

Annex XVIII: Addendum to document GCF/B.33/13

Fourth biennial report on the privileges and immunities of the Green Climate Fund

I. Introduction

1. This report presents:
 - (a) A background summary on the privileges and immunities of the GCF and their importance;
 - (b) The current status of privileges and immunities granted to the GCF;
 - (c) An assessment of the consequences of the absence of privileges and immunities.

II. Introduction

2. This report (a) recalls the background and basis for the privileges and immunities of the GCF; (b) gives an overview on the current status of privileges and immunities granted to the GCF; (c) provides an assessment of the consequences of the absence of privileges and immunities. The report has been prepared for the consideration of the Conference of the Parties (COP) to the United Nations Framework Convention on Climate Change in the context of the arrangements between the COP and the GCF, and pursuant to decision 7/CP.20, paragraph 22.
3. As of 1 July 2022, the GCF has, in addition to the Headquarters Agreement with the Republic of Korea, signed 28 bilateral agreements on the privileges and immunities of the GCF.
4. As GCF continues to scale up its operations, the potential risks of operating without privileges and immunities also increase. However, progress on concluding bilateral agreements with countries, as required under relevant United Nations Framework Convention on Climate Change (UNFCCC) and Board decisions, remains slow. In this context, fully implementing paragraph 8 of the Governing Instrument in order to achieve the mandate of GCF, may require, as appropriate, countries and the GCF pursuing supplementary modalities to accord GCF and its officials with the necessary privileges and immunities.

III. Summary of Background

5. Paragraph 7 of the Governing Instrument for the GCF provides that “[i]n order to operate effectively internationally, the [GCF] 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.” The Governing Instrument further provides in paragraph 8 that: “[t]he [GCF] will enjoy such privileges and immunities as are necessary for the fulfilment of its purposes. The officials of the [GCF] will similarly enjoy such privileges and immunities as are necessary for the independent exercise of their official functions in connection with the [GCF].”
6. As detailed in both the second and third biennial reports on the privileges and immunities of GCF¹ (Second Biennial Report and Third Biennial Report, respectively), privileges and immunities are necessary to ensure the effective, efficient and independent

¹ See UNFCCC documents FCCC/CP/2017/5, annex III (<https://unfccc.int/sites/default/files/resource/docs/2017/cop23/eng/05.pdf>) and FCCC/CP/2019/3, annex III (https://unfccc.int/sites/default/files/resource/cp2019_03E.pdf), respectively.

operationalization of GCF, and the implementation of its projects and programmes. For most multilateral institutions, these protections and the establishment of the formal legal and political relationship with the relevant country or countries are set out in the treaty establishing the relevant institution. Although the GI already that the GCF have these protections, they have not been automatically reflected into the internal legal order of all countries.

7. To ensure that the GCF is covered by privileges and immunities, the COP, in UNFCCC decision 7/CP.20, paragraphs 21 and 22, urged “developing country Parties to enter into bilateral agreements with the [GCF] based on the template to be approved by the Board of the [GCF], in order to provide privileges and immunities for the [GCF]” and requested the “Board of the [GCF] to report biennially to the Conference of the Parties on the status of existing privileges and immunities.

8. The risks faced by GCF as a result of operating without privileges and immunities have been extensively set out in both the Second Biennial Report and the Third Biennial Report. GCF notes, however, that as the size of the GCF portfolio grows, so too do these risks, and some of the most relevant risks and related issues have been recalled in Chapter V below.

9. Through Board decision B.08/24, the Board, inter alia, recommended “...that the COP may wish to consider recommending to the General Assembly of the United Nations that the General Assembly consider an institutional linkage between the United Nations and the Green Climate Fund that is consistent with the status of the Fund and the powers vested in the Board and a Secretariat that is fully independent and accountable to the Board, as stated in the Fund’s Governing Instrument, as approved by the COP in decision 3/CP.17”.

IV. Current status of bilateral agreements

10. Pursuant to relevant guidance from the COP and the corresponding decisions by the GCF Board, the Secretariat has continued its pursuit of finalizing bilateral agreements on privileges and immunities with countries. As at 1 July 2022, the Secretariat had sent draft agreements on GCF privileges and immunities to 141 countries and is in active negotiations with approximately 10 countries.

11. In addition to the agreement between the Republic of Korea and GCF concerning the headquarters of GCF, as at 1 July 2022, GCF has signed 28 bilateral agreements with countries regarding the privileges and immunities of GCF, an increase of 7 agreements since the Third Biennial Report three years ago.

12. GCF has entered into such agreements with the following countries: Antigua and Barbuda, Armenia, Barbados, Belize, Bhutan, Burkina Faso, Congo, Cook Islands, Dominica, Georgia, Grenada, Guyana, Honduras, Kiribati, Maldives, Micronesia (Federated States of), Mongolia, Montenegro, Namibia, Niue, Papua New Guinea, Saint Vincent and the Grenadines, Samoa, Solomon Islands, Tonga, Uruguay, Vanuatu and Zambia.

V. Consequences of the absence of privileges and immunities

13. As at 31 May 2022, the GCF portfolio under implementation spans 91 countries where it does not have privileges and immunities. This means that GCF is now disbursing USD 2.2 billion in such countries (worth USD 5.1 billion in total project value), with between USD 126 million (126,109,304.19) and USD 271 million (271,456,775.30) anticipated to be further disbursed in 2022 in countries where GCF does not have privileges and immunities. In addition, a further USD 466 million is being disbursed for multi-country projects which also include countries where GCF does not have privileges and immunities.

14. Many of the core challenges that the GCF could face where operating in some countries without privileges and immunities were highlighted in its Second and Third biennial reports on this matter, respectively in 2017 and 2019. In particular, the absence of such privileges and immunities creates an increased risk of legal action being taken against the GCF.

15. The lack of privileges and immunities also hampers the ability to effectively and safely engage in in-country activities. GCF personnel often face significant challenges in obtaining visas for travel to countries to attend meetings, including to negotiate projects/programmes as well as in countries where GCF projects/programmes are implemented. When on mission to assess or evaluate GCF projects and programmes, these challenges are exacerbated, potentially negatively impacting transparency and oversight over GCF resources and potentially hampering project reviews, in-country investigations and in-country evaluations. While a number of these risks have not yet materialized in practice, based on experience both of GCF itself² and other international organizations, such risks do materialize. The most effective way to address these is having the strong risk mitigant of having privileges and immunities in place to protect the Fund, its assets and relevant GCF personnel.

16. In a number of countries where the GCF has approved projects and programmes, relevant regulatory authorities have raised questions with regards to the legal status of GCF within the relevant country, which has delayed implementation of projects and programmes, or affected GCF partners' compliance with the relevant project/programme legal documentation and delaying reflows to GCF which could have been used for new projects/programmes.

² On at least one occasion, a GCF staff member was detained while in transit to their final destination for official purposes. Having privileges and immunities in that country could have avoided the distress and risks to GCF proprietary information caused by such detention.