Extract from:

UNITED NATIONS JURIDICAL YEARBOOK

2010

Part Two. Legal activities of the United Nations and related intergovernmental organizations

Chapter VI. Selected legal opinions of the Secretariats of the United Nations and related intergovernmental organizations

Chapter VI

SELECTED LEGAL OPINIONS OF THE SECRETARIATS OF THE UNITED NATIONS AND RELATED INTERGOVERNMENTAL ORGANIZATIONS*

A. Legal opinions of the Secretariat of the United Nations

(Issued or prepared by the Office of Legal Affairs)

1. Privileges and immunities

(*a*) Note Verbale to the Permanent Representative of [State] concerning the privileges and immunities of [a United Nations entity]

Abuse of privileges and immunities—Distinction between a United Nations entity and individual staff members—Concept of *persona non grata* only applies to accredited officials—Obligation of the United Nations to cooperate with local authorities—Official capacity—Secretary-General has sole authority to establish whether privileges and immunities apply—Prior to bringing charges against United Nations staff members, States must inform the United Nations so that it can determine whether immunity applies—Measures that increase the financial or other burdens of the Organization are inconsistent with Article 105 of the Charter of the United Nations

The Legal Counsel of the United Nations presents her compliments to the Permanent Representative of [State] to the United Nations and has the honour to refer to the Permanent Mission's Note Verbale addressed to the Office of Legal Affairs dated [date] [reference number] alleging abuse by the [United Nations entity] Country Office in [State] of its privileges and immunities in relation to the importation and use of telecommunication facilities.

The Legal Counsel wishes to inform the Permanent Representative that the United Nations takes seriously the allegations that are contained in the Permanent Mission's Note Verbale. In this regard, further to the Legal Counsel's Note Verbale [date], the Legal Counsel wishes to inform the Permanent Representative that the United Nations Office of Internal Oversight Services (OIOS) has been seized of the matter and is conducting an investigation. However, the Legal Counsel wishes to reiterate once again that the allegations lodged against [the United Nations entity] and those lodged against individual [United Nations entity] staff members must be dealt with separately.

* This chapter contains legal opinions and other similar legal memoranda and documents.

In this connection, the Legal Counsel notes that the Government requests "[Name 1] to leave the country within 24 hours as of the receipt of this Note Verbale by the United Nations". The Legal Counsel wishes to recall that the concept of *persona non grata*, which is implied in the Permanent Mission's Note Verbale, cannot be applied in the case of United Nations officials who are not accredited to the [Government]. Article 100, paragraph 2, of the Charter of the United Nations states that "[e]ach Member of the United Nations undertakes to respect the exclusively international character of the responsibilities of the Secretary-General and the staff and not to seek to influence them in the discharge of their responsibilities". Furthermore, article XVI, paragraph 1 (b) of the [Cooperation Agreement] provides that "[United Nations entity] officials [. . .] shall be entitled [. . .] to unimpeded access to or from the country".

The Legal Counsel also wishes to recall that under article V, section 21, of the Convention on the Privileges and Immunities of the United Nations* adopted by the General Assembly on 13 February 1946 (hereinafter the "General Convention"), to which [State] is a party without any reservation since [date], the United Nations has an obligation to cooperate at all times with the appropriate authorities of Member States to facilitate the proper administration of justice. The Legal Counsel wishes to reiterate that the United Nations is willing to cooperate with the Government in resolving the matter in a manner consistent with the Charter of the United Nations, the General Convention and the [Cooperation Agreement]. In this regard, the Legal Counsel wishes to invite the Permanent Representative to a meeting to discuss the matter further.

The Legal Counsel understands that [the United Nations entity] has decided to reassign [Name 2] to a different duty station. Without prejudice to the provisions referred to above and the outcome of the investigation by the United Nations into the matter, [Name 1] is scheduled to leave [State] today.

Furthermore, the Legal Counsel is informed that the competent [State] authorities are considering bringing charges against [Name 2] and [Name 3], both locally-recruited [United Nations entity] staff members who had earlier been detained. The Legal Counsel wishes to reiterate that pursuant to article V, section 18 (a) of the General Convention and article XIII, paragraph 1 (a) of the [Cooperation Agreement], both [Name 2] and [Name 3] are "immune from legal process in respect of words spoken or written and all acts performed by them in their official capacity". If the Government wishes to bring any charges against them, the United Nations needs to be informed of the specific charges, including facts supporting the charges, so that it can make a determination on whether immunity applies and take the necessary action. This includes notifying the Government of the decision of the Secretary-General as to whether to assert immunity from legal process for the officials concerned.

The Legal Counsel wishes to reiterate that pursuant to article V, section 20 of the General Convention, it is the Secretary-General who has the *sole authority* and duty to establish whether privileges and immunities apply in a particular case. This has been recognized by the International Court of Justice (ICJ) in its advisory opinion on the Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human

* United Nations, *Treaty Section*, vol. 1, p. 15 and vol. 90, p. 327 (corrigendum to vol. 1).

Rights of 29 April 1999 (the so-called "Cumaraswamy case").* The ICJ's opinion provides that "the Secretary-General, as the chief administrative officer of the Organization, has the primary responsibility to safeguard the interests of the Organization; to that end, *it is up to him to assess whether its agents acted within the scope of their functions* and, where he so concludes, to protect these agents, including experts on mission, by asserting their immunity. This means that the Secretary-General has the authority and responsibility to inform the Government of a Member State of his finding and, where appropriate, to request it to act accordingly" (emphasis added).

Under section 34 of the General Convention, [State] has an obligation to be "in a position under its own law to give effect to the terms of this Convention". Moreover, as to the provisions of the General Convention, any interpretation thereof must be carried out within the spirit of the underlying principles of the Charter of the United Nations, and, in particular, Article 105. Measures which might increase the financial or other burdens of the Organization are to be viewed as being inconsistent with this provision.

[. . .]

29 January 2010

(*b*) Interoffice memorandum to the Chief, Special Procedures Branch, Office of the High Commissioner for Human Rights (OHCHR), concerning the request for information on extending immunity from legal process to studies and/or reports prepared for a Special Rapporteur by a group of researchers

Special Rapporteurs of the Human Rights Council enjoy privileges and immunities accorded to experts on mission—Privileges and immunities of experts on mission are granted in the interest of the Organization and not for personal benefit—Special Rapporteur cannot extend privileges and immunities to researchers not appointed by the United Nations—Privileges and immunities of publications by the Special Rapporteur or the United Nations do not extend to external authors—Copyright and intellectual property

1. This is with reference to your memorandum of [date] requesting our advice on the questions put forth by [Name], the [Special Rapporteur of the Human Rights Council]. In particular, he has inquired whether the immunities he benefits from as a United Nations expert could be extended to a group of researchers at [University] from whom he commissioned a set of case studies. He has also inquired whether the immunity he enjoys extends to the studies so commissioned. Our comments are as follows.

2. Special Rapporteurs of the Human Rights Council enjoy the privileges and immunities accorded to experts on mission pursuant to article VI of the Convention on the Privileges and Immunities of the United Nations** (hereinafter, the "Convention"). In accordance with article VI, section 22 of the Convention, "experts performing missions for the United Nations shall be accorded such privileges and immunities as are necessary for the independent exercise of their functions during the period of their missions". In par-

* *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, Advisory Opinion, I.C.J. Reports 1999*, p. 62.

** United Nations, *Treaty Series*, vol. 1, p. 15, and vol. 90, p. 327 (corrigendum to vol. 1).

ticular, section 22(b) provides that experts on mission enjoy immunity from legal process of every kind in respect of words spoken or written and acts done by them in the course of the performance of their mission. Section 22(c) further provides that experts on mission shall also be accorded inviolability for all papers and documents. Finally, in accordance with section 23, "privileges and immunities are granted to experts in the interests of the United Nations *and not for the personal benefit of the individuals themselves*. The Secretary-General shall have the right and the duty to waive the immunity of any expert in any case where, in his opinion, the immunity would impede the course of justice and it can be waived without prejudice to the interests of the United Nations". (emphasis added)

3. Based on the foregoing, the researchers in question would have had to have been engaged or appointed by the United Nations, including OHCHR, or by the Human Rights Council, to be accorded the status of experts performing missions for the United Nations within the meaning of article VI of the Convention. It appears from the information provided, however, that the [University] researchers were engaged by [Name] himself. He is not in a position to pass on to them the status or the privileges and immunities he is accorded under the Convention.

4. As for the case studies [Name] has commissioned, they can only be covered by immunity if they are (i) used or published by [Name], in his capacity as a Special Rapporteur of the Human Rights Council or (ii) by the United Nations, including its principal and subsidiary organs and its officials. In the former case, and subject to the rights and duties of the Secretary-General under section 23, the studies could be protected both as words spoken or written by him in the course of the performance of his mission under section 22(b) and/or as his inviolable papers and documents under section 22(c). In the latter case, they could also be deemed to be documents of the United Nations within the meaning of article II, section 4 of the Convention pursuant to which "the archives of the United Nations and in general all documents belonging to it or held by it shall be inviolable wherever located". In either case, any immunity or inviolability conferred upon the case studies would not extend to the [University] researchers who authored them. Moreover, the studies would not enjoy any immunity in connection with their use or publication by the [University] researchers themselves.

5. Finally, and albeit beyond the scope of his inquiry, we would advise [Name], if he has not already done so, to obtain from the [University] researchers any and all copyrights and/or intellectual property rights to the case studies he has commissioned from them.

24 June 2010

(*c*) Note to the President of the International Criminal Tribunal for Rwanda concerning the immunity of defence counsel

Immunity from legal process for words spoken or written by defence counsel in official capacity—Obligation of all States to accord defence counsel such treatment as is necessary for the proper functioning of the Tribunal—Immunity of defence counsel does not extend to the Tribunal's disciplinary rules—Defence counsel enjoy privileges and immunities accorded to experts on mission—Immunity from legal process includes immunity from legal proceedings to determine the applicability of that immunity—Exclusive authority of the Secretary-General

TO DETERMINE EXTENT OF IMMUNITY OF EXPERTS ON MISSION—PRIOR TO BRINGING CHARGES AGAINST DEFENCE COUNSEL, STATES MUST INFORM THE UNITED NATIONS SO THAT IT CAN DETERMINE WHETHER IMMUNITY APPLIES—PRIVILEGES AND IMMUNITIES ARE GRANTED TO DEFENCE COUNSEL IN THEIR OFFICIAL CAPACITY, IN THE INTEREST OF THE TRIBUNAL AND NOT FOR THEIR PERSONAL BENEFIT—DEFENCE COUNSEL MUST ENSURE THAT THEIR PERSONAL VIEWS AND CONVICTIONS DO NOT ADVERSELY AFFECT THEIR OFFICIAL DUTIES OR THE INTERESTS OF THE TRIBUNAL

INTRODUCTION

1. This note seeks to clarify the immunity accorded to defence counsel at the International Criminal Tribunal for Rwanda (ICTR). There are three relevant legal instruments in this regard, namely: the Statute of the International Criminal Tribunal for Rwanda* (the Statute); the Agreement between the United Nations and the United Republic of Tanzania concerning the Headquarters of the International Tribunal for Rwanda** (the Headquarters Agreement); and the Memorandum of Understanding between the United Nations and the Republic of Rwanda to regulate matters of mutual concern relating to the Office in Rwanda of the International Tribunal for Rwanda of 3 June 1999*** (the Memorandum of Understanding). The Convention on the Privileges and Immunities of the United Nations**** of 13 February 1946 (the General Convention) is also relevant in so far as it is referred to in these legal instruments.

