



**GREEN
CLIMATE
FUND**

Meeting of the Board
28 June – 1 July 2021
Virtual meeting
Provisional agenda item 5

GCF/B.29/Inf.07/Add.05

25 June 2021

Institutional linkage between the United Nations and the Green Climate Fund

Summary

Pursuant to decision 7/CP.20, decision 9/CP/25, and decision 12/CP.25, this document presents the summary of the Secretariat's exchanges with the United Nations Secretariat on a potential linkage between the United Nations and the Green Climate Fund, including the possible form and scope of any such linkage. The document further presents the view of the Secretariat in relation to the two possible options by which GCF could enjoy privileges and immunities, other than through bilateral agreements.

I. Introduction

1. Pursuant to paragraph 20 of decision 7/CP.20, the Conference of the Parties to the United Nations Framework Convention on Climate Change (COP) took note of GCF Board decision B.08/24 on the institutional linkage between the United Nations and the Green Climate Fund and requested the Board to continue further deliberations on this matter and report back to the COP.
2. Additionally, in paragraph 9 of decision 12/CP.25, the COP took note of the engagement between the COP President and the Secretary-General of the United Nations on the matter relating to the privileges and immunities of GCF and requested the COP President to report on this engagement at the twenty-sixth meeting of the Conference of the Parties (COP 26), whereupon it would continue its consideration of the matter.
3. In order to support the Board's continued deliberations on this matter, as mandated by decision 7/CP.20, and to provide inputs and support to the engagement between the COP President and the Secretary-General of the United Nations referred to in decision 9/CP/25, the Secretariat has been exchanging preliminary views with the United Nations Secretariat on a potential linkage, including the possible form and scope of any such linkage.
4. Based on these exchanges, the Secretariat understands that there are two possible options by which GCF could enjoy privileges and immunities, other than through bilateral agreements: (i) an institutional linkage similar to that between the UNFCCC secretariat and the United Nations, thus availing itself of the relevant provisions in the 1946 Convention on the Privileges and Immunities of the United Nations (the General Convention); or (ii) seeking specialized agency status for GCF under Articles 57 and 63 of the Charter of the United Nations and once it obtains such status, obtain approval for an annex to the 1947 Convention on the Privileges and Immunities of Specialized Agencies (Specialized Agencies Convention) for GCF.
5. For the reasons set out in this addendum, the Secretariat considers, at this stage, that the best option with a realistic prospect of success is pursuing the option of specialized agency status with the United Nations pursuant to Articles 57 and 63 of the Charter of the United Nations, and recommends that the Board endorses this option.

II. Options for linkage with the United Nations

2.1 Institutional Linkage

6. As a first step, the COP would have to take a formal decision to initiate a process by which GCF would enter into an institutional linkage with the United Nations. It would then be for the General Assembly of the United Nations to decide whether or not to engage in such a process. If and when a proposal for an institutional linkage is agreed upon, it must be approved by the COP as well as the General Assembly.
7. As far as privileges and immunities under the General Convention are concerned, the Secretariat, while it would ideally like the GCF to benefit from the full extent of the privileges and immunities outlined in the General Convention, focused its attention on understanding the implications of pursuing an institutional linkage through Articles V and VII of the General Convention. Should the COP make a request to the United Nations to enter into an institutional linkage, the full scope and arrangements for an institutional linkage would have to be put forward by the Secretary-General. If such a proposal includes the extension of privileges and immunities under Articles V and VII, which would be seen as a short-term objective, it would secure for the staff of GCF the same privileges and immunities enjoyed by United Nations staff.

8. While the application of Articles V and VII of the General Convention to GCF staff members may achieve the short-term objective, adopting an institutional linkage that is similar to the one between the United Nations and the UNFCCC secretariat would, in particular, give rise to three broad and critical issues.

