

GREEN
CLIMATE
FUND

Options for an Institutional Linkage between the United Nations and the Fund

GCF/B.08/39
8 October 2014

Meeting of the Board
14-17 October 2014
Bridgetown, Barbados
Agenda item 32

Recommended action by the Board

It is recommended that the Board:

- (a) Take note of the information presented in document GCF/B.08/39 *Options for an Institutional Linkage between the United Nations and the Fund*; and
- (b) Adopt the draft decision presented in Annex I to this document.

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Options for an Institutional Linkage between the United Nations and the Fund

I. Background and introduction

1. In decision B.05/11 taken at its October 2013 meeting, the Board of the Green Climate Fund requested the Secretariat:

“to seek a legal opinion of the Office of Legal Affairs of the United Nations on whether, and if so, under which circumstances, the Fund might qualify for:

- (i) an institutional linkage with the United Nations; and*
- (ii) a relationship agreement with the United Nations under which the officials of the Secretariat and other persons associated with the Fund can make use of the United Nations Laissez Passer.”*

2. The request for a legal opinion on the aforementioned matter was sent on 26 November 2013 by the Executive Director of the Secretariat to Mr. Miguel de Serpa Soares, Under-Secretary-General for Legal Affairs and United Nations Legal Counsel (Annex II).

3. Mr. David Hutchinson, Principal Legal Officer in charge of the Office of the Legal Counsel responded on 21 February 2014 (Annex III) and focused on the permissibility of a relationship agreement between the Fund and the United Nations. He concluded that “the Fund does not have the same status under international law as the specialized agencies and related organizations that have relationship agreements with the United Nations” and, for that reason, “would not be able to conclude a relationship agreement of the nature concluded between the United Nations and specialized agencies and related organizations.”

4. As regards a possible institutional linkage between the Fund and the United Nations, Mr. Hutchinson reviewed the question as to whether the institutional linkage which currently exists between the United Nations and the United Nations Framework Convention on Climate Change (UNFCCC) secretariat may apply to the Fund and its officials, and concluded that this was not the case. However, in his legal opinion, he did not examine whether it might be possible *de lege ferenda* to approve an institutional linkage for the Fund on similar terms and conditions as those that are applicable to the UNFCCC secretariat and under which the Convention on the Privileges and Immunities of the United Nations (General Convention) would be applicable to officials of the Fund.

5. The Assistant Secretary-General for Legal Affairs, Mr. Stephen Mathias, and his team agreed in a discussion with Mr. Gerd Droesse, then Acting General Counsel, on 26 March 2014, to further review this question if the Fund should so request. In this context, on 16 May 2014 the Executive Director sought a supplementary legal opinion on the aforementioned question (Annex IV).

6. The response which was conveyed to the Executive Director by Mr. Stephen Mathias, Assistant Secretary-General in charge of the Office of Legal Affairs of the United Nations, on 13 August 2014 (Annex V), states:

“As to the questions raised in your letter, it would be for the UNFCCC COP and the General Assembly to take decisions respectively on whether an institutional linkage should exist between the United Nations and the Fund, and if approved, what the nature of that linkage should be. To date they have not done so.”

7. The Assistant Secretary-General highlights the difference in status between the Fund and specialized agencies. He recalls that the Fund has pursued a “hybrid option as the basis for the administrative framework of the Fund” under which “the Fund’s administrative policies, including on human resources, procurement, travel, and finance were to be based on those of the Asian Development Bank” and concludes on that basis:

“In the light of this development and the explanations provided above, the institutional linkage currently existing between the United Nations and the UNFCCC secretariat cannot, in our view, be used by analogy for any institutional linkage between the United Nations and the Fund, as long as the arrangements mentioned above apply to the Fund. Ultimately, however, these are questions for the COP of the UNFCCC and the General Assembly to decide upon.”

8. The legal opinion, while emphasizing that the institutional linkage of the UNFCCC secretariat cannot be applied by analogy, does not exclude the possibility *per se* that an institutional linkage of a different type than is applicable to the UNFCCC secretariat might be approved for the Fund. Any decision on such an institutional linkage is for the Conference of the Parties (COP) and General Assembly to take.

9. Section II below outlines the special features of the current institutional linkage between the United Nations and the secretariat of the UNFCCC. Section III below explores the implications of and options for an institutional linkage between the Fund and the United Nations.

II. Institutional linkage between the United Nations and the UNFCCC secretariat

10. To date, an institutional linkage with the United Nations has been approved in two cases:

- (a) For the secretariat of the United Nations Framework Convention on Climate Change (UNFCCC); and
- (b) For the secretariat of the United Nations Convention to Combat Desertification (UNCCD).¹

As the institutional linkage between the United Nations and the UNCCD Secretariat is modelled on and in substance very similar to the linkage that applies between the United Nations and the UNFCCC secretariat, only the latter linkage will be analysed in some detail in the following.

A. Background

11. The mandate to negotiate a Framework Convention on Climate Change originated in the United Nations General Assembly (UNGA), with the adoption by the UNGA of Resolution 45/212 on 21 December 1990, entitled “Protection of global climate for the present and future generations of mankind”. This resolution established an Intergovernmental Negotiating Committee (INC) under the auspices of the UNGA.

