



19 November 2019

**Submission by the Arab Republic of Egypt on behalf of the
African Group on new agenda item under the COP agenda
8c
The GCF**

The African Group would like to underscore the importance of clarifying the status of the privileges and immunities accorded to the GCF under its Governing Instrument at COP25 in order to enable developing countries to increase the non-conditional nature of their NDCs and in order to ensure ambition require access to predictable resources from the Green Climate Fund.

In this regard, the African Group would like to propose an additional agenda item to be included on the provisional agenda for the twenty-fifth session of the Conference of the Parties, new agenda item under the COP agenda 8c that relates to the GCF.

The agenda item is as follows: “Clarification of the status of the provision of privileges and immunities for the Green Climate Fund.”

The African Group is further presenting its justification for this new agenda item as a legal matter separate and distinct from the standing agenda item on Guidance to the Green Climate Fund. This justification is contained in the annex to this submission and could be used for the annotation of this agenda item.

Furthermore, the African Group presents a Conference Room Paper for consideration by Parties under this agenda item.

Annex I: Status of the Provision of Privileges and Immunities to the Green Climate Fund

1. Paragraph 7 of the Governing Instrument of the GCF states:
“In 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.”

2. Paragraph 8 of the Governing Instrument of the Fund states:
“The Fund will enjoy such privileges and immunities (Ps&Is) as are necessary for the fulfillment of its purposes. The officials of the Fund will similarly enjoy such privileges and immunities as are necessary for the independent exercise of their official functions in connection with the Fund.” Paragraph 8 underscores the need for Ps&Is in relation to *“(a) Fund-wide functions and (b) Fund officials.”*
3. Subsequent to its report to the COP and as agreed in Board Decision B.08/24, the Board specifically requested the COP 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.”*
4. At COP18, Parties agreed to continue their deliberations on the Board’s request and put in place a process to re-consider the requests every two years in conjunction with a report from the Board on the status of Ps&Is.
5. The 2019 report on Ps&Is makes the following assessment on the state of PS&Is and the impacts of the Fund’s activities:
 - a) The Board has reported that the absence of such privileges and immunities creates an increased risk that legal action may be taken against the GCF, its Board members and other officials, especially in the context of projects/programmes implemented by entities who themselves are protected by their own privileges and immunities. Such litigation would be costly and disruptive to the activities of the GCF and may dissuade contributors from making further contributions to the GCF;
 - b) The lack of privileges and immunities as a political risk mitigation mechanism means the GCF seeks to protect its rights, and funds entrusted to it by contributors, using

legal risk mitigants, such as its legal agreements. To address the relevant risks as well as comply with the requirements of the Board, these agreements tend to be complex and, in some cases, prescriptive. This in turn limits the ability of the GCF to utilize effective adaptive project management approaches, which can delay implementation; and

- c) The lack of privileges and immunities also gives rise to challenges with obtaining visas for travel to countries to help develop and implement projects/programmes and creates material risks to GCF personnel, especially those engaged in in-country investigations where privileges and immunities are essential to ensure the safety and independence of the investigators, and the integrity of the investigative processes. Furthermore. Moreover, the lack of immunity from jurisdiction for GCF personnel in, and the ability to freely enter into, countries in which the GCF has projects/programmes may adversely affect the ability of the GCF to discharge its functions and ensure transparency and oversight over GCF resources, for example in the context of: (i) project review/supervision missions in relevant countries; (ii) in-country investigations to be conducted by the Independent Integrity Unit (IIU) and the Independent Redress Mechanism (IRM); and (iii) in-country evaluations of projects/programmes conducted by the Independent Evaluation Unit.
6. The AGN notes that the Secretariat has actively pursued privileges and immunities negotiations with both developed and developing countries and, as of 30 April 2019, it had sent draft agreements to a cumulative total of 135 countries. As of 24 May 2019, 21 bilateral privileges and immunities agreements have been signed -- but none of these are with developed countries. The 21 countries that have signed agreements make up less than 1% of the developing country population. At the current pace, the GCF is averaging about 4 arrangements per year (since the Lima decision) and following the same trajectory, it will take up to 2047 to have such bilateral agreements with all developing countries.
7. As confirmed in the GCF Board's third biannual report on Ps&Is, paragraph 8 of the Governing Instrument has yet to be implemented. It is now appropriate for the COP to remedy this problem. The process agreed upon at the Lima

COP and subsequent guidance from the COP is insufficient to remedy the problem.

