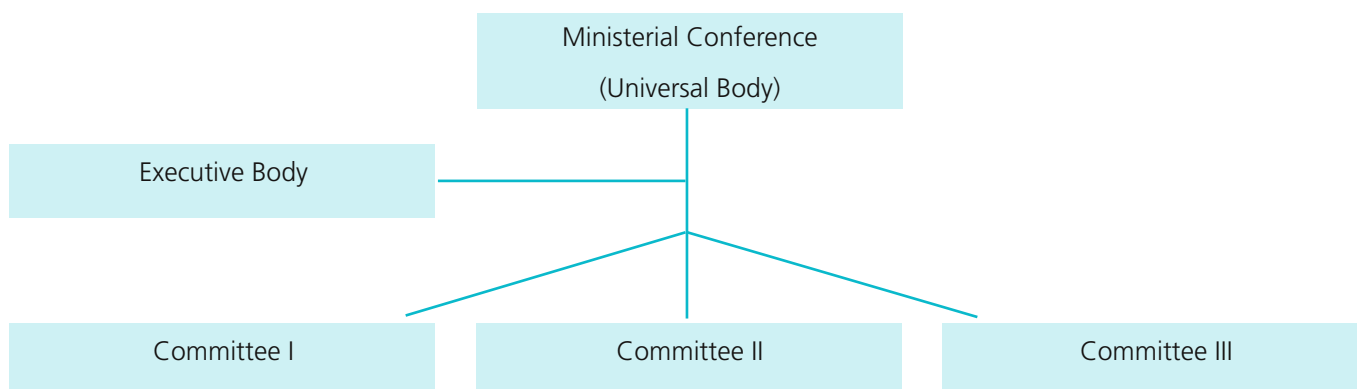
The governance structure of specialised agencies generally follow a similar pattern save of certain variations depending on the nature and scope of the agency's work. Most agencies balance their governance between a universal body in which all members are expected to participate and a smaller representative group, which works intersessionally on certain matters. Various structures could be adopted for a specialized agency for the environment, hence just one option is presented here simply for demonstration purposes:

In order to give ministers of environment a strong voice to set the global agenda, promote implementation of environmental policy at the national level and review implementation, the governance structure of the specialised agency would require both a high-level platform for decision-making as well as a global voice for environment ministers that enables flexibility, pragmatism and functionality.

As such the primary organs of the specialised agency for the environment would be a Ministerial Conference that would meet every two years, combined with an Executive Body that would meet at least every year to prepare the agenda of the Ministerial Conference and guide and direct the intersessional work.

Specialized agencies normally have the powers to establish subsidiary bodies and committees as required. These could be set up by the Ministerial Conference as deemed necessary to carry out the mandate of the agency. The work of the committees would feed into the Executive Body where it would prepare the necessary decisions by the Ministerial Conference. See diagram 1 for a description of possible organs.

Diagram One: Example of possible Organs and Governance of WEO



⁷ Article 96 (2) UN Charter

How would a Specialised Agency for the Environment legally be based on UNEP?

The constitution of the specialised agency could provide both language that the agency was established based on UNEP and an article giving the new agency the power to subsume UNEP's activities, functions and resources as well as any environmental activity within the field of the specialised agency.

A similar clause exists in the Constitution of the WHO which was added when it was changed from the Health Organization of the League of Nations to the current WHO. Article 72 of the WHO Constitution states that the WHO subject to a 2/3 vote "take over from any other international organisation or agency whose purpose and activities lie within the field of competence of the Organisation such functions, resources and obligations as may be conferred upon the Organisation by international agreement or by mutually acceptable arrangements entered into between the competent authorities of the respective organisations."

How would a country become a member of a Specialised Agency for the Environment? Does it require a treaty for ratification, acceptance under domestic law?

Specialised agencies are established based on a treaty or constitution that sets out the basic governance of the agency including its objectives, functions, organs, funding, membership, association and entry into force. For a country to become a member of a specialised agency it would sign the treaty/constitution and then it would be required to accept, ratify, or approve the treaty/constitution in accordance with the

countries' own constitutional and legislative processes. Once national acceptance, ratification, or approval is completed the country would deposit the formal instrument with the UN Secretary-General who normally acts as the depository for UN treaties. This signifies that the country has become a party to the treaty.

What would be the legal relationship with MEAs?

