
Global Green Growth Institute

Second session of the Council

Abu Dhabi, 17 January 2013

Decision on Privileges and Immunities

The Council,

Recalling Article 15 of the Agreement on the Establishment of the Global Green Growth Institute regarding the privileges and immunities of the Global Green Growth Institute (the “GGGI”); and,

Recognizing the importance and the need for a comprehensive agreement on privileges and immunities for the GGGI with all Members of the GGGI as well as potential non-Member states;

Decides:

1. To facilitate consultations with the Members of the GGGI and potential non-Member states on an agreement on privileges and immunities for the GGGI;
2. To authorize the Secretariat, on behalf of the Council, to initiate formal consultations on behalf of the GGGI with key Members and potential non-Member states on an agreement on privileges and immunities for the GGGI; and,
3. To authorize the Secretariat to conclude, on behalf of the GGGI, an Exchange of Notes on privileges and immunities for the GGGI, if necessary, with Members and potential non-Member states such as may be required in the near term to facilitate the efficient operations of the GGGI in relevant countries.

**RE THE PRIVILEGES AND IMMUNITIES OF
THE GLOBAL GREEN GROWTH INSTITUTE**

**MEMORANDUM FROM PROFESSOR DAN SAROOSHI, LL.M, PhD,
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1. INTRODUCTION

1. I am asked to provide on an urgent basis a memorandum for circulation to members of the Global Green Growth Institute (“GGGI”) Transitional Committee which addresses the following issues:
 - (i) why it is important for the GGGI to seek to obtain the privileges and immunities of an international organization; and
 - (ii) why the best way for the GGGI to achieve such privileges and immunities is by concluding a central Agreement on Privileges and Immunities of the GGGI.

2. CONCLUSIONS

2. For the reasons set out below, my conclusions are:
 - (i) The main reasons why the GGGI should actively seek the grant of privileges and immunities of an international organization are:
 - (a) to ensure complete independence of action (both perceived and actual) for the GGGI from the control of any of its member States in relation to its property or assets, officials, and its decision-making processes;
 - (b) to ensure that funds contributed to the GGGI (whether by States or third parties) are utilised solely to achieve the purposes of the GGGI and are not diverted into the treasuries of those States on whose territory the GGGI may maintain an office or otherwise carry out its

functions or the treasuries of those States whose nationals happen to be GGGI officials.

- (ii) The best way for the GGGI to achieve such privileges and immunities is for member States to adopt a separate Agreement on the Privileges and Immunities of the GGGI (“the Agreement”), this being the most efficient and effective way to achieve protection for the GGGI on a global basis. The importance of this Agreement is that once it enters into force then it shall impose an obligation on States under international law to ensure that the privileges and immunities contained in the Agreement are given effect in their domestic legal order, but it also provides an important basis to assert the immunities of the GGGI in the domestic courts of those States (whether GGGI members or not) which have not ratified the Agreement.
- (iii) It is further recommended that the GGGI Council, as the GGGI’s executive organ, should adopt a Resolution which:
 - (a) states that it is necessary for the effective functioning of the Organization that all States afford the GGGI privileges and immunities under international law, and
 - (b) exhorts all GGGI member States to ratify an Agreement on the Privileges and Immunities of the GGGI which should be annexed to the Resolution.
- (iv) As part of the process of finalising the terms of this Agreement it is recommended that one or more senior GGGI officials and the author of this Memorandum and the draft Agreement¹ visit the Legal Advisers of key GGGI member States² to discuss issues involved in implementing this option and to ensure that the terms of the Agreement are in general terms acceptable to key GGGI States. This will require the GGGI Secretariat to identify as a matter of some urgency these key GGGI States if there is a desire to seek the adoption of the Agreement by the GGGI Council at its meeting in Abu Dhabi on 17 January 2012.
- (v) In overall terms, the time frame involved with implementing this option will depend on the speed of the Council’s decision-making and any delay relating to the decision by States on an individual basis to ratify the Agreement.

¹ I have attached the draft Agreement as Annex 1 to this Memorandum.

² I can assist, if necessary, in establishing contact with the Legal Advisers of several States.

3. WHY IT IS IMPORTANT FOR THE GGGI TO OBTAIN PRIVILEGES AND IMMUNITIES

3. This section first considers the types of privileges and immunities that are typically granted to international organizations as well as the rationale for such conferrals before going on to consider more specifically the case of the GGGI.