IMMUNITY UNDER THE STATUTE

2. The Statute does not expressly refer to the privileges and immunities accorded to defence counsel. Article 29 (2) states that the Judges, Prosecutor and the Registrar shall enjoy the privileges and immunities, exemptions and facilities accorded to diplomatic envoys, in accordance with international law. Article 29(3) provides that the staff of the Prosecutor and of the Registrar shall enjoy the privileges and immunities accorded to officials of the United Nations under articles V and VII of the General Convention. Article 29(4) of the Statute, however, reasonably covers defence counsel. Article 29(4) provides that " . . . persons, including the accused, required at the seat or meeting place of the International Tribunal for Rwanda shall be accorded such treatment as is necessary for the proper functioning of the International Tribunal for Rwanda."

3. While the Statute does not define the treatment that should be accorded under article 29(4), at a minimum such treatment would include immunity from legal process for words spoken or written and acts done in their capacity as defence counsel. This is in line with the Basic Principles on the Role of Lawyers, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders held in Havana, Cuba, from 27 August to 7 September 1990. In particular, principle 20 states that lawyers shall enjoy civil and penal immunity for relevant statements made in good faith in written

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* Security Council resolution 955 (1994) of 8 November 1994, annex.

** United Nations, *Treaty Series*, vol. 1887, p. 63.

*** *Ibid.*, vol. 2066, p. 5.

**** *Ibid.*, vol. 1, p. 15, and vol. 90, p. 327 (corrigendum to vol. 1).

or oral pleadings or in their professional appearances before a court, tribunal or other legal administrative authority.

4. The Statute is part of Security Council resolution 955 (1994) adopted under Chapter VII of the Charter of the United Nations. Therefore, all States have an obligation to accord to defence counsel such treatment as is necessary for the proper functioning of the ICTR.

Immunity under the Headquarters Agreement

5. The Headquarters Agreement concluded with the United Republic of Tanzania is unequivocal as regards the privileges and immunities of ICTR defence counsel. Article XIX, paragraph 1, provides that counsel who has been admitted as such by the ICTR shall not be subjected by the host country to any measure which may affect the free and independent exercise of his or her functions under the ICTR Statute.

6. Article XIX, paragraph 2 states that, in particular, counsel shall, when holding a certificate that he or she has been admitted as counsel by the ICTR, be accorded: (a) exemption from immigration restrictions; (b) inviolability of all documents relating to the exercise of his or her functions as a counsel of a suspect or accused; and (c) immunity from criminal, civil and administrative jurisdiction in respect of words spoken or written and acts performed by him or her in his or her official capacity as counsel. Such immunity shall continue to be accorded to him or her after termination of his or her functions as a counsel of a suspect or accused.

7. Paragraph 3 of article XIX makes it clear that this article is without prejudice to such disciplinary rules as may be applicable to the counsel in accordance with the Rules of Procedure and Evidence of the ICTR. As such, counsel is not immune in relation to contempt of court, perjury, and other offences related to the proper administration of justice in the ICTR. The obligation to accord privileges and immunities provided for under the Headquarters Agreement applies in respect of the Government of Tanzania only.

Immunity under the Memorandum of Understanding

8. Pursuant to the Memorandum of Understanding concerning the ICTR Office in Rwanda, the Government of Rwanda extends: (a) to the Judges, the Prosecutor, the Registrar, the Deputy Prosecutor, and other key members (P-4 and above) of the Office whose names shall be communicated in advance to the Government of Rwanda for that purpose, the privileges, immunities, exemptions and facilities accorded to diplomatic envoys in accordance with international law; (b) to officials of the United Nations Secretariat assigned to the Office whose names shall be communicated to the Government of Rwanda for that purpose, the privileges and immunities to which they are entitled under articles V and VII of the General Convention; and (c) to other persons assigned to the Office whose names shall be communicated to the Government of Rwanda for that purpose, the privileges and immunities accorded to experts on mission for the United Nations, in accordance with article VI of the General Convention.

9. Defence counsel present in Rwanda in their official capacity would be covered by paragraph (c) above, and would therefore enjoy the privileges and immunities granted to experts on mission under article VI of the General Convention. Article VI of the General Convention accords to experts on mission the privileges and immunities that are neces-

sary for the independent exercise of their functions during the period of their missions, including the time spent on journeys in connection with their missions. In particular, experts on mission are accorded, among other things: immunity from personal arrest and detention and from seizure of their personal baggage; immunity from legal process of every kind in respect of words spoken or written and acts done by them in the course of the performance of their mission (which continues to be accorded notwithstanding that the person is no longer employed on mission for the United Nations); and inviolability for all papers and documents.

10. Defence counsel therefore enjoy immunity from personal arrest and detention, meaning that they must not be arrested or detained during the period of their missions, including the time spent on journeys in connection with their missions. It falls exclusively to the Secretary-General to determine whether or not defence counsel is on mission or on a journey in connection with their mission. Defence counsel also enjoy inviolability for their papers and documents, and functional immunity from legal process of every kind for words spoken or written and acts done in the course of the performance of their mission. Immunity from legal process includes immunity from legal proceedings to determine the applicability of that very immunity. The purpose of the immunity is to ensure the independent exercise of defence counsel's functions, without any interference that might inhibit either their ability to perform their functions, or their freedom to do so.

11. The obligation to accord privileges and immunities provided for under the Memorandum of Understanding applies in respect of the Government of Rwanda only. As a bilateral agreement, the Memorandum of Understanding does not have the effect of obliging other State parties to the General Convention to bring defence counsel within the scope of the General Convention or of its article VI.

Asserting or waiving immunity

12. The United Nations has consistently maintained the position that, pursuant to the General Convention and the Charter, it is for the Secretary-General, on behalf of the Organization, to afford experts on mission the functional protection they are entitled to when they are acting in the course of the performance of their mission. The Secretary-General has the exclusive authority, which he exercises judiciously, to determine whether certain words or acts fall within the course of a United Nations mission, and whether words and acts of defence counsel fall within his or her official capacity as counsel. It is not for States (including their courts) or defence counsel to make that determination.

13. Thus, when a State in which defence counsel enjoys the immunity from personal arrest and detention intends to arrest defence counsel, it must give the Secretary-General adequate and timely information about the reasons for the proposed arrest and detention so that he can determine whether the acts or words complained of fall within the course of the performance of the mission. The distinction between acts performed in the course of a mission and those performed in a private capacity is a question of fact which depends on the circumstances of the particular case.

14. There is no legal basis for asserting immunity if the Secretary-General determines that the matter is not related to official capacity or to the performance of a mission. In such a scenario, further intervention by the United Nations would rest on other legal or humanitarian considerations. For instance, the United Nations may seek to ensure that

the person is treated fairly, charged properly, and brought to trial promptly, in accordance with the minimum international standards.

15. Under the Headquarters Agreement, if the words or acts are within the official capacity of defence counsel, the Secretary-General has, pursuant to article XIX, paragraph 4, the right and duty to waive the immunity where it can be waived without prejudice to the administration of justice by the ICTR and the purpose for which it is granted. The Secretary-General has to examine each individual case in the light of its facts and the circumstances in order to ensure that a waiver will be without prejudice to the administration of justice by the ICTR and the purpose for which it is granted.

16. Similarly, under the Memorandum of Understanding, if the words or acts are found to be within the performance of the mission, the Secretary-General has, pursuant to article VI of the General Convention, the right and duty to waive the immunity in any case where, in his opinion, the immunity would impede the course of justice and can be waived without prejudice to the interests of the United Nations. The obligation to consider the interests of the United Nations and to assess whether asserting immunity impedes the course of justice means that each individual case must be examined in the light of the facts and circumstances pertaining to it.

17. Defence counsel should always be aware that privileges and immunities are granted in the interests of the ICTR and not for their personal benefit. As such, privileges and immunities do not furnish an excuse for evading private obligations or for failing to observe laws and police regulations. Further, the United Nations is under an obligation to cooperate at all times with the appropriate authorities of Member States to facilitate the proper administration of justice and to prevent the occurrence of any abuse in connection with the privileges and immunities.

Regulations governing the Status, Basic rights and Duties of Officials other than Secretariat Officials, and Experts on Mission

18. The relevant provisions of the Regulations governing the Status, Basic Rights and Duties of Officials other than Secretariat Officials, and Experts on Mission* should be used as guidelines for the conduct of defence counsel when they enjoy immunity as experts on mission pursuant to the Memorandum of Understanding.

19. In particular, in line with regulation 2(d), while the personal views and convictions of defence counsel, including their political and religious convictions, remain inviolable, they should ensure that those views and convictions do not adversely affect their official duties or the interests of the ICTR. Further, consistent with regulation 2(d), defence counsel should conduct themselves at all times in a manner befitting their status. They should not engage in any activity that is incompatible with the proper discharge of their duties. They should also avoid any action and, in particular, any kind of public pronouncement that may adversely reflect on their status, or on the integrity and independence that are required by that status.

20. Finally, in keeping with regulation 2(e), defence counsel should not use their office or knowledge gained from their official functions for private gain, financial or otherwise, or for the gain of any third party, including family, friends and those they favour. Nor

* ST/SGB/2002/9 (18 June 2002).

should they use their office for personal reasons to prejudice the positions of those they do not favour.

26 August 2010

2. Procedural and institutional issues

(*a*) Interoffice memorandum to the Chief, Treaty and Legal Assistance Branch, United Nations Office on Drugs and Crime (UNODC), concerning the establishment of the International Anti-Corruption Academy in Laxenburg, Austria

Legal options for the establishment of an international organization—Treaty body under existing convention—United Nations subsidiary organ—Establishment under a bilateral or multilateral agreement—Legal basis or mandate required for the establishment of an international organization and for the participation of the United Nations therein

1. This is with reference to your memorandum of [date], which was sent in response to my memorandum of [date], concerning the establishment of the International Anti-Corruption Academy ("the Academy") in Laxenburg, Austria. You have stated that the decision that the Academy should be established as an international organization has been taken after in-depth considerations of various options by all partners, that it is a consensual decision of the Steering Committee in charge of overseeing the establishment of the Academy, comprising representatives of all partners, and that it has been confirmed by the principals of those partners. Nevertheless, you seek more detailed advice on the possible legal status of the Academy, as outlined in paragraph 4 of my memorandum referred to above.