¹ See resolutions A/RES/52/198 and A/RES/56/196 and decisions 3/COP.1 and 32/COP. 10 (ICCD/COP(1)/11/Add.1 and ICCD/COP(10)/31/Add.1)

12. At its eleventh session, the Intergovernmental Negotiating Committee for the Convention (INC) decided to recommend to the COP, taking into account, inter alia, the advice of the Secretary-General, that:

*"...the Convention secretariat be institutionally linked to the United Nations, while not being fully integrated in the work programme and management structure of any particular department or programme."*²

13. The INC further recommended that this linkage be established for a definite duration and include a provision for its review, and invited the United Nations Secretary-General to recommend to COP 1:

"...an efficient arrangement for administrative support to the Convention secretariat that would ensure proper procedures, controls and accountability, while allowing for managerial autonomy, flexibility and full accountability to the Conference of the Parties".³

14. The Note of the United Nations Secretary-General to the first session of the COP set out in considerable detail the elements of this linkage as follows:⁴

- The United Nations Secretary-General shall appoint the head of the secretariat after consultation with the COP;
- The head of the secretariat shall be accountable:
 - a) To the COP for the implementation of the policies and programme of work approved by the Conference: and,
 - b) To the Secretary-General as the chief administrative officer of the UN, including for the observance of the Financial and Staff Regulations and Rules of the UN.

15. Both the INC and the United Nations Secretary-General underlined that the autonomy of the secretariat remained a paramount consideration. Thus, the capacities of relevant departments and programmes of the United Nations would be engaged *"without assigning supervision of the secretariat to any one of them."*⁵ Further, the United Nations Secretary-General emphasized that the institutional arrangement should respect the distinct character of the Convention and provide for the autonomy, responsiveness and accountability of its secretariat.⁶

16. Thus, although, the UNFCCC secretariat is institutionally linked to the UN, it is not an organ of the UN. The secretariat is accordingly an autonomous and independent treaty body accountable, first and foremost, to the COP.

17. The COP and UNGA have periodically reviewed the framework for the institutional linkage, and have taken note of the changes in the responsibilities for the administration of the secretariat. As stated in the United Nations Secretary-General's report to the General Assembly in 2001:

*"...the Executive Secretary functions within the scope of a broad delegation of authority, which, over the years, as reported to the Conference of the Parties at its fifth session, has adapted to changing circumstances and has resulted in a steadily greater assumption of administrative responsibility by the Convention secretariat."*⁷

² See A/AC.237/91, paragraphs 100-101.

³ See A/AC.237/91, paragraphs 100-101.

⁴ See FCCC/CP/1995/5/Add.4.

⁵ See A/AC.237/79/Add.5, paras. 2-6.

⁶ See A/AC.237/79/Add.1. 30 June 2006, which stated that *"the bodies established under the UNFCCC and the Kyoto Protocol are not United Nations organs."*⁶

⁷ See A/56/385.

18. In decision 14/CP.1, the COP decided that “the Convention secretariat shall be institutionally linked to the United Nations, while not being fully integrated in the work programme and management structure of any particular department or programme.” In paragraph 3 of the decision, the COP took note of, and provisionally accepted, the arrangements proposed by the United Nations Secretary-General for administrative support to the secretariat. In resolution 50/115 of 20 December 1995, the UNGA endorsed the institutional linkage between the Convention secretariat and the United Nations, “as advised by the Secretary-General and adopted by the Conference of the Parties.”

19. Similarly, the Executive Secretary of the UNFCCC reported to the COP in 2005 that, in agreement with the Department of Management, the Executive Secretary had taken over most of the responsibility for financial, procurement and personnel management of the secretariat.⁸

20. The COP and UNGA have recognized and accepted these changes, and have consistently confirmed and continued, without changes, the framework of the institutional linkage.

21. While the first three decisions and resolutions of the COP and the UNGA, respectively, set time limits for the institutional linkage, the COP in 2005, and the UNGA in 2006, both decided that the institutional linkage between the secretariat and the United Nations will continue until a review is deemed necessary by either the COP or the UNGA.

B. Nature, purpose and terms of institutional linkage

22. The central premise of the institutional linkage framework is to provide an efficient arrangement for administrative support to the secretariat that will ensure proper procedures, controls and accountability, while allowing for managerial autonomy, flexibility and accountability to the COP. This framework acknowledges the autonomy of the secretariat, and at the same time enables the secretariat to draw upon the advice and support of the departments, programmes and agencies of the United Nations and to benefit from close working relations with, and the support of, the UN.

23. The Executive Secretary of the UNFCCC secretariat has been delegated full authority on personnel matters, “subject to the retention by the Secretary-General of his authority to promulgate and interpret the Staff Regulations and Rules, and to take final decisions in appeals and disciplinary cases under the Staff Regulations and in compensation claims under Appendix D of the Staff Rules”, including:

- (a) Appointment and promotion of staff up to the D-2 level;
- (b) Establishment of an Appointment and Promotion Board (now called Review Board);
- (c) Termination of appointments, except for terminations under Article X of the Staff Regulations and appeals under Article XI of the United Nations Staff Regulations and Rules; and
- (d) Administration of UNFCCC staff in accordance with United Nations Staff Regulations and Rules and such special rules as may be established by the Head of the Convention Secretariat in agreement with the Secretary-General of the United Nations. In accordance with the latter provision, the Executive Secretary has promulgated UNFCCC-specific personnel and staff policies and rules.

⁸ See FCCC/SBI/2005/15.