The Conferences of Parties (COPs) of MEAs are autonomous and have their own legal authority and decision-making powers set out in the MEA. If the MEA is hosted by the UN, as most are, the secretariats of MEAs play a dual role in serving the COP but at the same time when carrying out decisions of COPs, follow UN rules and procedures. In addition, UN rules and procedures apply for MEA staff conduct and appointments.

Discussions concerning the fragmentation of the MEAs have often speculated on various methods to consolidate MEAs and several possibilities have been suggested ranging from consolidating them under an umbrella organisation, integrating them into existing organisations or clustering them. While there is an opportunity for substantial gains in effectiveness and efficiency by creating an umbrella or clustering their secretariats this may be politically difficult. Alternatively, gains are made by developing synergies at the national level for implementation and providing overarching policy guidance on the interlinkages of the MEAs by the universal body of the specialised agency. Under such a scenario the autonomy of COPs would be maintained but influence and recommendations by the universal body would be legally understood

in the context of the Vienna Convention on the Law of Treaties.

While decisions taken by COPs that are entirely within the scope of the MEA are within the domain of the COP, increasingly, MEAs must function in the greater context of environmental sustainability in order to effectively and efficiently achieve their objectives. This requires greater cooperation between MEAs as well as with the rest of the UN system. MEAs are not self-contained⁸ and operate in the greater context of international law. The specialised agency envisioned above would be the principle international body for the environment and would set the environmental agenda system-wide. It would also provide advice on the priorities, activities and actions required to have holistic approaches to environmental sustainability. It would make recommendations in this domain to the entire UN system, to MEAs and to all countries in general. As such, MEAs that take decisions that are related to areas of cooperation in the wider context of environmental sustainability could not adopt such decisions in isolation. COPs would have to take into consideration the recommendations made by the Ministerial Conference.⁹

Given that a specialised agency has the power to establish its own treaties and conventions, future MEAs could be negotiated under the auspices of the agency which would be a comparative advantage to the current system as it would reduce the treaty fragmentation that has developed over the past decades.

What is the difference between a UNEO and a WEO?

The confusion between UNEO and a WEO arises because they have been proposed interchangeably in

⁸ ICJ, Hostages case, Reports 1980, p. 40, para 86.

⁹ Similar issues have arisen in the WTO where there had been the perception that WTO rules operated in isolation to the greater body of international law. In several cases this perception has been clarified see US – Gasoline. The Appellate Body stated, "...there is specific acknowledgement to be found about the importance of coordinating policies on trade and the environment." WTO rules like any other rules are part of the greater corpus of international law" Also see United States - Import Prohibition of Certain Shrimp and Shrimp Products, WT/DS58/AB/R (12 October 1998).

discussions concerning IEG over the past decades. Indeed, both names can be used to signify a specialised agency under the UN Charter. There could, however, be some potential distinction in the two names. Organisations using “world” in their titles, generally connote that the organisation is an autonomous and independent body, such as the World Trade Organisation, the World Bank or the World Health Organisation. Whereas bearing the name ‘United Nations’ expresses a more direct link with the United Nations system. However, there is also a precedence of a UN subsidiary body using the title of both ‘United Nations’ and ‘organisation’ while not being a specialised agency and remaining subordinate to the UNGA:

In the late 1960’s there was a push by developing countries to upgrade the UN Industrial Development Centre into a specialised agency. The push, however, failed and a compromise was agreed to create a special organ of the UN referred to in the UNGA resolution as an ‘autonomous organisation’. The new name of the Centre became the United Nations Industrial Development Organisation (UNIDO), using the description ‘organisation’ but establishing it by UNGA resolution and not as a specialised agency. Two decades later and after further negotiations UNIDO was upgraded again, this time to a specialised agency.

This example demonstrates that an organ of the General Assembly could use the title ‘organisation’, instead of ‘programme’, ‘conference’ or ‘commission’ which are generally reserved for subsidiary organs of the General Assembly. In this regard a ‘UNEO’ could be a possible name for an upgraded UNEP if it were changed to have characteristics of an organisation such as more independent authority (i.e. universal membership) and permanence.

What would be the core funding of a Specialised Agency for the Environment?

There are no set rules stating that a specialised agency is required to have assessed contributions. In reality, most have, but not all while many have a combination between assessed contributions and voluntary contributions.

The actual funding modalities of specialised agencies are set out in their constitutions (or equivalent texts) and elaborated in financial regulations. The constitutions provide, in most cases, that the expenses of the approved budget estimates shall be apportioned among the member states on the basis of a scale to be determined by the supreme legislative body. The constitutions of most organisations foresee some funding in addition to assessed contributions (gifts, bequests, subventions, voluntary contributions), donated by public or private entities.