2. In my memorandum of [date], I outlined the possible legal options for the establishment of the Academy, that it could be established through various possible means, including: (i) as a treaty body under the Conference of the States Parties to the Convention Against Corruption* (COP), (ii) as a United Nations subsidiary organ, (iii) through a bilateral agreement between the United Nations and the Government of Austria, or (iv) through a multilateral agreement. In this regard, we note that each of these options would require that an appropriate mandate be provided by the relevant policy making organs to the Organization, including in its capacity as the secretariat of the COP, to undertake certain acts towards the establishment and operation of the Academy. These options would also have different implications for the establishment and functioning of the Academy, as well as for the role to be played by the United Nations. In this respect, as further explained below, the instruments referred to in your memorandum do not provide a sufficient legal basis for the Organization to participate in the establishment and operation of the Academy. Those instruments to which your memorandum referred were the Convention Against Corruption, resolutions 3/2 and 3/4 of the COP, the Economic and Social Council resolution 2009/22 of 30 July 2009, and a draft General Assembly resolution (A/C.2/64/L/37), entitled "Preventing and combating corrupt practices and transfer of assets of illicit origin returning such assets, in particular to the countries of origin, consistent with the United

* United Nations, *Treaty Series*, vol. 2349, p. 41.

Nations Convention against Corruption", which was subsequently adopted as General Assembly resolution 64/237 on 24 December 2009.

Establishing the Academy as a treaty body under the Convention Against Corruption

3. Pursuant to General Assembly resolution 58/4 of 31 October 2003, as reflected in section 6.2 (b) of the Secretary-General's bulletin ST/SGB/2004/6 of 15 March 2004, entitled "Organization of the United Nations Office on Drugs and Crime" ("the Secretary-General's Bulletin"), UNODC serves as the secretariat of the COP to the United Nations Convention Against Corruption ("the Corruption Convention") in order to assist the COP in carrying out its functions. Under article 64, paragraph 2 (a) of the Corruption Convention, the secretariat shall "[a]ssist the Conference of the States Parties in carrying out the activities set forth in article 63 of this Convention". Article 63, paragraph 7 of the Corruption Convention stipulates that, pursuant to paragraphs 4 to 6 of article 63, the COP "shall establish, if it deems it necessary, any appropriate mechanism or body to assist in the effective implementation of the Convention". Article 63, paragraph 4 (a) in turn states that the COP shall agree upon activities, procedures, and methods of work to facilitate the "activities by States Parties under articles 60 and 62 and chapters II to V of this Convention". We note that article 60 of the Corruption Convention pertains to training and technical assistance, article 62 pertains to other measures for the implementation of the Corruption Convention through economic development and technical assistance, and that chapters II to V concern preventive measures, criminalization and law enforcement, international cooperation, and asset recovery, respectively. We also note that article 60 on training provides, *inter alia,* in paragraph 3 that: "States Parties shall strengthen, to the extent necessary, efforts to maximize operational and training activities in international and regional organizations and in the framework of relevant bilateral and multilateral agreements or arrangements."

4. As you have stated, the need to facilitate training is identified in article 60 of the Corruption Convention, and you have informed us that training and technical assistance have been identified as a priority by the COP. However, we are of the view that the Corruption Convention in and of itself, including article 60 on training, does not provide a sufficient basis to establish a new body, i.e., the Academy, under the Convention (with or without other partners). Furthermore, we note from resolutions 3/2 and 3/4, adopted by the COP at its third session held in Doha, Qatar, in November 2009, that the COP is supportive of the establishment of the Academy, insofar as the preambular paragraphs on the Academy contained in those resolutions state, *inter alia,* that the COP has welcomed "the initiative of the [International Criminal Police Organization (INTERPOL), UNODC] and the Government of Austria, with the support of the European Anti-Fraud Office and other partners, to work collaboratively towards the establishment of the International Anti-Corruption Academy". However, neither such statements nor the adoption of such resolutions in and of themselves provides a sufficient basis or mandate to establish the Academy as a treaty body under the Convention. Rather, a specific mandate to that effect would be required from the COP providing that the Academy would be established by the COP itself, as a treaty body of the Corruption Convention in accordance with Article 63, paragraph 7.

5. In order to achieve the foregoing objective, we suggest that the COP request UNODC to submit a proposal for its consideration on the establishment of the Academy as a treaty body under the Corruption Convention. Issues such as the status, statute (if necessary), functions, governing structure, partnering organizations of the Academy should be addressed in the COP decision establishing the Academy. The COP's decision should also specify the role to be played by UNODC, as the secretariat to the COP, in the administration and operation of the Academy. The parameters of UNODC's role in administrating and operating such a body would also have to be limited to, and determined by, the language of the Corruption Convention, as well as the relevant decisions of the COP.

6. We understand that there is a desire for the proposed Academy to establish relationships with INTERPOL and the European Anti-Fraud Office (OLAF) in regards to anti-corruption training. We see no legal obstacle for the Academy, as a body established by the COP, to enter into relationship agreements with those and other entities for such purpose.

Establishing the Academy as a United Nations subsidiary organ

7. We recall that the Charter of the United Nations (hereinafter the "Charter") specifically confers the right to create subsidiary organs upon the General Assembly and the Security Council. In accordance with Articles 22 and 29 of the Charter, both the General Assembly and the Security Council may establish such subsidiary organs as they deem necessary for the performance of their functions. Article 68 of the Charter also states that the Economic and Social Council "shall set up commissions in economic and social fields and for the promotion of human rights, and such other commissions as may be required for the performance of its functions".

8. We note that certain training and research institutes have been established as subsidiary organs of the United Nations. For example, the General Assembly in its resolution 1827 (XVII) of 18 December 1962 requested "the Secretary-General to study the desirability and feasibility of establishing a United Nations institute or a training programme under the auspices of the United Nations, to be financed by voluntary contributions both public and private". The Secretary-General's plans were discussed and endorsed by the Economic and Social Council (see E/2780), and the General Assembly requested the Secretary-General to take the necessary steps to establish the United Nations Institute for Training and Research (UNITAR) in its resolution 1934 (XVIII) of 11 December 1963. Furthermore, the United Nations Institute for Disarmament Research (UNIDIR) was established pursuant to General Assembly resolution 34/83M of 11 December 1979 to undertake independent research on disarmament and related international security issues. Its statute was approved by the General Assembly in its resolution 39/148H of 17 December 1984. Finally, the United Nations Interregional Crime and Justice Institute (UNICRI) was established pursuant to Economic and Social Council resolution 1086B (XXXIX) of 30 July 1965, initially as the United Nations Social Defence Research Institute (UNSDRI), to contribute, through, *inter alia,* research and training, to the formulation and implementation of improved policies in the field of crime prevention and control. UNSDRI was subsequently renamed and established as UNICRI, and UNICRI's Statute was adopted by Economic and Social Council resolution 1989/56 of 24 May 1989.

9. If it is desirable to establish the Academy as a subsidiary organ of the United Nations, the necessary and appropriate legislative mandate must be provided by the Gen-

eral Assembly or by the Economic and Social Council. In this connection, we note that the Economic and Social Council in its resolution 2009/22 of 30 July 2009 welcomed "the initiative of [INTERPOL, UNODC] and the Government of Austria, with the support of the European Anti-Fraud Office and other partners, to work collaboratively towards the establishment of an international anti-corruption academy". The resolution further states that the Economic and Social Council "looks forward to the academy becoming fully operational in the shortest possible time and contributing to the building of capacity in the area of countering economic fraud and identity-related crime, as well as corruption". While the resolution does not provide a mandate for the Academy to be established as a subsidiary organ of the Economic and Social Council, such a mandate could be sought pursuant to this resolution. Alternatively, a mandate could be sought from the General Assembly to establish the Academy as a subsidiary organ of the General Assembly. The resolution establishing the Academy as a subsidiary organ would also specify, *inter alia,* its functions, e.g., in the Statute of the Academy to be adopted by the resolution (if necessary), governing structure, and financial and administrative arrangements.

10. In this respect, were the Academy to be established as a United Nations subsidiary organ, it would be subject to United Nations regulations, rules, policies and procedures. In addition, as a United Nations entity, the overall responsibility for the administration, management and operation of the Academy would vest with the United Nations. Other partnering organizations and Governments, including INTERPOL, the European Anti-Fraud Office and the Government of Austria, would have less substantive roles and responsibilities in the administration, management and operation of the Academy. In this regard, and based on the information provided to this Office, it is unclear whether it would be appropriate for the Academy to be established as a United Nations subsidiary organ.

Establishing the Academy through a bilateral agreement between the United Nations and the Government of Austria

11. The Academy could be established through an agreement between the United Nations and the Government of Austria, provided that an appropriate mandate as described above, is obtained. From the information you have provided and from our conversations with [Name], we understand that a bilateral arrangement is not a viable option.

Establishing the Academy through multilateral agreement

12. A diplomatic conference could be organized through the COP, under the auspices of the Economic and Social Council, or independently, to negotiate a multilateral treaty to establish the Academy as an independent international organization. The role of the United Nations could be specified, as appropriate, in the multilateral agreement. This option would have the benefit of including a larger number of States in the creation of the Academy. However, it may take a significant amount of time and resources to reach a consensus on the text of the agreement. Furthermore, it may take time for the agreement to enter into force. In view of the above, and given our understanding that the intention of the interested parties is to establish the Academy as soon as possible, this option does not appear to be viable.

Conclusion

13. Based on the information provided to this Office thus far, the establishment of the Academy as a treaty body under the Corruption Convention appears to represent the most feasible option available to UNODC, for the reasons set forth above. This office remains available to work with you concerning this and the other options discussed above.

19 January 2010

(*b*) Letter to the President of the Economic and Social Council concerning the allocation of seats on the Committee on Economic, Social and Cultural Rights

Allocation of seats on the Committee on Economic, Social and Cultural Rights—Rotation of a seat between regional groups with equal numbers of parties to the Convention

I would like to refer to your letter of [date] to the Legal Counsel forwarding a letter of the same date from the Permanent Representative of [State] in his capacity as Chairman of the [Regional Group]. You have requested that the Office of Legal Affairs provide a written opinion by [date] to the question raised in the Permanent Representative of [State's] letter, which concerns the allocation of seats on the Committee on Economic, Social and Cultural Rights ("Committee"), that consists of experts from States that are Parties to the 1966 International Covenant on Economic, Social and Cultural Rights* ("the Convention"). Bearing in mind the extremely short period we have been given, I would like to respond as follows:

The Committee was established pursuant to paragraph (b) of Economic and Social Council resolution 1985/17 of 28 May 1985 which reads as follows:

> "The Committee shall have eighteen members who shall be experts with recognized competence in the field of human rights, serving in their personal capacity, due consideration being given to equitable geographical distribution and to the representation of different forms of social and legal systems; to this end, fifteen seats will be equally distributed among the regional groups, while the additional three seats will be allocated in accordance with the increase in the total number of States parties per regional group."