24. In addition, the Executive Secretary has unlimited authority to administer secretariat funds in accordance with the financial procedures of the UNFCCC, as adopted by the COP in decision 15/CP.1.⁹ In this decision, the COP stated that:

“These financial procedures shall govern the financial administration of the {COP}, its subsidiary bodies and its permanent secretariat. In so far as not specifically provided under these procedures, the Financial Regulations and Rules of the United Nations shall apply”.¹⁰

III. Possible institutional linkage between the United Nations and the Fund

25. For the speedy operationalization of the Fund, it is essential that the Fund and the persons associated with it are covered by privileges and immunities. An institutional linkage between the United Nations and the Fund would provide an efficient framework of support inasmuch as it would mean that the Convention on the Privileges and Immunities of the United Nations (General Convention) would be applicable to the staff of the Fund’s Secretariat and allow them to avail themselves of the United Nations *laissez passer*. However, any such institutional linkage would involve complex legal issues regarding its scope and applicability. Moreover, in essence, a decision needs to be taken on the extent to which the Fund’s legal framework may deviate from the rules and regulations applicable to the United Nations. These issues will be analysed in the following.

A. Scope of institutional linkage

26. The institutional linkage between the United Nations and the UNFCCC secretariat is limited in scope in that it applies only to the staff of the UNFCCC secretariat, but not to representatives of the State parties to the Convention or any other persons associated with the UNFCCC. Thus, only the staff of the UNFCCC secretariat are entitled to use the United Nations *laissez passer*. It appears likely that the same limitation may also apply to a possible institutional linkage between the Fund and the United Nations. This would imply that an institutional linkage, if approved, would only extend to the staff of the Secretariat, but not to the Fund’s Board members, consultants or other persons associated with the Fund. Moreover, it is not clear at this stage whether, and to what extent, the Fund itself would be covered by an institutional linkage between the United Nations and the Fund.

27. In view of the foregoing, it is anticipated that, irrespective of the approval of an institutional linkage by the COP and General Assembly, necessary steps will need to be taken to ensure that, in addition to the staff of the Secretariat, the Fund, Board members and consultants are covered by privileges and immunities.

28. To enable the effective operation of the Fund, it is essential that the Fund is not subject to the jurisdiction of all the countries where it is operating. For that reason it needs to be ensured, in line with firmly established practice, that immunity of jurisdiction and other privileges (e.g. privilege of communication) and immunities (e.g. immunity of assets and archives), and exemptions (e.g. exemption of taxation) are extended to the Fund in the countries where it is operating. In addition, appropriate action needs to be taken to ensure that Board

⁹ For purposes of financial management, the United Nations Financial Regulations and Rules apply “in so far as not specifically provided under [the financial procedures of the UNFCCC]” (decision 15/CP.1, paragraph 1).

¹⁰ See paragraph 1 of the annex of decision 15/CP.1.

members, consultants and other persons associated with the Fund are covered by privileges and immunities. To this end:

- (a) The Fund will need to prepare bilateral agreements with all the State parties to the Convention where it is planning to operate to ensure that the Fund, its officials and operations are covered by privileges and immunities. Doing so will be critical in the initial phase of the Fund's operations in particular. Such bilateral agreements will incorporate provisions on the Fund's status, privileges and immunities and will establish the basis for the Fund's readiness, loan and grant operations and for engaging the private sector in the State parties to the Convention where the Fund is operating.
- (b) In addition, and in parallel to the bilateral agreements mentioned under (a) above, it is recommended that the Board mandate the preparation of a multilateral agreement which recognizes the Fund's status and privileges and immunities and propose this agreement to the State parties to the Convention for adoption. A similar approach has been adopted by the Global Fund to Fight AIDS, Tuberculosis and Malaria to ensure that the staff of the Global Fund are covered by privileges and immunities in the countries where they are operating. The multilateral agreement would contain core provisions relating to the Fund's status and privileges and immunities which are universally recognized to be essential for the effective functioning of the Fund (e.g. immunity of jurisdiction, immunity of assets and archives and freedom of assets from restriction, privilege of communication and exemption from taxation). Participation would be entirely voluntary and would be open to all State parties to the Convention. It would be for each State party to the Convention to decide whether to adhere to such a multilateral agreement. The agreement could enter into force upon ratification by ten (10) countries.
- (c) Finally, certain countries (e.g. countries where the Fund does not have operations), may consider granting unilateral privileges and immunities to the Fund under their national law.

B. Terms of institutional linkage

29. An institutional linkage, even if limited in scope, would be very beneficial to the Fund's staff as it would enable the staff of the Fund to avail themselves of the privileges and immunities of the General Convention, including the use of the United Nations laissez passer. The United Nations laissez passer is a valuable document, which would greatly facilitate travel for the staff of the Secretariat, in particular, in countries in post-conflict situations. An institutional linkage would also provide an effective framework for collaboration between the Fund and the United Nations. However, it needs to be clarified to what extent it would involve the Fund being accountable to the United Nations and the application of United Nations rules and regulations, resulting from the fact that the Fund would become part of the United Nations system and the staff of the Secretariat would have the status of officials of the United Nations.

30. Under the terms of its institutional linkage with the United Nations, the UNFCCC secretariat enjoys autonomy, in particular in personnel and financial matters. This could be seen as an indication that autonomy is not intrinsically incompatible with an institutional linkage. However, overall United Nations rules and regulations apply to the staff of the UNFCCC secretariat. Moreover, the Secretary-General appoints *inter alia* the Executive Director of the UNFCCC secretariat and has retained the power to decide on any waiver of privileges and immunities under the General Convention, and in the event that such a waiver is denied, on disciplinary actions to be taken against individuals who have abused the UN's privileges and immunities.