9. **First, the appointment of the Executive Director.** The Secretariat understands that, as a general matter, the United Nations Secretary-General appoints United Nations staff members, including heads of United Nations Funds and Programmes. There are examples where the appointment or the election of a head of a United Nations Fund or Programme is carried out by the General Assembly. For example, pursuant to General Assembly resolution 2997 (XXVII) of 15 December 1972, the Executive Director of the United Nations Environment Programme (UNEP) is elected by the General Assembly for a four-year term (see General Assembly decision 73/416 for the most recent election of the Executive Director of UNEP), and the Secretary-General makes the appointment following the General Assembly decision. Thus, the issue of the appointment of the Executive Director would be a matter that would have to be further discussed with the United Nations. That said, this could pose a fundamental obstacle for GCF as, pursuant to the terms of paragraphs 18(k) and 20 of its Governing Instrument, it is the Board that appoints the Executive Director. Bearing in mind that GCF is an independent and autonomous body, there would be significant legal and political hurdles if this were to be accommodated.

10. **Second, the staff of GCF and Articles V and VII of the General Convention.** The Secretariat understands that, as a general matter, if staff were to be accorded the privileges and immunities provided for under Articles V and VII of the General Convention, all GCF staff members would have to become United Nations officials, that is, United Nations staff members. How this would be arranged, including with respect to the heads of the Independent Units, would be subject to further discussions with the United Nations. If GCF staff were to become United Nations staff members, they would be subject to United Nations Staff Regulations and Rules, which means that GCF would have to adopt and implement the United Nations Staff Regulations and Rules. GCF's rules would have to be amended to be fully aligned with the United Nations Staff Regulations and Rules, including those on compensation and benefits. This would have an impact on GCF's administrative budget because there are certain allowances that United Nations staff now enjoy which GCF staff do not now enjoy, or where the relevant benefit is different, including different formula for housing benefits and post adjustments, among others. These requirements would pose significant legal and political hurdles for GCF in view of its Governing Instrument and its own staff structure, which is currently regulated under its own Administrative Guidelines on Human Resources.

11. **Third, the United Nations Joint Staff Pension Fund (UNJSPF).** The UNJSPF is a fund established by the United Nations General Assembly to provide retirement, death, disability and related benefits for the staff of the United Nations and other organizations admitted to membership in the Fund. Under Article 3 of the Regulations, Rules and Pension Adjustment System of the United Nations Joint Staff Pension Fund (Fund's Regulations), membership in the UNJSPF shall be open to the specialized agencies referred to in Article 57, paragraph 2, of the Charter of the United Nations and to any other international, intergovernmental organization which participates in the common system of salaries, allowances and other conditions of service of the United Nations and the specialized agencies. GCF staff, should they become United Nations staff members holding United Nations letters of appointment, would then become eligible to be participants in the UNJSPF as staff members of the United Nations, the largest member organization of the UNJSPF. Such a proposal could, however, pose legal and financial issues for GCF in view of the fact that (i) GCF does not currently operate a similar type of pension scheme for the benefit of its staff; and (ii) GCF does not participate in the common system of salaries, allowances and other conditions of service of the United Nations and the specialized agencies. Participation in the UNJSPF would also impact GCF's administrative budget, as provision would have to be made for payments to be made to the UNJSPF by the

United Nations (on behalf of GCF staff) as the employing organization in accordance with the Fund's Regulations to meet the additional financial obligations arising from the participation in the UNJSPF of GCF staff holding United Nations letters of appointment. GCF's financial obligations vis-à-vis the UNJSPF would include, for example, the employee and employer's monthly contributions to be made to the UNJSPF, any expenses incurred in the administration of the Fund's Regulations (Article 15 of the Fund's Regulations) by the United Nations on behalf of GCF, and in the event that an actuarial valuation of the UNJSPF shows that its assets may not be sufficient to meet its liabilities under the Fund's Regulations, the relevant member organization (i.e. the United Nations on behalf of GCF staff) would have to pay into the UNJSPF the sum necessary to make good the deficiency (Article 26 of the Fund's Regulations). Specific details of GCF's financial obligations would need to be further discussed with the United Nations' Office of Human Resources and with the UNJSPF.