We understand that fifteen seats are distributed evenly among the five regional groups, i.e., Africa, Asia, Eastern Europe, Latin American and Caribbean ("GRULAC") and the Western European and Others Group ("WEOG"), i.e., three seats each. The remaining three seats are allocated to the three regional groups that have the largest number of Parties to the Convention, which we understand were previously Africa, Asia and WEOG. However, recently the number of States Parties from GRULAC has increased to exactly the same number of States Parties from WEOG, i.e., twenty-seven.

The Permanent Representative from [State] has, in light of the fact that WEOG and GRULAC now hold an equal number of seats, requested advice on the following compromise arrangement for purposes of the upcoming election:

> "Is an arrangement between GRULAC and WEOG, whereby the one additional seat currently allocated to WEOG would rotate during the next two four-year periods

* United Nations, *Treaty Series*, vol. 993, p. 3.

between the two regional groups, this arrangement being implemented regardless of the number of ratifications of each group during these periods, in accordance with Economic and Social Council resolution 1985/17 of 28 May 1985 and the Rules of Procedure of the Economic and Social Council?"

In the first instance, we would point out that, in accordance with Economic and Social Council resolution 1985/17 of 28 May 1985, when the number of States Parties in a particular Regional Group has surpassed that of a Group holding an extra seat, the seat has been rotated at a subsequent election to ensure that the three additional seats are equally allocated to those three Groups that hold the highest number of seats.

Should the Economic and Social Council decide upon the allocation of one of the additional seats for a period of eight years by dividing it between two Regional Groups respectively, then this would prevent flexible rotation within this period based upon the criteria set out in resolution 1985/17.

As to this arrangement being consistent with the Rules of Procedure of the Economic and Social Council, we would point out that the Rules deal, *inter alia*, with voting and the election of candidates and do not deal with the regional allocation of seats to the various bodies that the Economic and Social Council elects. As such, we do not see this arrangement as being inconsistent with the Rules of Procedure of the Economic and Social Council.

Our understanding is also that WEOG have agreed that their additional seat be given to GRULAC subject to the understanding that it reverts to WEOG in four years time.

Thus, should it be the wish of the Economic and Social Council, then we would recommend that it adopt a decision stating that notwithstanding the provisions of resolution 1985/17 of 28 May 2005, the one additional seat currently held by WEOG shall be held by GRULAC for a four-year term beginning on 1 January 2011 and ending on 31 December 2014 and it shall then be allocated to WEOG for the period 1 January 2015 to 31 December 2018. This arrangement would apply during the periods mentioned above, notwithstanding the number of ratifications received by any of the regional groups.

The Economic and Social Council, may, if it wishes to do so, also decide that the allocation of seats decided upon in paragraph (b) of resolution 1985/17 shall then apply effective 1 January 2019.

Finally, I would recommend that you informally convey the content of this letter to the Coordinators of all the Regional Groups, with a view to a decision being arrived at that has the Economic and Social Council's approval.

28 April 2010

(*c*) E-mail to the Senior Deputy Director, Head of Legal Affairs, International Maritime Organization, concerning the circulation of a letter as a document of the International Maritime Organization

Documents to be circulated by the United Nations and its specialized agencies must fall under an agenda item—Sovereign right of States to circulate relevant documents that are submitted by a duly accredited representative, that do not exceed page limitations and that are not blatantly inflammatory, potentially

LIBELLOUS OR CONTAIN PROTECTED OR CONFIDENTIAL MATERIAL OR LANGUAGE—STRONG CRITICISM OF A MEMBER STATE IN A DOCUMENT DOES NOT JUSTIFY REFUSAL TO CIRCULATE

This is further to your e-mail [. . .] concerning a letter from the Permanent Representative of [State] to the Secretary-General of the International Maritime Organization (IMO) dated [date] by which the Permanent Representative transmits a letter to the IMO from the "Representative of the [Entity]" in London. The Permanent Representative requests that the text of his letter and its annex, i.e., the letter from the [Entity] be circulated as a document of the IMO. You seek our advice on this request.

In the first instance, we are only in a position to advise on what the practice has been in the General Assembly, which can briefly be described as follows:

In order for the Secretariat to circulate a document from a Member State as a document of the General Assembly it must fall under an agenda item of the Assembly or be for purposes of requesting a supplementary agenda item. Thus, there have been occasions in the past, where the Secretariat has declined requests to circulate a document from a Member State as it did not fall under any approved agenda item and did not constitute a formal request for a supplementary item.

Secondly, should the above conditions be met, then the practice of the United Nations Secretariat has been that Member States have the right to circulate any document they deem appropriate. The Secretariat does not interfere with this sovereign right provided that the document is submitted by a duly accredited representative, that it does not exceed the page limitations established by the General Assembly and that it is not blatantly inflammatory or potentially libellous. The fact that a document contains a strong criticism of another Member State has not in the past justified the Secretariat's refusal to circulate a document. However, should a document contain potentially libellous, protected or confidential material or language, then this would provide a legitimate basis to approach the Member State that has sought the circulation of the document with a request that it be withdrawn or revised in order to omit such material/language.

In this particular case, should you wish to follow the practice outlined above then there is no clear basis upon which this request from a Member of the IMO can automatically be denied based upon the fact that it attaches a letter from the [Entity].

However, you can highlight to the [State's] Permanent Representative that the IMO and its Committees have a technical mandate. Any communication from a Member State should fall under an agenda/draft agenda item for the upcoming session of the Maritime Safety Committee in London. The IMO would not be in a position to circulate a document in advance of the meeting unless there was clearly an agenda/draft agenda item that the document could be circulated under.

The [State's] Permanent Representative should accordingly be requested to identify exactly which agenda/draft agenda item for this upcoming session the letter should be circulated under and if you think it appropriate informally asked to submit a revised letter that is more suited to the technical mandate of the Maritime Safety Committee.

6 May 2010

(*d*) Interoffice memorandum to the Chief, Human Rights Council Branch, Office of the High Commissioner for Human Rights (OHCHR), concerning the publication of the national report of [State 1] with reference to "Republic of China (Taiwan)" in the report

Reference by the United Nations to "Taiwan" should read "Taiwan, Province of China"—The United Nations cannot change the content of documents submitted for circulation by Member States—The United Nations can add explanatory footnotes to documents submitted for circultation by Member States

1. I wish to refer to your memorandum to [name] of this Office of [date] in which you seek our advice concerning a national report submitted by [State 1] under the Universal Periodic Mechanism ("UPR") of the Human Rights Council ("HRC"). You indicate that in paragraphs 45 and 76 of its report [State 1] refers to "assistance provided by and activities carried out with the 'Republic of China (Taiwan).'" You indicate that representatives of [State 2] have strongly objected to publication of a national report that includes this reference and have argued that its publication by the Secretariat is in violation of General Assembly resolution 2758 (XXVI) of 25 October 1971. [State 1] has refused to change its report and you seek our advice in the matter.

2. The question of "Taiwan" in the United Nations is regulated by General Assembly resolution 2758 (XXVI) of 25 October 1971 [. . .], entitled, "Restoration of the lawful rights of the People's Republic of China in the United Nations". By that resolution, the General Assembly decided to recognize "the representatives of the Government of the People's Republic of China [as] the only lawful representatives of China to the United Nations" and "to restore all its rights to the People's Republic of China and to recognize the representatives of its Government as the only legitimate representatives of China to the United Nations."

3. Since the adoption of that resolution the United Nations considers "Taiwan" as a province of China with no separate status, and the Secretariat strictly abides by this decision in the exercise of its responsibilities. Thus, since the adoption of this resolution the established practice of the United Nations has been to use the term "Taiwan, Province of China" when a reference to "Taiwan" is required in United Nations Secretariat documents.

4. However, the practice of the United Nations when circulating a document from a Member State has been to reproduce the document as it has been received and not to alter the terminology employed. The United Nations cannot change its contents as this would be tantamount to interfering in the official/national position of a Member State. Full responsibility for the substance of a communication remains with the Member State requesting its circulation.

5. We accordingly agree with the view expressed in your memorandum that OHCHR does not have the authority to change the content of a national report submitted by [State 1], notwithstanding the fact that the terminology used is not consistent with General Assembly resolution 2758 (XXVI) of 25 October 1971. Secondly, this is a national report submitted by [State 1] under the UPR established by the HRC. Thus, the Secretariat cannot refuse to circulate the document on the grounds that it falls outside the parameters of work of the HRC.

6. Nevertheless, we concur with you that a footnote can be added to [State 1's] national report in light of resolution 2758 (XXVI). We note that the footnote which you recommend reads as follows: "In accordance with United Nations terminology, reference to Taiwan in the present document should read Taiwan, Province of China." You indicate that, "this option, which remains unsatisfactory to [State 2], would allow the Secretariat to include a reference to the correct denomination of "Taiwan", without making substantive changes to the national report of [State 1]."

7. However, the footnote as it has been drafted indicates that the reference to "Taiwan" in the report submitted by [State 1] is incorrect. [State 1] could object to the footnote on the grounds that this is inconsistent with its national position. They could also point out that the Secretariat should not comment on terminology contained in the submission of a Member State as this would be interfering in the inter-governmental process.

8. We would therefore recommend the following footnote used in General Assembly documents [document symbol A], [document symbol B], [document symbol C] and [document symbol D] on "Taiwan" be followed:

> "The document has been reproduced as received. The designations employed do not imply the expression of any opinion whatsoever on the part of the Secretariat of the United Nations concerning the legal status of any country, territory or area, or of its authorities."

9. In communicating with both [State 2] and [State 1] on this matter you should point out that the Secretariat is merely following existing editorial practice in this regard and that the use of this footnote is without prejudice to the position of any Member State on "Taiwan".

27 October 2010

(*e*) Interoffice memorandum to the Assistant Secretary-General for Human Resources Management concerning the recognition of Kosovo nationals

Recognition of States is a matter for States only, not for the Secretariat—The Organization follows the decisions of its principal organs regarding State recognition—"Status neutrality"

[. . .]

2. At the outset, I should like to clarify the approach taken by the Secretary-General following the "Unilateral Declaration of Independence" (UDI) by the authorities in Kosovo in 2008 and the Advisory Opinion rendered by the International Court of Justice at the request of the General Assembly on the question: "Is the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo in accordance with international law?"*

3. Following the UDI and in light of the stalemate in the Security Council on the matter and the continuing mandate of the United Nations Interim Administration Mission in Kosovo (UNMIK) [. . .] under Security Council resolution 1244 (1999), the Secretary-

* *Accordance with international law of the unilateral declaration of independence in respect of Kosovo*, *Advisory Opinion,* forthcoming in *I.C.J. Reports 2010.*

General has maintained a "status neutral" approach with respect to Kosovo. This approach continues to obtain following the International Court of Justice Advisory Opinion. The Opinion only addressed the legality of the act of promulgating the declaration, and did not pronounce on the legality under international law of the subsequent actions taken by the authors of the declaration and other parties. Accordingly, the status of Kosovo remains unaffected by the Opinion, as does the status of UNMIK.