31. To be consistent with decision 3/C.P.17 and the Governing Instrument of the Fund, an institutional linkage between the United Nations and the Fund would need to include a greater degree of autonomy than is currently applicable to the UNFCCC secretariat. Any institutional linkage would need to be without prejudice to the powers conferred to the Board of the Fund under this decision and the Governing Instrument, such as the power of the Board to appoint the Executive Director and to adopt policies, guidelines and rules and procedures for the effective functioning of the Fund. The Board has availed itself of the latter power *inter alia* by adopting administrative policies for the Fund which are consistent overall with those of the Asian Development Bank. In addition, the institutional linkage would need to be consistent with paragraph 19 of the Governing Instrument and with the powers vested in the Secretariat and the Executive Director heading the Secretariat by the Governing Instrument.

32. The right to waive privileges and immunities under the General Convention would be retained by the Secretary-General of the United Nations, as this right is a corollary of the coverage of officials under the General Convention. However, the Executive Director, as the head of the Secretariat, should decide on the imposition of any disciplinary measures on staff of the Secretariat.

Annex I: Draft decision of the Board

The Board, having taken note of the information presented in document GCF/B.08/39 *Options for an Institutional Linkage between the United Nations and the Fund*:

Decides to incorporate the following recommendation in the report of the Board to the Conference of the Parties:

“The Board considers it of utmost importance for the quick operationalization of the Fund to ensure that the staff of the Fund’s Secretariat are covered by privileges and immunities in the countries where the Fund is operating. To this end, and to give effect to the provisions set forth in paragraphs 7 and 8 of the Governing Instrument of the Fund, the Conference of the Parties (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 the Secretariat by the Fund’s Governing Instrument.”



Annex II: Letter from the Executive Director to the United Nations Office of Legal Affairs dated 26 November 2013

Green Climate Fund

Mr. Miguel de Serpa Soares
Under-Secretary-General for Legal Affairs
and UN Legal Counsel
United Nations Office of Legal Affairs
United Nations Headquarters
New York, NY 10017
U.S.A.

Date: 26 November 2013
Reference: HC/GD/tj
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Re: Request for legal opinion

Dear Mr. de Serpa Soares,

1. Under the direction of the Board of the Green Climate Fund (the "Fund"), I wish to request, in my capacity as the Executive Director of the Secretariat, a legal opinion from the Office of Legal Affairs of the United Nations (UN) on the two questions listed in paragraph 11 and the two questions listed in paragraph 14 below.

Background

2. The Conference of the Parties (COP) to the United Nations Framework Convention on Climate Change (the "Convention"), in its decision 3/CP.17 taken in December 2011, approved the Governing Instrument for the Green Climate Fund (the "Governing Instrument"), and designated the Fund as an operating entity of the financial mechanism of the Convention under Article 11 of the Convention, with arrangements to be concluded between the COP and the Fund to ensure that the Fund is accountable to, and functions under the guidance of, the COP to support projects, programmes, policies and other activities in developing country Parties.

3. The COP, in the same decision, decided that the Green Climate Fund be conferred juridical personality and legal capacity and requested the Board and the host country of the Fund to develop, in accordance with paragraphs 7 and 8 of the Governing Instrument, the legal and administrative arrangements for hosting the Fund, and to ensure that juridical personality and legal capacity are conferred to the Fund.

4. The Green Climate Fund Board (the "Board"), by consensus in an open and transparent process, selected the Republic of Korea to be the host country of the Fund. In June 2013, the Government of the Republic of Korea and the Green Climate Fund entered into the "Agreement between the Republic of Korea and the Green Climate Fund concerning the Headquarters of the Green Climate Fund" (the "Headquarters Agreement"), which was ratified by the Government of the Republic of Korea as a treaty

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under Article 6 of the Constitution of the Republic of Korea, and entered into force in August 2013. The Headquarters Agreement firmly establishes the juridical personality and legal capacity of the Fund in the host country of the Fund and confirms that the Fund is able to enter into agreements with States and international organizations governed by international law.

5. At its meeting in June 2013, the Board, having considered various options, including the adoption of the UN Common System or a multilateral development bank system, decided to pursue a hybrid option as the basis for the administrative framework of the Fund. Thus,

- (i) The privileges and immunities for the Fund's officials were to be consistent with paragraph 8 of the Governing Instrument, with reference to those provided to the International Fund for Agricultural Development and other international financial institutions that operate effectively internationally through appropriate bilateral and multilateral agreements; and
- (ii) The Fund's administrative policies, including on human resources, procurement, travel and finance, were to be based on those of the Asian Development Bank.

6. At the fifth Board meeting in October 2013, the Board decided to establish the fully independent Secretariat of the Fund ("Secretariat"), as provided for under paragraph 19 of the Governing Instrument. The Secretariat will assume its activities in Songdo, Incheon City, Republic of Korea on 4 December 2013, following the termination of the interim arrangements under which the secretariats of the Convention and the Global Environment Facility (GEF) provided technical, administrative and logistical support to the Fund.

7. At the same meeting, the Board also requested the Secretariat to seek a legal opinion from the UN Office of Legal Affairs on whether the Fund might qualify for:

- (i) An institutional linkage with the UN; and
- (i) A relationship agreement with the UN under which the officials of the Secretariat and other persons associated with the Fund can make use of the UN Laissez Passer.

Request for legal opinion

I. Institutional linkage

8. Taking account of the advice of the Secretary General and the endorsement of the General Assembly, the COP determined, by its decision 14/CP.1, that the Convention secretariat "shall be institutionally linked to the UN, while not being fully integrated in the work programme and management structure of any particular department or programme." This decision, which was confirmed by subsequent COP decisions, shows that an institutional linkage is possible as a matter of principle.