8. It is the view of the Executive Director of the Independent Secretariat of the GCF, with the support by the African Group, that “in terms of tools, the Secretariat believes that given the global span of its project portfolio, the increasing number of projects entering the implementation phase, and the Fund’s increased need for adaptive portfolio oversight and management, continuing to operate the Fund without the essential privileges and immunities specifically called for in paragraph 8 of the Governing Instrument presents an ongoing risk to the Fund’s Board members, its investments, and the Secretariat’s personnel.
9. Privileges and immunities are of the utmost importance to ensure that the GCF can perform its functions effectively and operationalize its activities in a speedy manner. Moreover, they are necessary to protect the financial resources that have been made available to the GCF and to ensure its independence. Privileges and immunities establish a formal political relationship between a country and an international organization. This is critical as, for international organizations to perform their functions effectively, their assets, archives and communications must be protected and personnel such as members and alternate members of the Board, staff and other persons associated with the GCF must enjoy functional immunity of legal process in relation to acts performed by them in an official capacity.
10. The absence of privileges and immunities creates increased litigation risks, not only for the GCF as an institution, but for its Board members and other officials. This risk relates to the operational activities of the GCF, including but not limited to decisions on accreditation and funding proposals. The fact that many of the Fund’s activities are carried out by AEs does not protect the Fund and its Board and officials from litigation. In fact, because many of the GCF’s AEs are independently covered by privileges and immunities, there is an increased likelihood that aggrieved third parties would consider recourse against the GCF as the most exposed party involved in a transaction.

Annex II: Conference Room Paper: *Clarification of the status of the provision of privileges and immunities for the Green Climate Fund*

Decision __/CP.25

The Conference of the Parties,

Reaffirming paragraph 108 of decision 1/CP.16, and the provisions of decision 3/CP.17;

Recalling Article 7, paragraphs (h), (i) and (k), of the Convention;

Recalling further Article 11, paragraph 1, of the Convention;

Recalling further that the Convention and its bodies, mechanisms and implementing entities, including the Green Climate Fund as an implementing entity of the Convention's Financial Mechanism, were established under the aegis of the United Nations and in accordance with the United Nations Charter in furtherance of the purposes of the United Nations;

1. *Decides* that the secretariat of the Green Climate Fund and the Independent Units, as established by the Board of the Green Climate Fund pursuant to paragraph 108 of decision 1/CP.16 and paragraph 15 of decision 3/CP.17, shall be institutionally linked to the United Nations, 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;
2. *Requests* the General Assembly of the United Nations, through the President of the General Assembly, to endorse the decision in paragraph 1 above relating to the institutional linkage of the Green Climate Fund secretariat to the United Nations;
3. *Requests* the Board of the GCF to ensure that the institutional linkage to the United Nations for the GCF secretariat referred to in paragraph 1 above is reflected in the legal and administrative arrangements of the Host Country Agreement;

4. *Requests* the UN Secretary-General, subsequent to the endorsement of the General Assembly of the United Nations of the decision in paragraph 1 above relating to the institutional linkage of the Green Climate Fund secretariat to the United Nations, to give effect to such decision and the endorsement of the General Assembly by authorizing the issuance of United Nations laissez-passer under Article VII of the 1946 Convention on the Privileges and Immunities of the United Nations to staff and officials of the Green Climate Fund;

5. *Decides* that, immediately upon endorsement by the General Assembly under paragraph 2 above of the decision of the COP under paragraph 1 above, all Parties to the Convention that are Parties to the 1946 Convention on the Privileges and Immunities of the United Nations are deemed to recognize *ipso jure* the institutional linkage between the Green Climate Fund and the United Nations pursuant to this decision and therefore according to the Green Climate Fund the same immunities and privileges for the Fund and its officials that are accorded to United Nations officials and staff under the 1946 Convention on the Privileges and Immunities of the United Nations..