4. The recognition of States is a matter for States only and not for the Secretariat. The fact that a number of States, not only European, have recognized Kosovo as a State is not determinative for the Organization. The Organization will be guided by the decisions of its Principal Organs, the General Assembly and Security Council. In this regard, I note that to date neither Organ has pronounced itself on the status of Kosovo, following the UDI.

5. Turning to the issue of "Kosovo nationality", it is clear from the foregoing that we will not be able to accede to the request and that the current practice should continue. Any deviation from the current practice would imply a change in the Secretariat's position of "status neutrality" in circumstances of continuing political divisions within the United Nations membership on this issue. Accordingly, we have advised at Headquarters, UNMIK, and the United Nations System Organizations to find pragmatic solutions to problems that involve the status issue, on a case-by-case basis. For example, we could consider permitting home leave travel to Kosovo without formally recognizing Kosovo nationality.

[. . .]

24 November 2010

3. Liability and responsibility of the United Nations

(*a*) Interoffice memorandum to the Director of the United Nations Mine Action Service (UNMAS), Department of Peacekeeping Operations (DPKO) concerning an invitation from [a development organization] to UNMAS to provide an expert on demining to a tender assessment panel

Participation of a United Nations staff member on a tender assessment panel of an external organization—Participation in official capacity does not constitute outside employment or activity—Staff members prohibited from seeking or accept ing instructions from any source external to the United Nations—Liability of the staff member and the United Nations—Privileges and immunities of the United Nations—Doctrine of *respondeat superior*—Fiduciary duty of United Nations staff member to other organization violates the Charter of the United Nations and Staff Regulations and Rules—Participation of a staff member in an official capacity in a non-decision making, non-policy making, advisory capacity is not legally objectionable

1. This refers to your memorandum of [date], seeking the Office of Legal Affairs' (OLA) urgent advice on the issue of the appropriateness of a staff member of the Mine Action Service participating on a tender assessment panel (the "Panel") constituted by the [development organization]. Such participation would be at [the development organization]'s

invitation. This also refers to the e-mail from [the development organization] to the staff member, dated [date] (the "[development organization] e-mail"). [. . .]

2. You indicated in your memorandum of [date] that the concerned staff member is "well known and respected throughout the mine action community, where he has worked for the past 15 years, nine of which have been with the United Nations". We understand that the staff member would be participating on the Panel in his official capacity, that there is no intention for [the development organization] to provide compensation to the United Nations or the staff member in return for his participation on the Panel, the staff member would fulfill his role during regular office hours by distance (i.e., there is no requirement to travel to the [country of origin of the development organization] or elsewhere in order to participate on the Panel[1]) and UNMAS is supportive of [the development organization]'s request for the staff member to participate as a member of the Panel. OLA has requested that UNMAS clarify, with [the development organization], whether the staff member's role would be in an advisory or a decision-making capacity. [The development organization] has not responded to UNMAS on this matter as of the date of this memorandum.

3. At the outset, we would like to emphasize that, inasmuch as the UNMAS staff member would be participating on such Panel in his official capacity and representing the views of the United Nations, he would not be engaging in an outside activity or occupation. Consequently, the appropriateness of the participation of the staff member on the Panel cannot be determined by reference to staff regulation 1.2 on "Outside Employment and Activities" or Administrative Instruction, ST/AI/2000/13, of 25 October 2000, entitled "Outside Activities". The foregoing staff regulation and Administrative Instruction concern the engagement by staff members in activities outside the course of their official functions and not as representatives of the United Nations. Thus, they are not applicable to the present issue of staff members' participation in their official capacity on panels constituted by Member States.

4. Of particular importance to the present issue are Article 100 of the Charter of the United Nations, as well as staff regulation 1.1 (a) and (b), staff regulation 1.2 on "General Rights and Obligations", staff rule 1.2 (i) and staff rule 1.2 (r).

5. Pursuant to Article 100 of the Charter of the United Nations:

> "1. In the performance of their duties the Secretary-General and the staff shall not seek or receive instructions from any government or from any other authority external to the Organization. They shall refrain from any action which might reflect on their position as international officials responsible only to the Organization."
>
> "2. Each Member of the United Nations undertakes to respect the exclusively international character of the responsibilities of the Secretary-General and the staff and not to seek to influence them in the discharge of their responsibilities."

[1] We note, however, that the [development organization] e-mail states in the final row of the table contained in that e-mail that the anticipated time commitment in order to moderate all scores following the 'invitation to tender' will require a one-day meeting with other panel members probably in [City]. In such case, responsibility for the costs of any such travel should be clarified. If such travel is to be provided by [the development organization], then this should be done in accordance with the United Nations Financial Regulations and Rules and applicable administrative issuances.

6. The aforementioned Staff Regulations and Rules elaborate on the exclusively international nature of staff members' work and functions and prohibit staff members from seeking or accepting instructions in regard to the performance of their duties from any Government or other source external to the Organization. Consequently, any participation by a United Nations official on the Panel must comply with the spirit and letter of Article 100 of the Charter of the United Nations, as well as with the aforementioned Staff Regulations and Rules.

7. Were the staff member to participate on the Panel in a *decision-making role,* his actions or omissions not only could result in legal liability for the staff member but also potentially for the Organization itself. For example, were a disqualified or otherwise unsuccessful vendor to seek to appeal [the development organization]'s decision to either disqualify them or not to award a contract, such appeal would be subject to the applicable laws of the [country of origin of the development organization]. Moreover, the appeal and the actions of the staff member could fall within the jurisdiction of the national courts or administrative tribunals of the [country of origin of the development organization]. Furthermore, the disgruntled bidder could seek to sue the staff member or the Organization (the Organization's potential liability being derivative under the doctrine of *respondeat superior*). Thus, if the staff member were acting in a decision-making capacity on behalf of [the development organization], it might not be possible to maintain the privileges of the United Nations with respect to the submission of such matters to the [country of origin of the development organization's] legal system, and this would be inconsistent with the status and privileges and immunities provided under the 1946 Convention on the Privileges and Immunities of the United Nations.*

8. Furthermore, should the staff member be required to undertake a decision-making role on the Panel, he would owe a fiduciary duty toward [the development organization] and be subject to the instructions of relevant bodies of [the development organization], e.g., the relevant procurement or ethics offices. Any such fiduciary duties required of United Nations staff members would be inconsistent with their duties and obligations of loyalty to the Organization, as well as, as noted above, the prohibition against receiving instructions from any authority external to the Organization as set forth in the Charter of the United Nations and the United Nations Staff Regulations and Rules.

9. For the reasons set out above, therefore, it would not be appropriate for the United Nations staff member to serve in any direct, decision-making capacity in the [the development organization's] Panel. If, on the other hand, [the development organization] confirms that the role of the staff member in the Panel would be in his official capacity and limited to a *non-policy making, non decision-making and advisory capacity* only, we consider that the staff member's participation would not be legally objectionable and, in such circumstances, would essentially be a policy matter for UNMAS. If UNMAS is supportive of the proposed arrangement, you may wish to consult with the Ethics Office, in advance, as that Office is developing procedures for these types of advisory service arrangements.

5 May 2010

* United Nations, *Treaty Series*, vol. 1, p. 15 and vol. 90, p. 327 (corrigendum to vol. 1).

(*b*) Interoffice memorandum to the Assistant Secretary-General, Programme Planning, Budget and Accounts, Controller, concerning a third-party claim against the United Nations Mission in Liberia (UNMIL) from [the Society]

Compensation for non-consensual use of premises—Fair rental value—In the absence of rental rates established during a pre-mission technical survey, the amount of compensation payable should be assessed taking account of comparable market rental data—Need to confirm the legal status of owner of premises—Payment of compensation subject to signature of appropriate release—Notification to government

1. This is with reference to your memorandum, dated [date], requesting the Office of Legal Affairs' (OLA) advice in connection with a recommendation by UNMIL to pay compensation in the sum of $36,000 in full and final settlement of a third party claim. The claim was submitted by [the Society] and relates to the non-consensual use by UNMIL of premises located in [the Premises]. As the recommended amount exceeds the financial authority delegated to UNMIL for the settlement of third party claims, the Mission has forwarded the claim to your Office for approval.

[. . .]

Summary and conclusion

3. Based on the information provided, OLA agrees that [the Society] is entitled to compensation for UNMIL's non-consensual use of the Premises during the period from [date] to [date]. For the reasons set out in paragraphs 8–10 below, however, we recommend that a number of issues be confirmed by UNMIL prior to any payment being made to the claimant. We also recommend that, in accordance with established practice, a signed release be obtained from the claimant before any payment is made to it, that the amount of compensation paid by UNMIL be notified to the Government of Liberia pursuant to Section 16 of the UNMIL Status-of-Forces Agreement, and that UNMIL reserve the right to seek reimbursement from the Government of Liberia for such amount.

Background

4. The detailed background of this matter is described in the Minutes of the UNMIL Local Claims Review Board (LCRB) Meeting Nos. [numbers]. The salient facts may briefly be summarized as follows:

(*a*) The Premises were first occupied by the [UNMIL contingent] in June 2005. The Premises consisted of 12 lots of land and included a warehouse, an office building, a four bedroom guesthouse, a cafeteria and a security house.

(*b*) In its letter to UNMIL of [date], [the Society] claimed compensation, in the sum of $204,000, for UNMIL's occupation of the Premises from [date] to [date] (i.e., 3 years x $68,000 per annum). In the same letter, [the Society] waived its previously asserted claim for compensation in respect of UNMIL's occupation of the Premises prior to [date].

(*c*) On [date], UNMIL and [the Society] entered into a lease agreement for 8 of the 12 lots of land comprised in the Premises for a period of one year commencing on [date] (the "2009 Lease Agreement"). The rent payable under the 2009 Lease Agreement was $1,000

per month. In its letter to UNMIL of [date], [the Society] claimed that, notwithstanding the conclusion of the 2009 Lease Agreement, UNMIL continued to occupy the entire 12 lots of land and that a claim for rent would, therefore, continue to accrue in respect of the additional 4 lots.

(*d*) [The Society]'s claim was first reviewed by the LCRB in its Meeting No. [number] held on [date]. At that meeting, the LCRB agreed that [the Society] was entitled to compensation for the non-consensual use of the Premises by UNMIL during the period from [date] to [date]. With regard to the amount of compensation payable, the LCRB considered data provided by the UNMIL Regional Administrative Officer (RAO) as to the rents paid by UNMIL staff for accommodation in the locality.[1] Based on the data provided by the UNMIL RAO, the LCRB recommended that compensation in the sum of US$72,000 (i.e., 3 years x $26,000) be paid to the claimant.

(*e*) Following concerns raised by the UNMIL Director of Mission Support that the amount of compensation recommended by the LCRB was higher than most rents paid by UNMIL in the regions, the LCRB reviewed the case again at its Meeting No. [number] held on [date]. At that meeting, the LCRB noted that, in accordance with General Assembly resolution 52/247 of 21 May 1997, compensation for the non-consensual use of premises should be based on the rates established by the pre-mission technical survey. The LCRB further noted, however, that in the case of UNMIL, no such rates had been established in the pre-mission technical survey. In the absence of such pre-established rates, the LCRB decided that the fair rental for the Premises should be established taking account of comparable market rental data.