12. Were GCF to seek to join the UNJSPF independently from the United Nations (which would require GCF to establish to the UNJSPF and the General Assembly that it was an international organization applying the common system of salaries, allowances and benefits), then the issues mentioned above (i.e. budgetary impact, employer and employee contributions, establishing administrative machinery to ensure effective participation in the UNJSPF, deficit payment obligations, etc.) would fall directly on GCF itself. Meeting such financial requirements, whether through participation in the UNJSPF as staff of the United Nations itself or through an independent joiner, may be challenging in the context of GCF, whose core activities are funded through replenishment cycles, rather than assessed contributions as is the case for the core activities of the United Nations.

13. If these fundamental hurdles were to be accepted by GCF and the COP then it could provide a sufficient basis for the General Assembly to consider and take action on the proposal for an institutional linkage between the United Nations and GCF, without prejudice to the fact that Member States of the United Nations may take a different view. It may also be possible for the COP to formally request the Secretary-General to lay out what the institutional linkage could look like, taking into account certain matters. Such a linkage could be similar in some respects to those put in place for the secretariats of the UNFCCC and the United Nations Convention to Combat Desertification, albeit that a linkage between GCF and the United Nations would need to recognize the different legal and institutional set-up of GCF.

14. It should be noted, however, that even if the above efforts were successful, the GCF as an institution would continue to have to seek privileges and immunities for the institution and its assets on a bilateral basis.

2.2 Specialized agency status

15. This option too, as a first step, would require the COP to take a formal decision to initiate a process by which it would enter into an agreement with the United Nations to become a specialized agency. It would then be for the Economic and Social Council of the United Nations (ECOSOC) to decide whether or not to engage in such a process. If and when a text for an agreement is agreed upon, it must ultimately be approved by the COP as well as the General Assembly of the United Nations.

16. Legal and political hurdles also exist in the context of GCF seeking to acquire the status of a specialized agency of the United Nations, and subsequently benefit from the privileges and immunities set out in the Specialized Agencies Convention, pursuant to a specific annex to be approved for GCF. In the pursuit of this modality, GCF would, among other things, be required to satisfy ECOSOC, and subsequently the United Nations General Assembly, that it meets the requirements set out in Article 57 of the Charter of the United Nations, namely that it is "established by inter-governmental agreement" and has "wide international responsibilities, as

defined in [its] basic instruments, in economic, social, cultural, educational, health, and related fields”.

17. It would be for ECOSOC and the General Assembly to determine whether GCF should be brought into relationship with the United Nations in accordance with Article 63 of the Charter of the United Nations. If members of ECOSOC are in favour of considering the request to become a specialized agency, ECOSOC could include the relevant item in the ECOSOC agenda and establish a Committee on Negotiations with Intergovernmental Agencies. The draft relationship agreement with GCF would then be negotiated by the Committee on Negotiations with Intergovernmental Agencies, normally based on a proposal by the Secretary-General. If the draft relationship agreement is approved by the Committee and GCF, for it to enter into force it would also need to be approved by ECOSOC and subsequently by the General Assembly and the COP.

18. The United Nations Office of Legal Affairs intimated in a legal opinion, published in the United Nations Juridical Yearbook, issued on 21 February 2014, that it considered that GCF was not a separate free-standing international organization, and that therefore it would not be able to conclude a relationship agreement with the United Nations of the type concluded between the United Nations and specialized agencies and related organizations.

19. The Secretariat understands that in light of its institutional set-up and the opinion referred to in paragraph 31 above, and indeed in any event, some Member States may, in the course of any ECOSOC deliberations on this matter, take a view that GCF is not an “intergovernmental organization” or was not established by “intergovernmental agreement”.¹ The Secretariat understands that the relevant considerations are both legal and political, and that therefore these are matters for the relevant bodies to decide upon.

20. The Secretariat is of the view that, notwithstanding the foregoing, GCF would be able to make a compelling case to ECOSOC that GCF meets the requirements set out in Article 57 of the Charter of the United Nations. In particular, GCF has evolved significantly since 2014, when the opinion referred to in paragraph 31 above from the United Nations Office of Legal Affairs was prepared, and there are numerous factors which demonstrate that GCF, in fact and in law, (i) is an intergovernmental organization, and (ii) was established by intergovernmental agreement.