9. The Fund was established by a COP decision as an operating entity of the financial mechanism of the Convention under Article 11 of the Convention and, given this aspect, might qualify for an institutional linkage with the United Nations. However, the status of the Convention secretariat and that of the Fund vary to a certain extent, taking account, inter alia, COP decision 3/CP.17 and the Governing Instrument annexed thereto. Also, unlike the



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Convention secretariat, which follows the UN Common System, the Fund's administrative policies, including on human resources, procurement, travel and finance, are based on those of the Asian Development Bank.

10. It needs to be ascertained whether the aforementioned differences between the Convention secretariat and that of the Fund are relevant to the issue of whether there is a basis for a possible institutional linkage between the United Nations and the Fund.

11. In view of the foregoing, we are seeking a legal opinion from the UN Office of Legal Affairs on the following questions:

A. Whether the Fund may avail itself of an institutional linkage with the UN under which the Convention on the Privileges and Immunities of the United Nations will be applicable to the Fund and its officials, given the Fund Secretariat's "fully independent" status under paragraph 9 of the Governing Instrument and the decision taken by the Board that the Fund's administrative policies, including on human resources, procurement, travel and finance, are to be based on those of the Asian Development Bank?

B. Assuming that the Fund may avail itself of such an institutional linkage, what are the legal requirements and procedures to be followed to give effect to such an institutional linkage between the UN and the Fund?

II. Relationship agreement

12. There are various organizations with substantially different legal status and administrative frameworks that make use of the UN Laissez Passer under the terms of a relationship agreement with the United Nations (UN).¹ Some of these organizations have not signed the statutes of the International Civil Service Commission and do not form part of, or unilaterally adhere to, the UN Common System.

13. Considering these circumstances, we are seeking a legal opinion from the UN Office of Legal Affairs on the feasibility of, and legal requirements for, a possible relationship agreement between the United Nations and the Fund on terms and conditions which would be similar to those contained in relationship agreements concluded between the UN and organizations which do not participate in the UN Common System, based on the understanding that (a) such a relationship agreement would allow the officials of the Fund to make use of the UN Laissez Passer as the Fund's travel document; and (b) neither the Convention on the Privileges and Immunities of the United Nations nor the Convention on the Privileges and Immunities of the Specialized Agencies would apply to the Fund under such relationship agreement.

¹ The UN has concluded relationship agreements with the International Atomic Energy Agency, the International Criminal Court, the Organization for the Prohibition of Chemical Weapons, the Preparatory Commission for the Comprehensive Nuclear-Test-Ban Treaty Organization, the International Seabed Authority, and the World Trade Organization.



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14. In view of the foregoing, we are seeking a legal opinion from the UN Office of Legal Affairs on the following questions:

- A. Assuming that the Fund may enter into such relationship agreement with the UN, what would be the requirements for the officials of the Fund to avail themselves of the use of the UN Laissez Passer under the terms of that agreement?
- (i) Would it be necessary for the Fund to propose that State parties to the Convention adopt and ratify a multilateral agreement which provides for privileges and immunities for the Fund and its officials and authorizes the use of the UN Laissez Passer as the travel document for the Fund's officials?
 - (ii) Alternatively, would it be sufficient for the Fund to enter into bilateral agreements with those States where it conducts operations or maintains offices which recognize the use of the UN Laissez Passer as the travel document for the Fund's officials?
 - (iii) Would a combination of (i) and (ii) be possible? Thus, would it be possible for the Fund to initially enter into bilateral agreements with those States where it conducts operations or maintains offices which recognize the use of the UN Laissez Passer as the travel document for the Fund's officials, while proposing to the State parties to the Convention to become parties to a multilateral agreement as specified under (i) above.
- B. Following the adoption of multilateral or bilateral agreement(s) as specified under subparagraph A above, what would be the requirements and the necessary procedures to be followed for the Fund to enter into a relationship agreement with the UN which allows the use of the UN Laissez Passer as the travel document for the Fund's officials?

15. In accordance with the work plan of the Fund's Board for 2014 transmitted to, and accepted by, the COP (document FCCC/CP/2013/6/Add.1, 20 November 2013), the issue of the Fund's "[l]egal relationships, including securing privileges and immunities for the Fund and its staff", is to be addressed between Board meetings. Consistent with the above, we would greatly appreciate if a legal opinion on these matters could be rendered prior to 15 January 2014. Your support in this matter is greatly appreciated.



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16. We stand ready to respond to any questions and to provide any additional information you may require. Please address any questions you may have to the Fund's Legal Counsel, Mr. Gerd Droesse (E-mail: gdroesse@gcfund.net), cc: Ms. Teodora Jacinto (E-mail: tjacinto@gcfund.net).

Very truly yours,

Héla Cheikhrouhou
Executive Director

cc: Mr. Manfred Konukiewitz / Mr. Jose Maria Clemente Sarte Salceda
Co-Chairs of the Board of the Green Climate Fund



Annex III: Reply from the United Nations Office of Legal Affairs dated 21 February 2014



HEADQUARTERS • SIEGE NEW YORK, NY 10017
TEL.: 1 (212) 963.1234 • FAX: 1 (212) 963.4879

REFERENCE:

21 February 2014

Dear Ms. Cheikhrouhou,

I wish to refer to your letter dated 26 November 2013 to the Legal Counsel in which you ask for our advice on whether the Green Climate Fund (“the Fund”) may enter into a relationship agreement with the United Nations pursuant to which the officials of the Fund may avail themselves of the use of the United Nations laissez-passer (“UNLP”).