(*f*) In this regard, the UNMIL Procurement Section provided data on the rents paid under other leases entered into by UNMIL. In particular, the UNMIL Procurement Section focused on a lease for "half an acre [of land] with a house of 4 bedrooms" concluded by UNMIL in 2005. Extrapolating from this data, the Procurement Section assessed that the fair market rental value for the Premises would be $1,000 per month.

(*g*) Based on the data provided by the UNMIL Procurement Section, the LCRB recommended the payment of compensation to [the Society] in the amount of $36,000 (i.e., $1,000 per month for a total of 36 months). The LCRB's recommendation was approved by the UNMIL Director of Mission Support on [date].

Analysis

5. The scope of the Organization's responsibility to compensate property owners for the non-consensual use of privately owned property is set out in the Secretary-General's reports entitled A/51/389 and A/51/903, dated 20 September 1996 and 21 May 1997, as

[1] The information provided by the RAO included a description of the buildings on the Premises, together with estimates of the number of personnel that could be accommodated in each building. According to the RAO, most of the buildings on the Premises had been repaired by the [UNMIL contingent] (including repairs to the roof, windows, doors, ceilings, electrical circuitry, plumbing and drainage works). The RAO also noted that the guesthouse had been refurbished by the United Nations High Commissioner for Refugees (UNHCR) but that its "roof was blown off by an UNMIL helicopter rotor wash". The LCRB Minutes do not specify the amounts expended by UNMIL or UNHCR for the renovation of the various structures, nor do the Minutes specify the monetary damages to the guesthouse.

endorsed by the General Assembly in resolutions 51/13 of 4 November 1996 and 52/247 of 26 June 1998, respectively.[2] In particular, A/51/389 provides that:

> "11. [. . .] the United Nations force may take temporary possession of land and premises—whether State or privately owned—as may be operationally necessary for the deployment of the force and the pursuance of its mandate.
>
> 12. The legality of the occupancy under these conditions does not, however, exempt the Organization from liability to pay adequate compensation or fair rental for privately owned property, while maintaining its right to seek reimbursement from the government pursuant to article 16 of the model status-of-forces agreement or the principle reflected therein."

6. Paragraph 10 (a) of General Assembly resolution 52/247 further provides that:

> "(a) Compensation for non-consensual use of premises shall either: (i) be calculated on the basis of the fair rental value, determined on the basis of the local rental market prices that prevailed prior to the deployment of the peacekeeping operation as established by the United Nations pre-mission technical survey team; or (ii) not exceed a maximum ceiling amount payable per square metre or per hectare as established by the United Nations pre-mission technical survey team on the basis of available relevant information; the Secretary-General will decide on the appropriate method for calculating compensation payable for the non-consensual use of premises at the conclusion of the pre-mission technical survey."

7. In the present case, the fact that the Premises were occupied by the [UNMIL contingent] for the period from [date] to [date] and that no lease agreement was concluded between UNMIL and [the Society] for that period is not in dispute. [The Society]'s claim in respect of UNMIL's occupation of the Premises was also submitted within the time limits set out in General Assembly resolution A/RES/52/247. In accordance with the relevant resolutions of the General Assembly referred to in paragraphs 5 and 6 above, therefore, we agree with the LCRB's assessment that the claimant is, *prima facie,* entitled to fair rental value for UNMIL's use of the Premises during the period in question.

8. We also agree with the approach taken by the LCRB that, in the absence of rental rates established during a pre-mission technical survey, the amount of compensation payable should be assessed taking account of comparable market rental data. Based on the documentation provided, however, it is not clear how the LCRB applied the comparison rental data when calculating the fair market rental value for the Premises.[3] We recommend, therefore, that, prior to any payment being made to the claimant, UNMIL should

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[2] Reports of the Secretary-General, "Administrative and budgetary aspects of the financing of the United Nations peacekeeping operations: financing of the United Nations peacekeeping operations".

[3] For example, the data provided by the UNMIL Procurement Section focused primarily on the rent payable for another property comprising 12 lots and a 4 bedroom house leased by UNMIL in 2005 (see paragraph 4 (f), above). It is not clear, however, whether any adjustments were made to this rental rate to take account of the additional buildings located on the current Premises, the renovations to the buildings carried out by UNMIL and UNHCR and/or the damage to the guesthouse caused by the UNMIL helicopter (see paragraphs 4 (a) and (d) above). The fair rental of $1,000 per month recommended by the LCRB is also the same as the rent payable under the 2009 Lease Agreement (which includes 8 lots of land only). The LCRB Minutes also make reference to an unspecified technical report that "was relevant to the year 2006". Based on the documentation provided, however, the relevance of this report is unclear.

confirm that all relevant factors for calculating the fair rental value of the Premises were duly taken into account by the LCRB at the time it made its recommendation.

9. Whilst it is a matter for UNMIL to satisfy itself that [the Society] is duly incorporated under the laws of Liberia and that it was the lawful owner of the Premises during the relevant period, we recommend that, prior to any payment being made to the claimant, UNMIL should confirm, in particular, that the fact that the [the Society]'s certificate of incorporation was "re-activated on [date]" does not in any way prejudice [the Society]'s legal position as the rightful owner of the Premises.[4] If necessary, UNMIL may wish to consider confirming the foregoing with the assistance of the appropriate Liberian authorities.

10. We note that the LCRB did not address [the Society]'s claim that, notwithstanding the conclusion of the 2009 Lease Agreement, UNMIL continued to occupy the entire area of 12 lots of land (and not just the 8 lots included in the 2009 Lease Agreement). Should [the Society]'s claim in this regard be founded in fact, we recommend that this matter be addressed by the LCRB with a view to reaching a full and final settlement of all outstanding rental claims relating to the Premises. In addition, if UNMIL intends to continue occupying the additional 4 lots prospectively, the necessary arrangements should be made to enter into a suitable leasing arrangement with [the Society].

11. Finally, in accordance with established procedures, we recommend that the payment of compensation to the claimant be made subject to the signature of an appropriate release. We also recommend that the amount of compensation paid by UNMIL be notified to the Government of Liberia pursuant to section 16 of the UNMIL Status-of-Forces Agreement, and that UNMIL reserve the right to seek reimbursement from the Government of Liberia for such amount.

[. . .]

3 June 2010

(*c*) Interoffice memorandum to the Director of the Division for Public Administration and Development Management, Department of Economic and Social Affairs (DESA), concerning the Secretary-General's and the Organization's relationship with the [Alliance]

Use of United Nations name and emblem—Express prohibition to use the United Nations name and emblem for non-official purposes without the express authorization of the Secretary-General—Legal implications of the Secretary-General's serving as honorary chairman of an alliance, particularly with regard to the privileges and immunities of the Organization and its precedential value—The Secretary-General's having agreed to serve as Honorary Chair does not constitute an endorsement by the Secretary-General or by the Organization

1. This memorandum responds to your memorandum of [date], requesting the Office of Legal Affairs' (OLA) advice concerning the "political and legal implications" of the

[4] As evidence of its legal title to the Premises, [the Society] has provided copies of a [Certificate], dated [date], and a letter from the [Ministry], dated [date], which states that [the Society] "now possessed legitimately twelve (12) acres of tribal public land in [the area of the Premises]". [The Society] has also provided copy of a [Certificate], dated [date], issued by the [Agency] (and re-activated on [date]).

Secretary-General's serving as the Honorary Chairman of the [Alliance]. In this connection, your memorandum stated that, without having obtained the prior approval of the United Nations, the "[Alliance] has been publicly using the Secretary-General's name in its correspondence." [. . .]

Establishment and status of the [Alliance]

2. As explained in the memorandum of [date], we understand that the [Alliance] is an "initiative" that was launched by the Secretary-General in 2006 as a direct response to paragraph 80 of the Tunis Agenda for the Information Society, adopted by the World Summit on the Information Society (WSIS) held in Tunis in 2005. The Tunis Agenda was endorsed by the General Assembly in its resolution 60/252, of 27 March 2006. Based on the information you have provided to OLA, we also understand that the main objective of [the Alliance] is to support and promote information and communication technology (ICT) activities as a means of advancing economic and social development. Such support and promotion of ICT activities is conducted through the cooperation of multiple types of public and private entities at the national, regional and international levels. The [Alliance], thus, is an unincorporated association that is open to a broad range of participation by private and public sector entities in the fields of ICT and development, including governments, businesses, civil society, international organizations, industry groups, professional associations, media, and academia. We understand that, as an unincorporated association, the [Alliance] does not have operational, policy-making or negotiating functions.

The [Alliance]'s use of the United Nations name and emblem

3. Your memorandum noted that, on its Website, the [Alliance] is displaying the name of the United Nations together with the United Nations emblem. Indeed, the uniform resource locator (URL) for the [Alliance]'s website is "www.un-[alliance].org", and OLA is not aware that the United Nations has authorized the [Alliance] to use the Organization's name, by way of an abbreviation thereof, in its website.[1] Moreover, the letterhead of the [Alliance] states that it is "supported by the Department of Economic and Social Affairs". Again, OLA is not aware that the [Alliance] has been given permission for the use of its name in its letterhead. Finally, as DESA pointed out to OLA in an e-mail message, dated [date], the [Alliance] has been using the United Nations name and emblem in its publications (see *[Alliance] Series 1: Foundations of the [Alliance]*). It is likewise not clear to OLA that the [Alliance] has specifically been authorized to use the name or emblem of the Organization in any of its publications.

4. As you may recall, General Assembly resolution 92 (I), of 7 December 1946, reserves the use of the United Nations name and emblem for the official purposes of the Organization and expressly prohibits the use of the United Nations name and emblem for non-official purposes without the express authorization of the Secretary-General. As noted above, OLA is not aware that the [Alliance] was ever authorized to use the name and emblem of

[1] A United Nations copyright designation appears at the bottom of the homepage of the website at http://www.un-[alliance].org. Thus, it may be the case that DESA has created or hosted the website of the [Alliance]. However, for the reasons discussed in this memorandum, such hosting of the [Alliance]'s website and its use of the "UN" in the URL is not appropriate, given that the [Alliance] is not a United Nations body and does not otherwise constitute an official programme or activity of the Organization.

the United Nations in connection with its activities. Moreover, Administrative Instruction ST/AI/189/Add.21 of 15 January 1979, entitled "Use of the United Nations emblem on documents and publications", provides that the name and emblem of the United Nations may only be used in official publications of the United Nations and of United Nations bodies. Insofar as the [Alliance] is an unincorporated association or a network of entities whose activities are funded by the voluntary contributions of its members and partners, the [Alliance] neither is a subsidiary organ of the General Assembly nor otherwise is an organ, programme or activity of the United Nations.[2] Accordingly, the [Alliance] does not constitute a "United Nations body" within the meaning of footnote 2 of that Administrative Instruction. In view of the foregoing, we concur with your office that the use of the Organization's name and emblem on the [Alliance]'s letterhead, in its publications and on its website should be discontinued immediately.