However, the International Telecommunication Union (ITU), Universal Postal Union (UPU) and World Intellectual Property Organisation (WIPO) have adopted contributory systems based on voluntary principles.

For these specialised agencies, a “class and unit” system is adopted. For example for ITU, the ordinary (core or regular in other organisations) budget includes expenditures pertaining to the ITU Council, the Geneva headquarters, and the various conferences and meetings. At each plenipotentiary Conference, member states choose a class of contribution ranging from between 1/16 to 40. One unit is 63,000 Swiss Francs to be paid annually. The effective amount of the contributory unit is determined every two years when the biannual budget is established by the ITU Council.

The lowest classes are reserved for countries designated least developed countries by the United Nations. The ordinary budget is then divided by the number of units assigned to each member. All other organisations (private enterprises, international organisations, etc.) that take part in the work of the union’s three sectors must also choose a contribution class; however, their units are 1/5th the value of the member countries’ contributory unit. Separate contributions must be made for participation in any of the various conferences of the union.

What this analysis shows is that developing a funding system for a specialised agency for the environment could be flexible and adaptive to the current financial climate and would not necessarily need to follow the assessed contributions system that specialised agencies have followed in the past. Several scenarios could be developed, for example the current voluntary indicative scaled contribution system (VISCS) that UNEP now uses could become the core method for funding and could be scaled up so that funding needs of the new specialised agency could be met. There could be a combination of assessed contributions and voluntary contributions whereby only a percentage of the overall budget would be assessed. For example, if the total budget needs of the new agency were set at US\$500 million per biennium, 50% could be based on assessed contributions and the remainder be based on voluntary contributions or loosely earmarked contributions that were directed to specific activities such as country or regional support or issue areas such as biodiversity or land degradation. There could also be a combination of funds set up for technical assistance, capacity building and implementation of MEAs that was combined with other funding modalities. The experience of the international

¹⁰ United Nations General Assembly Resolution 2152 session 21 United Nations Industrial Development Organisation on 17 November 1967.

funding for agencies and the UN in general in the past few decades has shown that there is no one method to funding and that the best and most stable systems are those that combine multiple and flexible funding methods.

Would the Specialised Agency receive regular budget support from the UN regular budget?

The UN Secretariat and UN subsidiary bodies receive financial contributions for regular staff members from the assessed contributions made by member states to the UN's regular budget. In 2008-2009 the appropriations from the Regular budget were at the slightly lower level of US\$12.93 million. That was equal to approximately 3.1% of the total expected income in 2008-2009, excluding contributions from GEF. In 2010-2011, UNEP will receive US\$13.4 million.

The UN Development Account is also part of the regular budget. These funds are used to support selected UNEP project activities on issues of development and environment. In 2006-2007 UNEP received US\$2.2 million; in 2008-2009 the financial support reached US\$2 million, and exceeded US\$2.7 million for 2010-2011.¹¹

As a specialised agency these contributions would no longer be available as agencies are regarded as linked with the UN system but financially independent.

B. Enhanced UNEP

The assumption under this option is that UNEP would be scaled up to an organization with universal membership effected through an UNGA resolution instead of the route via a treaty as set out in the specialised agency option above.

Two types of UNGA resolutions are possible under this option:

1. An UNGA resolution building on the existing resolutions and mandates of UNEP (GA resolution 2997 and Nairobi Declaration) but adding additional mandates, for example changing the Governing Council to become a body with universal membership or giving it additional mandates, such as a stronger mandate for implementation at the national level.
2. A new UNGA resolution re-establishing UNEP as the United Nations Environment Organisation.

How is an organisation created by UNGA different from the current institutional arrangements of UNEP under the GA?

The main distinction between UNEP's current institutional arrangements and creating an organisation by the UNGA is the 'what' is being established. UNGA Resolution 2997 establishes four components, a Governing Council, a Secretariat, a Coordination Board and an Environment Fund.

Under Article 22 of the UN Charter, the General Assembly can establish any subsidiary organs as it deems necessary for the performance of its functions. Typically it has established various different types of organs such as boards, committees, councils, commissions, panels, working groups and even universities and institutes. It also has the power to create organisations as was the case when it established UNIDO in 1967.¹²

An UNGA resolution creating a UNEO would establish an organisation and under that organisation it would set up the governance, functions,

financing, and relationship with the rest of the UN.