We would like to recall that the Fund was established by decision 1/CP.16 of the Conference of the Parties (“COP”) of the United Nations Framework Convention on Climate Change (“UNFCCC”). By paragraph 3 of COP decision 3/CP.17 which recalled the earlier decision, the COP decided, “to designate the Green Climate Fund as an operating entity of the financial mechanism of the Convention, in accordance with Article 11 of the Convention” and decided that the Fund would be “accountable to and function under the guidance” of the COP.

As to whether the Fund may avail itself of an “institutional linkage” with the United Nations and more specifically the requirements and procedures to be followed for the Fund to enter into a relationship agreement with the United Nations, we would like to point out the following.

The United Nations has previously concluded relationship agreements with international organizations. Those international organizations that have negotiated relationship agreements with the Economic and Social Council and concluded such agreements with the United Nations upon approval by the General Assembly, pursuant to Articles 57 and 63 of the Charter are specifically referred to as “specialized agencies”, as provided in Article 57 (2) of the Charter. There are also several other international organizations known as “related organizations” that have concluded

Ms. H  la Cheikhrouhou
Executive Director
Secretariat of the Green Climate Fund
Incheon City



relationship agreements with the United Nations in the past and upon approval by a competent principal organ of the United Nations, but outside the framework of Articles 57 and 63 of the Charter. These include the International Atomic Energy Agency (IAEA), the Organization for the Prohibition of Chemical Weapons (OPCW) and the International Criminal Court (ICC).

Currently there exists no relationship agreement between the COP of the UNFCCC and the United Nations and the COP does not have either the status of a United Nations specialized agency or related organization.

As far as the Fund is concerned, by decision 3/CP.17, the COP decided to confer juridical personality and legal capacity on the Fund. Paragraph 11 of the decision provides that the COP “[d]ecides that the Green Climate Fund be conferred juridical personality and legal capacity and shall enjoy such privileges and immunities related to the discharge and fulfilment of its functions, in accordance with paragraphs 7 and 8 of the governing instrument”. Paragraph 7 of the governing instrument of the Green Climate Fund annexed to the decision further provides that “[i]n 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.”

While COP decision 3/CP.17 did confer juridical personality and legal capacity on the Fund, it also stated that the Fund would be accountable to and function under the guidance of the COP thus establishing the subsidiary nature of the Fund and confirming the fact that it remains part of the UNFCCC process rather than a separate free-standing international organization. As such, the Fund does not have the same status under international law as the specialized agencies and related organizations that have relationship agreements with the United Nations.

Therefore, it is our view that the Fund would not be able to conclude a relationship agreement of the nature concluded between the United Nations and specialized agencies and related organizations.

As to whether it is possible for the Fund to avail itself of the institutional linkage that the UNFCCC secretariat has with the United Nations in order for the 1946 Convention on the Privileges and Immunities of the United Nations (the “General Convention”) to be fully applicable to the Fund and its officials, we wish to recall that the institutional linkage, including the applicability of the United Nations staff regulations and rules to the UNFCCC secretariat, was approved by the General Assembly and the COP.¹ It was approved by the COP pursuant to a proposal submitted by the Secretary-General during the Intergovernmental Negotiating Committee for a Framework Convention on Climate Change and was intended to

¹ See COP decision 14/CP.1 and General Assembly resolutions 50/115 of 20 December 1995, 54/222 of 27 December 1999, 56/199 of 21 December 2001 and 61/201 of 20 December 2006 which has endorsed an institutional linkage between the secretariat of the Convention and the United Nations.



provide an efficient arrangement for administrative support to the Convention secretariat.²

In the light of the fact that staff of the secretariat enjoy the privileges and immunities set out under the General Convention and also fall under the UN Staff Regulations and Rules, they are entitled to use the UNLP

However, we note from paragraph 9 of your letter that the COP and the Board of the Fund have decided on a different set of administrative and financial arrangements for the Fund. The General Convention and UN Staff Regulations and Rules are not applicable to the Fund and the United Nations plays no role in its administrative support.

Consequently, the institutional linkage that currently exists between the United Nations and the UNFCCC secretariat does not apply to the Fund and its officials. In addition, officials of the Fund are not entitled to a UNLP.

You have also sought our views on whether there are any arrangements that can be put in place so that officials of the Fund can avail themselves of the use of the UNLP.

The United Nations' authority to issue UNLPs stems from the General Convention and the 1947 Convention on the Privileges and Immunities of the Specialized Agencies (the "Specialized Agencies Convention"), which sets out the privileges and immunities of officials of the United Nations and Specialized Agencies respectively and the use by those officials of a UNLP.


In the case of "related organizations", to which the General Convention and the Specialized Agencies Convention do not apply, the United Nations only issues UNLPs to those related organizations, such as IAEA, OPCW and the ICC, that have their own multilateral treaty pursuant to which States Parties agree to grant privileges and immunities to officials of these organizations which include a provision concerning the use of the UNLP and that have concluded relationship agreements with the United Nations that provides for the entitlement of those officials of those organizations to use the UNLP.

In answer to the questions you raise in paragraph 14 of your letter, the Fund may propose to States Parties of the UNFCCC to negotiate and adopt a multilateral treaty which establishes the Fund as a separate international organization and that provides for the privileges and immunities for the Fund and its officials and authorizes the use of the UNLP as the travel document for the Fund's officials. The Fund would then need to conclude a relationship agreement with the United Nations that included a provision concerning the entitlement of officials of the Fund to use the UNLP.