The Secretary-General's serving as Honorary Chair of the [Alliance]

5. With respect to the political and the legal implications of the Secretary-General's having agreed to serve as the "Honorary Chairman" of the [Alliance], in our recent meetings and e-mail exchanges, we have discussed that the functions and responsibilities of the Honorary Chair of the [Alliance] are not clear and do not appear to have been defined in any terms of reference or other similar document. We assume that, based on the term "honorary", the title is merely ceremonial and does not connote that the Secretary-General would have any official or functional role or powers with respect to the [Alliance]. In any event, as we also discussed, in light of the [Alliance]'s amorphous and uncertain legal status, the Secretary-General's having agreed to serve as the Honorary Chair of the [Alliance] could create the misleading impression that [Alliance] is a United Nations body, that [Alliance] activities are somehow affiliated with the official programme of work of the Organization, or that the activities of the many non-United Nations participants in the [Alliance], including those of governments or even private sector entities, are being endorsed by the Secretary-General and by the United Nations. While it might be understandable or even desirable for the Secretary-General to emphasize his support for the aims and activities of the [Alliance], showing such support through some sort of institutional linkage by serving as the [Alliance]'s Honorary Chairman may create confusion both with respect to the an institutional and operational relationship between the United Nations and the [Alliance] (or create the impression thereof), as well as in connection with the role of the Secretary-General in the operations of the [Alliance].

6. With respect to this latter point, the Secretary-General's serving as the Honorary Chair of the [Alliance] could subject the Organization to the risk that claims might be brought against the Secretary-General and/or the United Nations by third parties who might not appreciate the ceremonial nature of the role of "Honorary Chair" or who might not understand the fact that the [Alliance] is not a United Nations body or programme or activity. Even though we consider that neither the Organization nor the Secretary-General should be exposed to legal liability with respect to such claims, given that the [Alliance] is

[2] As far as we can determine, even though technical and administrative support to the [Alliance] is provided by DESA in the form of a "secretariat" for the [Alliance], pursuant to a technical cooperation assistance project of DESA, the [Alliance] has not been programmed by the General Assembly as a United Nations activity.

not a United Nations body, programme or activity, the Organization would have to deal with the fact of such claims and would have to provide some mode of settlement therefor, pursuant to the obligations of the United Nations set forth in article VIII, section 29 of the 1946 Convention on the Privileges and Immunities of the United Nations.* Thus, merely defending such claims, even if they had no merit, could expose the Organization to substantial legal costs. In addition, should it be determined that a third party was reasonable in considering that the United Nations and the [Alliance] were authorized to act jointly or on behalf of one another, given such involvement by the Secretary-General in the [Alliance], the Organization might not be able to avoid legal liability in respect of any such claims. Moreover, given the amorphous and legally uncertain legal status of the [Alliance] as an unincorporated association, were any such claim to be brought in courts of Member States, and were such courts to consider the Secretary-General's role in or relationship to the [Alliance] was something other than ceremonial, such claims could subject the Secretary-General or the Organization to the jurisdiction of such courts.[3] This would have serious implications with regard to the privileges and immunities of the United Nations and of the Secretary-General, including as set forth in the 1946 Convention on the Privileges and Immunities of the United Nations.

7. Finally, the Secretary-General's having agreed to serve as the Honorary Chairman of the [Alliance] could create a precedent and place the Secretary-General in a difficult position should similar requests be made in the future by unincorporated associations similar to the [Alliance] or by incorporated bodies. In light of the foregoing and to the extent that the Secretary-General desires to continue to lend his persona in support of the aims and activities of the [Alliance], you may wish to inform the [Alliance] and its participating persons and entities that the Secretary-General's role as the Honorary Chair will be limited to supporting the aims and activities and the general purposes of the [Alliance]. At the same time, in such circumstances, the [Alliance] should be informed that the Secretary-General's having agreed to serve as Honorary Chair should not be deemed to constitute an endorsement by the Secretary-General or by the Organization of the policies, the operations or any specific activities of [the Alliance], or of any of the non-United Nations participants in the [Alliance] or their activities.

[. . .]

9. For the reasons discussed above, absent specific written authorization by the United Nations, it is not appropriate for the [Alliance] to use the name or emblem of the United Nations nor the identity of the Secretary-General in promoting itself or its activities. Since [the Chair of the Alliance's Board of Directors] has not acknowledged your e-mail message of [date] calling for the [Alliance] to cease and desist doing so, we recommend that DESA now send a formal letter, perhaps signed by the Under-Secretary-General of DESA "on behalf of the Secretary-General", reiterating the content of your e-mail message of [date]. Should the [Alliance] fail to respond to that more formal communication, then this Office could send a cease and desist letter to the [Alliance] and evaluate with DESA whatever further action might be appropriately required to deal with this matter.

27 September 2010

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* United Nations, *Treaty Series*, vol. 1, p. 15 and vol. 90, p. 327 (corrigendum to vol. 1).

[3] As noted in paragraph 5 of OLA's memorandum of [date], the Under-Secretary-General of DESA is apparently an "*ex officio*" member of the [Alliance]'s steering committee, which gives rise to similar concerns about his serving in such capacity.

4. Other issues relating to peacekeeping operations

(*a*) Note to the Under-Secretary-General, Department of Peacekeeping Operations (DPKO), regarding the United Nations Mission in Sudan (UNMIS) area of responsibility

Area of responsibility—Scope of ceasefire monitoring and verification mandate—Area of deployment—Freedom of movement of peacekeeping operation key component of the privileges and immunities necessary for the fulfillment of its mandate

1. This refers to your note dated [date] requesting the Office of Legal Affairs' (OLA) assistance with regard to the interpretation of what constitutes the area of responsibility (AOR) of UNMIS. As we understand from your note and UNMIS [code cable] dated [date], UNMIS military tasks are conducted in a ceasefire zone consisting of six sectors, designated Sector I-VI. [. . .] UNMIS asks for advice regarding the extent of its "area of responsibility" (AOR) [. . .].

The issue

2. In essence, the issue is whether UNMIS military tasks, consisting of ceasefire monitoring and verification, extend to the whole of Southern Kordofan State or, on the contrary, only a smaller portion of that State known as Nuba Mountain Area. [. . .] With regard to Sector VI, we understand that following the decision of the Permanent Court of Arbitration concerning the boundaries of Abyei, which has been accepted by both Sudanese parties, the area around Higlig and Kharsane has been placed outside the Abyei Area and into Southern Kordofan State. Since Sector VI covers the Abyei area, these areas now lie outside Sector VI. [. . .]

The UNMIS mandate

3. As background, it is helpful to briefly recall that the core element of the mandate of UNMIS, as set forth in Security Council resolution 1590 (2005) operative paragraph 4, is to support the implementation of "The Comprehensive Peace Agreement between The Government of The Republic of The Sudan and The Sudan People's Liberation Movement/Sudan People's Liberation Army"* (the CPA) by performing tasks specified in that paragraph. In the relevant part, the tasks assigned to UNMIS under its mandate are: "To monitor and verify the implementation of the Ceasefire Agreement and to investigate violations";** and "To observe and monitor movement of armed groups and redeployment of forces *in the areas of UNMIS deployment* in accordance with the Ceasefire Agreement" (emphasis added).***

* Available at http://unmis.unmissions.org/Portals/UNMIS/Documents/General/cpa-en.pdf.

** Security Council resolution 1590 (2005) of 24 March 2005, operative paragraph 4(a)(i).

*** *Ibid.*, operative paragraph 4(a)(iii).

4. As clearly appears from both resolution 1590 (2005)* and the CPA**, the ceasefire monitoring and verification mandate does not entail any enforcement action under Chapter VII of the Charter of the United Nations, but is based on the request made and consent already given by the Government of the Sudan (GOS) and the Sudan People's Liberation Movement/Sudan People's Liberation Army (SPLM/A), as parties to the CPA.

5. UNMIS is also authorized by the Security Council, under Chapter VII of the Charter of the United Nations, "to take the necessary action, in the area of deployment of its forces and as it deems within its capabilities, to protect United Nations personnel, facilities, installations, and equipment, ensure security and freedom of movement of United Nations personnel, humanitarian workers, joint assessment mechanism and assessment evaluation commission personnel, and, without prejudice to the responsibility of the Government of the Sudan, to protect civilians under imminent threat of physical violence".*** Also acting under Chapter VII of the Charter of the United Nations, the Council requested that the Secretary-General and the Government of the Sudan, "following appropriate consultation with the Sudan People's Liberation Movement, conclude a status-of-forces agreement within 30 days of adoption of the resolution . . . .**** The Agreement between the Government of the Sudan and the United Nations concerning the status of the United Nations Mission in the Sudan (the "SOFA") was concluded on 28 December 2005.

The Ceasefire Zone

6. Security Council resolution 1590 (2005), dated 24 March 2005, was adopted following the signing of the CPA, and the presentation to the Council of the report of the Secretary-General on the Sudan, dated 31 January 2005***** as well as the request of the Sudanese parties for the establishment of a United Nations peace support mission in the Sudan. Annexure I to the CPA, entitled "Permanent Ceasefire and Security Arrangements Implementation Modalities and Appendices", lays down the terms and arrangements for the ceasefire whose implementation is subject to monitoring and verification by UNMIS.

7. Annexure I defines the Ceasefire Zone as follows:

> "6.1 Southern Sudan, which shall be divided, for all the purposes of the ceasefire and monitoring activities, into three areas consisting of:
>
> Bahr el Ghazal;
>
> Equatorial Area
>
> Upper Nile Area
>
> 6.2 *Nuba Mountains Area*
>
> 6.3 Southern Blue Nile Area
>
> 6.4 Abyei Area

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* *Ibid.*, 21st preambular paragraph.

** See CPA, Annexure I: Permanent Ceasefire and Security Arrangements Implementation Modalities and Appendices, para. 15.1.

*** Security Council resolution 1590 (2005) of 24 March 2005, operative paragraph 16(i).

**** *Ibid.*, para. 16(ii).

***** Report of the Secretary-General on the Sudan, 31 January 2005 (S/2005/57).

6.5 Eastern Sudan Area (Hamashkoreb, New Rasai, Kotaneb, Tamarat, and Khor Khawaga)" (*emphasis added*)

8. On the other hand, the above-mentioned Secretary-General's report at paragraph 35, describes the *mission area* of UNMIS as consisting of six sectors, designated Sector I-VI, as follows:

> "Sector I: the Equatoria area, including the states of West Equatoria, Bahr Al Jabal and East Equatoria; the sector headquarters would be located in Juba
>
> Sector II: the Bahr el Ghazal area, including the states of West Bahr el Ghazal, North Bahr el Ghazal, Warab and Al Buhairat; the sector headquarters would be located in Wau
>
> Sector III: the Upper Nile area, including the states of Jonglei, Unity and Upper Nile; the sector headquarters would be located in Malakal
>
> Sector IV: the *Nuba Mountains area, which would have the same boundaries of former Southern Kordofan Province when Greater Kordofan was subdivided into two provinces*; the sector headquarters would be located in Kadugli
>
> Sector V: Southern Blue Nile, which is in Blue Nile State; the sector headquarters would be located in Damazin
>
> Sector VI: the *Abyei area*: the sector headquarters would be located in Abyei" * (*emphasis added*)

The UNMIS AOR in Southern Kordofan State

9. The concept of operations for UNMIS was developed in accordance with the CPA and the Report of the Secretary-General on the Sudan dated 31 January 2005.** That report describes the main features of the CPA, and notes that the parties to the CPA "agreed to an internationally monitored ceasefire" and that international monitoring and assistance would include the monitoring and verification of a large number of military personnel [. . .]". In relation to this monitoring and verification task, paragraph 13 of the report notes that the Agreement on Permanent Ceasefire and Security Arrangements Implementation Modalities (the "Ceasefire Agreement") details the monitoring and verification role to be played by the military elements of the foreseen United Nations peace support operation should the Security Council decide to authorize it.