3.1. Privileges and Immunities of International Organizations

4. The necessity and importance of privileges and immunities for the effective functioning of international organizations such as the GGGI has long been recognized by international law.
5. A very large number of international organizations and their officials enjoy express privileges and immunities whether provided for by the constituent treaty of an organization or by a separate agreement. These protections are, for example, contained in the 1946 UN Convention on Privileges and Immunities and the 1947 UN Specialized Agencies Convention which confer broad privileges and immunities on the UN and UN Specialized Agencies. There are also a relatively large number of agreements that confer such privileges and immunities on organizations that are not part of the UN system such as, for example, the International Criminal Court; the World Trade Organization; and the European Bank for Reconstruction and Development.
6. The types of privileges and immunities commonly granted to international organizations by their member States include, for example, the following:
 - The capacity within member States to contract, to acquire and dispose of immovable and movable property, and to institute legal proceedings;
 - Immunity for the organization, its property and assets from every form of legal process, except where this is expressly waived in a particular case by the organization;
 - Immunity for the property and assets of the organization from search, requisition, confiscation, expropriation or any other form of interference, whether by executive, administrative, judicial or legislative action of States;
 - Inviolability of the premises and archives of the organization;
 - Immunity from financial controls and regulations;

- Exemption for the organization, its assets, income and other property from all direct taxes (except charges for public utility services) and some limited exemptions from indirect taxes; and
 - Exemption for the organization from customs duties and prohibitions and from restrictions on imports and exports in respect of articles imported or exported by the organization for its official use.
7. Moreover, a number of privileges and immunities are commonly granted to officials of international organizations and these include, for example, the following:
- Immunity from legal process in respect of words spoken or written and all acts performed by them in their official capacity;
 - Exemption from taxation on their salaries and emoluments;
 - Immunity, together with their spouses and dependents, from immigration restrictions and alien registration requirements;
 - The same privileges in respect of exchange facilities as are accorded to the officials of comparable rank forming part of diplomatic missions to the government concerned;
 - Together with spouses and dependent relatives, the same repatriation facilities in times of crisis as diplomatic envoys;
 - Immunity from national service obligations.
8. The main reason why these privileges and immunities are readily accepted by States is the widespread recognition that they are necessary to ensure the independence of an international organization from the control of any one of its member States in relation to the organization's property or assets, its staff, and its decision-making processes. Moreover, in relation to the exemption of an organization from taxes and other fiscal charges imposed by States these are considered important to ensure that the funds of an organization are utilised solely to achieve the purposes of the organization and are not diverted into the treasuries of those select States on whose territory the organization may maintain an office or otherwise carry out its official activities. A similar rationale applies to the exemptions from taxes and other fiscal charges imposed by States on an organization's officials, since it would not be appropriate for monies contributed by all member States to be diverted to the treasuries of those States whose nationals happened to be officials of the organization. The remaining privileges and immunities granted to the officials of an organization are intended to ensure the independence of the official from the direction or control of States (including

their State of nationality) and, by implication, to ensure that the organization can operate independently of such control. In the case of many international organizations these privileges and immunities are extended also to persons who participate in the decision-making organs of the organization.

9. As the International Court of Justice stated in 1949 in relation to the immunities of officials of an organization (the UN):

“In order that the agent may perform his duties satisfactorily, he must feel that this protection [i.e. immunity from arrest, legal process etc.] is assured to him by the Organization, and that he may count on it. To ensure the independence of the agent, and, consequently, the independent action of the Organization itself, it is essential that in performing his duties he need not have to rely on any other protection than that of the Organization (save of course for the more direct and immediate protection due from the State in whose territory he may be). In particular, he should not have to rely on the protection of his own State. If he had to rely on that State, his independence might well be compromised”
(Reparation for Injuries suffered in the Service of the United Nations, Advisory Opinion, I.C.J. Reports 1949.)

10. In the case of persons enjoying privileges and immunities there is a general caveat that these have only been conferred on them in the interests of the organization and not for their personal benefit. As such, the organization is obligated to waive such immunities where the assertion of the immunity would impede the administration of justice and where it can be waived without prejudice to the interests of the organization: for example, in the case where an official commits a crime.

3.2. Privileges and Immunities and the GGGI

11. The rationale set out above relating to the need for privileges and immunities of international organizations applies of course also in the case of the GGGI. The objectives and mandate of GGGI will clearly require it to operate internationally, and it will need privileges and immunities to be able to do so effectively and independent of influence from any State.

12. However the GGGI currently enjoys no express privileges and immunities in the Republic of Korea or in any other member State.
13. The Agreement on the Establishment of the GGGI concluded on 20 June 2012 does not provide any privileges and immunities for the GGGI, its officials, or for any persons serving on its Assembly, Council, and Advisory Committee. It simply states in permissive, rather than mandatory, terms the following in Article 15:

“The GGGI may enjoy such privileges and immunities in the member state in which it is headquartered and may seek such privileges and immunities in other Members as may be necessary and appropriate for the proper functioning of the GGGI in the territory of member states, in due consideration of such privileges and immunities as are customarily accorded to a similar type of international organization. Such privileges and immunities shall be specified in a separate agreement that may be concluded among the Members or between the GGGI and the individual Member.”

(Emphasis added.)