² See FCCC/CP/1999/5/Add.4 and A/AC.237/91.

As to whether it would be possible and sufficient for the Fund to enter into bilateral agreements with those States where it conducts operations or maintains offices which recognize the use of the UNLP as the travel document for the Fund's officials, we would point out, as explained above, that there is no multilateral treaty establishing the Fund that provides, inter alia for the privileges and immunities of its officials and there is no relationship agreement between the United Nations and the Fund. Consequently, the United Nations would not be in a position at this stage to issue UNLP's on the basis of such bilateral agreements.

Yours sincerely,



David Hutchinson
Principal Legal Officer
in charge of the Office of the Legal Counsel

Annex IV: Letter from the Executive Director to the Assistant Secretary-General for Legal Affairs dated 16 May 2014

Green Climate Fund

Mr. Stephen Mathias
Assistant Secretary-General for Legal Affairs
United Nations Office of Legal Affairs
United Nations Headquarters
New York, NY 10017
U.S.A.

Date: 16 May 2014
Reference: HC/GD/tj
Page: 1 of 3

Subject: Possible Institutional Linkage between the United Nations and the Fund

Dear Mr. Mathias,

I refer to the letter conveyed to me on 21 February 2014 by Mr. Hutchinson, Principal Legal Officer in charge of the Office of the Legal Counsel, in response to my letter of 26 November 2013.

We appreciate your detailed analysis of issues relating to a possible relationship agreement between the United Nations and the Green Climate Fund (Fund). We take note that you do not consider such a relationship agreement to be a feasible option, consistent with your view that the Fund has a different legal status in this regard than the specialized agencies and related organizations which have relationship agreements with the United Nations.

You mention, with reference to paragraph 14 of my letter of 26 November 2013, that a relationship agreement might be concluded with the United Nations if the Fund were to "propose to State Parties of the UNFCCC to negotiate and adopt a multilateral treaty which establishes the Fund as a separate international organization and that provides for the privileges and immunities for the Fund and its officials and authorizes the use of the [UN laissez passer] UNLP as the travel document for the Fund's officials." I wish to clarify that the agreement referred to in paragraph 14 of my letter was meant to be a multilateral agreement by which State Parties to the United Nations Framework Convention on Climate Change (UNFCCC) would recognize the legal status and privileges and immunities of the Fund and its officials and allow the use of the UNLP by said officials. Negotiating a new constituent agreement for the Fund would not be a viable option at this time.

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cc: Co-Chairs of the Board of the Green Climate Fund
Mr. Robert C. Orr, Assistant Secretary-General for Policy Coordination and Strategic Planning, United Nations

Green Climate Fund

As regards a possible institutional linkage between the Fund and the United Nations, we fully concur with your assessment that *de lege lata* the Fund cannot avail of the UNFCCC Secretariat's institutional linkage with the United Nations. In accordance with Decision 3/CP.17 and the Governing Instrument, the Fund is separate from and not a part of the UNFCCC Secretariat. Accordingly, currently the Convention on the Privileges and Immunities of the United Nations (General Convention) does not apply to the Fund.

As agreed by you and your team with our Acting General Counsel, Gerd Droege, on 26 March 2014, we would greatly appreciate it if you could supplement the Legal Opinion dated 21 February 2014 by reviewing whether *de lege ferenda* an institutional linkage similar to that which currently exists between the UNFCCC Secretariat and the United Nations could also be applied to the Green Climate Fund.

It would appear to us that such an institutional linkage should not *per se* be precluded by the fact that the Fund's administrative policies are in line with those of the Asian Development Bank. It appears that currently in the UN system, there is no direct link between the legal status of an organization and the regime governing its privileges and immunities on the one hand and the administrative rules applied by the organization, on the other hand. Thus, a number of specialized agencies and related organizations are part of the UN system and enjoy privileges and immunities under the General Convention or the Convention on the Privileges and Immunities of the Specialized Agencies, even though they have not signed the Statutes of the International Civil Service Commission. Similarly, it should be possible, in principle, for the Fund to have an institutional linkage with the UN while applying its own administrative rules.

The proposed institutional linkage would define first and foremost the institutional relationship between the Fund and the UN. It would make the Fund part of the UN system and would be consistent with the fact as highlighted by your Office that the Fund was established by the Conference of the Parties (COP) to the UNFCCC and designated by the COP as an operating entity of the financial mechanism under Article 11 of the UNFCCC. Moreover, the institutional linkage would give effect to paragraphs 7 and 8 of the Governing Instrument as it would entail that the General Convention would become applicable to the Fund and its officials.

Assuming that such an institutional linkage is possible, please indicate which procedures would need to be followed to ensure such a linkage. We take note that in case of the UNFCCC Secretariat, the institutional linkage with the UN was endorsed by the General Assembly and was decided, as highlighted by your Office, "by the COP pursuant to a proposal submitted by the Secretary-General during the Intergovernmental Negotiating Committee for a Framework Convention on Climate Change" Would a similar procedure be followed for approving an institutional linkage between the United Nations and the Fund?

We greatly appreciate the invaluable support which the Secretary-General of the United Nations is providing to the operationalization of the Fund. It is of crucial importance to ensure that the Fund is covered by privileges and immunities in the State Parties to the Convention. The approval of an institutional linkage would be an important contribution to the quick operationalization of the Fund and we hope that this option will be favourably considered.

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Green Climate Fund

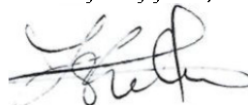
In the view of the foregoing, we request a Legal Opinion of your Office on the issue of applying to the Fund *de lege ferenda* an institutional linkage similar to that which currently exists between the UNFCCC Secretariat and the United Nations.