How is an organisation under the UNGA legally different from a Specialised Agency?

An organisation under the UNGA would remain legally a subsidiary organ of the General Assembly and therefore would not be completely autonomous from UNGA decision-making and its powers over it. Given the fact the UNGA establishes it as an organisation would mean that a UNEO would have sweeping powers, but remain legally subordinate to the UNGA. Also, compared to a specialised agency it would lack certain powers, such as the power to appoint its own Executive Head, the power to create treaties and conventions under its authority, the power to request advisory opinions from the International Court of Justice and the power to develop its own financial rules and policies or vary from the UN regulations and rules. Its programme of work and budget would also be dependent on the approval of the UNGA.

How would an organ of the UN be initiated?

It would be initiated through an UNGA resolution submitted for consideration by the UNGA and supported by a regionally representative group of developing and developed countries.

What would be its legal authority?

As discussed above, the organisation would be a subsidiary organ of the UNGA and as such its legal authority would remain dependent on the powers granted to it by the UNGA. It would have basic powers such as:

- Create subsidiary bodies and committees;

¹¹ UNEP website see http://www.unep.org/rms/en/Financing_of_UNEP/Regular_Budget/index.asp

¹² UNGA Resolution 2152, 17 November 1966.

- Enter into agreements with governments and other intergovernmental bodies;
- Adopt decisions;
- Make recommendations to the UN system in the areas of its mandate;
- Administratively follow the procedures and rules set by the UN, implying that the head of the organisation and managers are accountable to the UN and must comply with UN rules and procedures.

What would be the organs and governance of an Enhanced UNEP?

The organs would be the same as recommended in the reforms above, i.e. a Ministerial Conference and an Executive Body or variations thereof. The Ministerial Conference and the Executive Body would have the powers to create subsidiary bodies as required including the committees described in the above sections.

How would a country become a member?

There is no process for becoming a member. As with all subsidiary organs of the General Assembly all members of the UN are also members of its subsidiary bodies. Under the reforms described above there is the assumption that there would be both a universal ministerial conference and an executive board. Election to the Executive Body would be done through a regionally balanced approach as it is currently done for the UNEP Governing Council.

Does it require a ratification process?

No.

What would be its relationship with MEAs?

The relationship with MEAs would be the same as described under the

specialised agency option above, with the only distinction that recommendations coming from the Ministerial Conference would legally be subject to General Assembly approval. However, as the UNEO would be set up as an organisation under the UNGA with universal membership there would be no need for such decisions to be reopened by the General Assembly, they would simply be passed and adopted as an adoption procedure under the UNGA.

What would be its relationship with the UN system and UNGA?

The UNEO would remain a part of the UN system and would be an internal organisation of the UN Secretariat. It would therefore work through the internal mechanisms of the UN for coordination including such bodies as the Executive Committee for Economic and Social Affairs (ESA). It would however, also define its explicit relationship with other UN bodies and specialised agencies as a way of providing clarity and coherence to its work.

What would be its financial arrangements?

The financial arrangements of using either UNGA resolution scenario would be similar to what they are currently with UNEP. Both, an enhanced UNEP or a UNEO would operate under the UN and in accordance with UN financial rules and procedures.

Will universal membership require assessed contributions or major financial commitments?

Universal membership does not require that an enhanced UNEP under scenario one or the UNEO under scenario two would need to have assessed contributions. The financing arrangements can be determined by the members and they can be through a voluntary system

like VISC or any system that would be acceptable to the membership. For example in scenario 2 of a UNEO, the financing arrangements would be similar to UNEP's current financing arrangements through the Environment Fund, UN regular budget and other voluntary contributions.

It is not envisioned that universal membership would add significant financial burdens. For an understanding of the financial implications of universal membership see pages 12-13 "Elaboration of Ideas for Broader Reform of International Environmental Governance: Information note from the co-Chairs of the Consultative Group", prepared for the second meeting of the Consultative Group of Ministers or High-level Representatives on International Environmental Governance, held in Helsinki, 21-23 November 2010 and "Issue Paper Concerning the Questions of Universal Membership of the GC/GMEF" UNEP/GC.22/INF/36, 19 December 2002.

Are there significant costs adding a capacity building and implementation arm?

Yes. There would be significant financial implications for such an arm but also significant benefits for improving the implementation of environmental commitments and policies as well as becoming much more responsive to developing countries' needs to achieve environmental sustainability .

Would an organisation under the UNGA (UNEO) receive funds from the UN regular budget?

Yes.