14. There is at present no Headquarters Agreement (“HQA”) in force with the Republic of Korea: the terms of this HQA is currently being negotiated with the Government, but in any case the existence of an HQA does not obviate the need for a broader Agreement on Privileges and Immunities of the GGGI.
15. The lack of privileges and immunities currently leaves the GGGI and its officials facing serious risks in every country, a number of which are as follows:
 - GGGI may potentially be sued in any court in relation to any of its decisions or any other aspect of its operations; and the GGGI and its assets will not enjoy immunity in relation to the enforcement of any court decision in a State;
 - GGGI assets, income, and property are not immune from taxes and currency restrictions;
 - GGGI archives, working documents, and data will not be immune from search by government authorities and these can also be made the subject of a domestic court order. This may be a particular risk when such documents and data are in the possession of travelling GGGI officials;
 - GGGI may be sued by present or former employees in any court; and the GGGI’s assets may be vulnerable to enforcement of any such court decision;

- GGGI officials would not be immune from any legal process for acts and words spoken or written in the discharge of their official duties;
- GGGI officials, even when travelling in the performance of their official functions, are not immune from arrest or detention;
- GGGI officials when travelling on official business have no privileges or immunities relating to visa or immigration requirements of States;
- GGGI officials may be subjected to different levels of taxation by their States of nationality (or even residence) leading to GGGI funds being diverted into the treasuries of these States and GGGI not being able to fix comparable salary levels for comparable posts;
- GGGI officials would not be immune from national military service obligations as may be required by their State of nationality;

16. In order to address these serious risks facing the GGGI and its officials the following section considers the most best way forward for the GGGI to obtain the necessary privileges and immunities.

4. ACHIEVING PRIVILEGES AND IMMUNITIES FOR THE GGGI

17. There are two main ways in which States can confer privileges and immunities on the GGGI.

18. The first, most effective, way is for member States to adopt an Agreement on the Privileges and Immunities of the GGGI. This Agreement would contain all of the privileges and immunities commonly conferred on international organizations such as the GGGI, a number of these having been set out above in Section 3.1 of this Advice. As mentioned, I have drafted the terms of a proposed Agreement on Privileges and Immunities of the GGGI.³

19. I would furthermore recommend that the GGGI Council adopt a Resolution which (i) states that in order to ensure the effective functioning of the Organization that all States should afford privileges and immunities to the GGGI under international law, and (ii) exhorts all GGGI member States to ratify the Agreement on the Privileges and Immunities of the GGGI which should be annexed to the Resolution. Once a specified number of States – three in the current draft – ratify the Agreement then it shall enter into force as a binding treaty. Obviously the

³ Annex 1 to this Memorandum.

- more States that ratify the Agreement the broader the global coverage of privileges and immunities that will be enjoyed by the GGGI.
20. A considerable advantage of concluding a separate Agreement on Privileges and Immunities of the GGGI is that it also provides a basis to assert the immunities of the GGGI in the domestic courts of those States (whether GGGI members or not) which have not ratified the Agreement.
 21. The procedural approach of putting the Agreement to member States by means of a Council Resolution offers the significant advantage that the GGGI retains control over the content of the Agreement, but it shall nonetheless be necessary in practice to negotiate the terms of the Agreement with key GGGI member States to ensure that its terms are acceptable. As such, I have proposed in the Conclusions set out above that one or more senior GGGI officials and the author of this Memorandum and the draft Agreement visit the Legal Advisers of key GGGI member States to negotiate the terms of the Agreement.
 22. The second way the GGGI can seek privileges and immunities exists only in relation to those States whose governments are authorised by legislation to designate an international organization as enjoying privileges and immunities under their domestic law (“the designation by government method”). For example, the U.S. International Organizations Immunities Act of 1945 (“the IOIA”) authorises the U.S. President to designate an international organization by Executive Order as enjoying the broad privileges and immunities set out in the IOIA within the US legal system.
 23. Based on preliminary research, it appears that approximately 40 or so States employ the “designation by government method” of conferring privileges and immunities on international organizations. The ease with which such designations can be made by governments will, of course, vary widely according to the different legal systems and legislative requirements of GGGI member States.
 24. The use of the “designation by government method” to obtain privileges and immunities for the GGGI should only however be envisaged as a way forward once an Agreement on Privileges and Immunities of the GGGI has entered into force as a binding treaty. It is simply not feasible as a legal and practical matter to negotiate with every relevant GGGI member State to seek the designation of the GGGI as enjoying privileges and immunities pursuant to national legislation. By far the most effective and efficient way forward in order to provide the GGGI

with worldwide protection is to encourage States to adopt an Agreement on the Privileges and Immunities of the GGGI. Once they ratify the Agreement which binds States on the international plane, then it will be a far simpler (and in some cases automatic) process for member States to use the “designation by government method” to confer privileges and immunities on the GGGI within their domestic legal systems.

PROFESSOR DAN SAROOSHI

15 NOVEMBER 2012

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