Assuming that such an institutional linkage is possible, we seek your advice on:

- i. What are the procedures to be followed for establishing such an institutional linkage; and
- ii. To what extent would the Convention on the Privileges and Immunities of the United Nations become applicable to the Fund's Secretariat, Board and other persons associated with the Fund.

We would greatly appreciate receiving your Legal Opinion as soon as possible, so that we can brief the Board of the Fund on the position of your Office and options for the way forward.

Very truly yours,



Héla Cheikhrouhou
Executive Director

Annex V: Response from the Assistant Secretary-General for Legal Affairs dated 13 August 2014



REFERENCE:

13 August 2014

Dear Ms. Cheikhrouhou,

I refer to your letter dated 16 May 2014 in which you ask for our advice on whether an institutional linkage similar to that between the United Nations and the secretariat of the United Nations Framework Convention on Climate Change ("UNFCCC secretariat") could be established between the United Nations and the Green Climate Fund ("the Fund"). In the event that such an institutional linkage could be established, you have also asked about the procedures to be followed to establish such linkage and to what extent the Convention on Privileges and Immunities of the United Nations ("the General Convention") could "become applicable to the Fund's Secretariat, Board and other persons associated with the Fund".

At the outset, I would like to respond to certain general comments you make in your letter before addressing the specific questions which you have raised. In your letter you point out that it should be possible, in principle, for the Fund to have an institutional linkage with the United Nations while applying the Fund's own administrative rules. In support of this view, you note that a number of specialized agencies and related organizations are part of the United Nations system and enjoy privileges and immunities either under the General Convention or the Convention on the Privileges and Immunities of the Specialized Agencies, even though they have not signed the Statutes of the International Civil Service Commission.

In this regard, I would like to emphasize that the specialized agencies are in a distinct category as they apply their own privileges and immunities specified in the Convention on the Privileges and Immunities of the Specialized Agencies. Related organizations do not need to make special arrangements with the United Nations to apply the General Convention as they have their own multilateral treaties pursuant to which States Parties agree to grant privileges and immunities to officials of these organizations.

Ms. H  la Cheikhrouhou
Executive Director
Secretariat of the Green Climate Fund
Incheon

As we pointed out in our letter of 21 February 2014, the use of the United Nations laissez-passer is specifically provided for in the relationship agreements concluded between the United Nations and the specialized agencies and related organizations, all of which have been approved by the General Assembly or another competent principal organ of the United Nations.

As far as the institutional linkage between the United Nations and the UNFCCC secretariat is concerned, we would like to recall that in our previous letter, we pointed out that the institutional linkage, including the applicability of the United Nations Staff Regulations and Rules to the UNFCCC secretariat, was approved by the General Assembly and the COP to UNFCCC,¹ which was based on a proposal submitted by the Secretary-General.² The institutional linkage was intended to provide an efficient arrangement for administrative support to the UNFCCC secretariat.

Staff of the UNFCCC secretariat that are subject to the Staff Regulations and Rules of the United Nations have the status of officials of the United Nations and enjoy the privileges and immunities set out in the General Convention and specifically Articles V and VII of that Convention. In addition, the General Convention is made applicable to the UNFCCC secretariat headquarters in Germany by the Agreement among the United Nations, the Government of the Federal Republic of Germany and the Secretariat of the United Nations Framework Convention on Climate Change concerning the Headquarters of the Convention Secretariat concluded on 20 June 1996.

As to the questions raised in your letter, it would be up to the UNFCCC COP and the General Assembly to take decisions respectively on whether an institutional linkage should exist between the United Nations and the Fund, and if approved, what the nature of that linkage should be. To date they have not done so.

Should a request be made by the COP and the General Assembly on this matter to the Secretary-General, any proposal by him on an institutional linkage would be premised upon decisions taken or recommendations made by the COP and the General Assembly and would also have to be approved by these two intergovernmental bodies.

In this connection, we wish to emphasize that any decision as to whether the provisions of the General Convention should be made applicable to the Fund's secretariat, Board and other persons associated with the Fund or whether officials of the Fund can enjoy the benefits of the United Nations laissez-passer rests with the General Assembly.

¹ See COP decision 14/CP.1 and General Assembly resolutions 50/115 of 20 December 1995, 54/222 of 27 December 1999, 56/199 of 21 December 2001 and 61/201 of 20 December 2006 which endorsed an institutional linkage between the UNFCCC secretariat and the United Nations and its continuation.

² See FCCC/CP/1999/5/Add.4.

However, we would recall that, in your letter of 26 November 2013, you had indicated that the Board of the Fund had decided in June 2013 “to pursue a hybrid option as the basis for the administrative framework of the Fund”. Specifically, the Board had decided the privileges and immunities applicable to the Fund, “with reference to those provided to the International Fund for Agricultural Development and other international financial institutions”, and that “the Fund’s administrative policies, including on human resources, procurement, travel and finance were to be based on those of the Asian Development Bank”.

In the light of this development and the explanations provided above, the institutional linkage currently existing between the United Nations and the UNFCCC secretariat cannot, in our view, be used by analogy for any institutional linkage between the United Nations and the Fund, as long as the arrangements mentioned above apply to the Fund. Ultimately, however, these are questions for the COP of the UNFCCC and the General Assembly to decide upon.

Yours sincerely,



Stephen Mathias
Assistant Secretary-General
in charge of the Office of Legal Affairs