21. In fact, (ii) above is one of the defining elements of an international organization. It is generally accepted that international organizations have three defining characteristics: (1) they are founded or established by an international agreement; (2) they have at least one organ with a will of its own; and (3) they have been established under international law.

22. Traditionally, most international organizations have been established by treaty. However, agreements establishing an international organization can also be expressed in other ways.² This approach is also recognized in the commentaries to the *Draft articles on the responsibility of international organizations*, which makes clear that “forms of international cooperation are sometimes established without a treaty”.³

¹ See also the Memorandum from the COP President to Parties dated 28 December 2020, available at <https://unfccc.int/sites/default/files/resource/Memo%20GCF%20COP25%20Presidency%20report%20to%20COP26.pdf>.

² For example, government representatives assembled in a conference may decide to establish an international organization without using a treaty, and without the usual proviso for subsequent ratification (see: Schermers H and Blokker N. 2011. *International Institutional Law* (revised 5th edition, p.37).

³ In this context, in order to cover organizations established by States on the international plane without a treaty, the definition of international organization in the draft articles is “an organization established by a treaty or other instrument governed by international law and possessing its own international legal personality.” This wording is intended to include instruments such as **resolutions adopted by** an international organization or by **a conference of States** [emphasis added], see Article 2(a) of the draft articles on the responsibility of international organizations, and related commentary: Draft articles on the responsibility of international organizations, with commentaries,

23. The Governing Instrument can be classified as an instrument adopted by a conference of States, which manifests the **written agreement** of the parties. Additionally, the Board of the GCF is an organ with a will of its own, and separate from that of the parties which adopted the Governing Instrument. Finally, it is clear that GCF is established under international law – a consequence of its establishment by decision of the COP rather than under the national or municipal law of any particular State.

24. Furthermore, as a matter of practice, there is wide acceptance of GCF as an international organization; the international legal status of GCF has to date been recognized by 27 countries which have conferred privileges and immunities on it. The host country, the Republic of Korea, has also recognized its international legal status by entering into a Headquarters Agreement conferring privileges and immunities on it on similar terms and conditions as any other international organization. Additionally, GCF has entered into several agreements governed by public international law with other international organizations, including various agencies of the United Nations and multilateral development banks, which have all recognized GCF's status as an international organization.

25. Finally, the mandate of GCF and its central role in climate finance, as well as the climate emergency, are political factors that the Secretariat believes would make a compelling case to obtain the necessary approval from ECOSOC and the General Assembly.

26. It is acknowledged that obtaining the status of specialized agency would not in itself provide GCF with privileges and immunities under the Specialized Agencies Convention. Once GCF is brought into relationship with the United Nations as a specialized agency, a GCF-specific annex to the Specialized Agencies Convention, based on a draft annex recommended by ECOSOC, would need to be prepared by the Secretary-General for the approval of ECOSOC, which could then recommend the draft for approval by the specialized agency concerned. The Specialized Agencies Convention could become applicable to GCF upon transmission by it of the final text of the annex to the Secretary-General. Thereafter, each party to the Specialized Agencies Convention would need to indicate its agreement to be bound by such annex with respect to GCF.

III. Conclusion

27. Both options, seeking an institutional linkage with the United Nations and seeking specialized agency status, entail political and legal hurdles. However, in the view of the Secretariat, seeking specialized agency status is the preferable route because it would not affect the heavily negotiated governance arrangements for GCF, and would remain consistent with the requirement set by the Board in decision B.08/24 that any United Nations linkage be “*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*”, and that it was understood that “*such institutional linkage will not affect the powers of the Board to appoint the Executive Director and to adopt rules, policies and guidelines for the effective administration of the Fund, and the powers vested in the Executive Director as the head of the Secretariat*”.

28. Having regard to the above factors, the Secretariat recommends that the Board consider endorsing the pursuit of this option – to seek specialized agency status for the GCF – and to report back to the COP in this regard in order to fulfil the mandate in decision 7/CP.20.

2011 (https://legal.un.org/ilc/texts/instruments/english/commentaries/9_11_2011.pdf). See also: Brownlie I. 2008. *Principles of Public International Law* 678 (7th edition).