10. The same paragraph then mentions that the Ceasefire Agreement calls for the active participation of the United Nations in the several bodies that will be created to assist in the implementation of the ceasefire, and that these bodies include "a Ceasefire Political Commission, a Ceasefire Joint Military Committee, Area Joint Military Committees and numerous joint military teams to be deployed *throughout the area of operations*" *** (*emphasis added*).

11. While paragraph 36 states that UNMIS would have an *area of responsibility* measuring 1,250 by 1000 kilometres, this does not shed any light on the specific question of the UNMIS AOR as raised in your note and in the UNMIS code cable.

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* *Ibid.*, paragraph 35.

** *Ibid.*

*** *Ibid.*, paragraph 13.

12. While the report of the Secretary-General variously uses the terms "mission area" (paragraph 35), "area of responsibility" (paragraph 36) and "area of operations" (paragraph 13), it is our understanding that the issue raised by UNMIS and which you have referred to us relates to the area of responsibility for the purpose of monitoring and verification of the implementation of the Ceasefire Agreement, and this note accordingly deals with that issue.

13. The description of Sector VI, as set forth in paragraph 35 of the above-mentioned Report of the Secretary-General, accords to the term "Nuba Mountain Area" the same meaning as Southern Kordofan State, by describing the area as having "the same boundaries of former Southern Kordofan Province when Greater Kordofan was subdivided into two provinces". It is important to note that one of the main documents constituting the CPA, "The Resolution of the Conflict in Southern Kordofan and Blue Nile States" (Chapter V of the CPA), specifically addresses the conflict in Southern Kordofan State. That document uses the term "Southern Kordofan/Nuba Mountain" mainly as a reference to a State.*

14. By defining Sector IV, Nuba Mountains area, as being co-terminus with "the former Southern Kordofan Province when Greater Kordofan was subdivided into two provinces", paragraph 35 of the Secretary-General's report suggests that "Southern Kordofan/Nuba Mountains" reflects two names either of which is a sufficient reference to one and the same area, rather than designating two contiguous areas whose mutual boundaries are not clearly defined.

15. However, even if Southern Kordofan/Nuba Mountains were two interchangeable names for the same state, it appears that "Nuba Mountains area" would not have been a valid reference to that state at the time the report was issued on 24 March 2005. By that date, the List of Corrections in the Protocols and Agreements, which is appended to the CPA, had been signed (on 31 December 2004), and it stated at paragraph 1.4 that the words "Southern Kordofan/Nuba Mountains" should be changed to "Southern Kordofan" in all the Protocols and Agreements. Nowhere does the CPA provide that the term "Nuba Mountains", when used alone and not combined with "Southern Kordofan", should be changed to "Southern Kordofan". It is therefore not clear to us why the report of the Secretary-General described Sector VI as the Nuba Mountain Area. This is a matter which UNMIS and DPKO are in a better position to shed light on, as they were more closely involved in the negotiations that led to the CPA.

16. In the early stages of the peace negotiations, the Sudanese parties used the term "Southern Kordofan/Nuba Mountains State" to refer to the area having "the same boundaries of former Southern Kordofan Province when Greater Kordofan was sub-divided into two provinces".** They decided, however, that the name of the State would be settled by a committee representing the State formed by the two Parties to the Peace Agreement.***

17. As indicated above, the List of Corrections in the Protocols and Agreements confirms the subsequently agreed name of the state as simply "Southern Kordofan State".

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* See the CPA, Chapter V: The Resolution of the Conflict in Southern Kordofan and Blue Nile States, paras. 2.1, 3-chapeau, 3.1, 8.6, 8.8, 9.3,10.1,11.2).

** *Ibid*., para. 2.1.

*** *Ibid*., para. 2.1, footnote 2.

18. Accordingly, the information available to us does not permit us to conclude that the Secretary-General's report, in designating Sector IV "Nuba Mountains" as extending to the entire area of Southern Kordofan State, accurately reflected the intention of the Sudanese parties in the Ceasefire Agreement. Our analysis of the matter is based on CPA and United Nations documents at our disposal, as well as information we received during an oral briefing we received from DPKO's Office of Operations (including in particular the desk officer and Office of the Military Adviser). We do not, however, have the benefit of information concerning any practice established during international mediation efforts or international ceasefire monitoring activities prior to the establishment of UNMIS which might be relevant to an understanding of the references Southern Kordofan/Nuba Mountains State, or Nuba Mountains Area, which might be relevant to understanding what those terms were understood to mean by the parties involved. Any additional information that DPKO might have in this regard could shed more light on the matter.

The extent of Sector VI—the Abyei Area

19. With regard to the AOR in Sector VI, Abyei Area, we note that the decision of the Permanent Court of Arbitration concerning the boundaries of the Abyei area have been accepted by both the GOS and the SPLM/A. According to that decision, an area around Higlig and Kharsane, previously considered to be part of Sector VI for UNMIS ceasefire monitoring and verification purposes, has been placed to the north of Abyei's northern boundary and thus within Southern Kordofan State. That area is thus no longer a part of Sector VI, which, according to the Secretary-General's report, paragraph 35, and Annexure I to the CPA, paragraph 6.4, only covers the "Abyei Area". The area is subject to the same doubt as to whether it is covered by Sector IV, to the extent Sector IV may be deemed to cover the whole of Kordofan State, or is outside the area covered by Sector IV, to the extent that that sector is deemed to cover only a portion but not the whole of Southern Kordofan State, as discussed above.

Freedom of movement of UNMIS

20. UNMIS also asks for advice regarding [its freedom of movement] considering that Security Council resolution 1690 (2005) and subsequent resolutions, as well as the UNMIS status-of- forces agreement (SOFA), provide that UNMIS shall have unrestricted movement throughout the territory of the Sudan.

21. With regard to the SOFA, we note that paragraph 12 thereof provides, in relevant part: "UNMIS, its members and contractors, together with their property, equipment, provisions, supplies, materials and other goods, including spare parts, as well as vehicles, vessels and aircraft [. . .] shall enjoy full and unrestricted freedom of movement without delay throughout the Sudan by the most direct route possible, without the need for travel permits or prior authorization or notification, except in the case of movement by air, which will comply with the customary procedural requirements for flight planning and operations within the airspace of the Sudan as promulgated and specifically notified to UNMIS by the Civil Aviation Authority of the Sudan". This provision reflects the relevant provisions of the Charter of the United Nations, whereunder the Organization shall enjoy in

the territory of each of its Members such privileges and immunities as are necessary for the fulfillment of its purposes.*

22. Paragraph 12 of the SOFA also contains the usual procedural stipulation that large movements of UNMIS personnel, stores, vehicles or aircraft through airports or on railways or roads used for general traffic within the Sudan shall be coordinated with the Government. This raises the question whether, regardless of the definition of geographical extent of Sector IV in paragraph 35 of the Secretary-General's report, or the definition of the Ceasefire Zone in paragraph 6.2 of Annexure I of the CPA, UNMIS is entitled to freedom of movement within the entire Southern Kordofan State [. . .].

23. Freedom of movement has consistently been recognized as a key component of the privileges and immunities necessary for a peacekeeping operation's mandate. This is reflected in various status-of-forces and similar agreements signed by the Organization with host countries and third States. To the extent that freedom of movement is essential to the fulfillment of the functions of UNMIS under its mandate to monitor and verify the implementation of the ceasefire between the GOS and the SPLM/A, the SOFA may be invoked by UNMIS in its discussions with the Sudanese authorities with a view to granting UNMIS access and freedom of movement in the whole of Southern Kordofan State.

24. Accordingly, although we are not in a position to conclude that the Ceasefire Zone under the CPA—and hence the UNMIS AOR—extends to the entire area of Southern Kordofan State, the Organization could argue that freedom of movement and access by UNMIS throughout the Southern Kordofan State is necessary for the fulfillment of its ceasefire monitoring and verification tasks under its mandate, and thus, that the whole of Southern Kordofan State should be deemed as falling within the AOR.

25. Such freedom of movement and access appears essential for monitoring and verification of the implementation by the parties of paragraphs 18.5 and 18.6 of the Ceasefire Agreement, which provide as follows:

> "18.5. The SPLA shall complete redeployment of its excess forces from Southern Blue Nile and Southern Kordofan/Nuba Mountains within six months of the deployment of the JIUs in those areas.
>
> 18.6. Without prejudice to the Agreement on the Security Arrangements and the right of Sudan Armed Forces (SAF) Command to deploy forces all over North Sudan as it deems fit, SAF troop levels in Southern Kordofan/Nuba Mountains and Blue Nile during the Interim Period shall be determined by the Presidency."

26. The above provisions mean that UNMIS must, as part of its mandate, monitor and verify the redeployment of SPLA forces from Southern Kordofan/Nuba Mountains, i.e., from the entire Southern Kordofan State, as well as to monitor troop levels in Southern Kordofan/Nuba Mountains, i.e., in the whole of Southern Kordofan State, and verify that they are in accordance with the determination of the Presidency, collectively [. . .]. UNMIS would not be able to accomplish this task if it were excluded from parts of Kordofan State.

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* Compare Article 105(1) of the Charter of the United Nations.

Conclusion

27. In conclusion, we would advise that UNMIS seek information regarding any practice that may have been established prior to its inception in 2005 that would support its view that its area of responsibility should cover the whole of Southern Kordofan State. We would also advise that UNMIS avail of the provisions in the SOFA concerning freedom of movement, as being essential for the fulfillment of its mandate.

15 April 2010

(*b*) Note to the Military Adviser for Peacekeeping Operations, Department of Peacekeeping Operations, concerning exceptional authorization for United Nations Military Experts on Missions to carry arms

Exceptional authorization for United Nations military experts on missions to carry arms—Applicable status-of-forces/mission agreement may determine authorization to carry arms—Jurisdiction over wrongful use of force—Liability of the United Nations for wrongful use of force—Directives on use of force—Requirement of firearms proficiency testing and training

1. This is with reference to your memorandum of [date] requesting the Office of Legal Affairs' (OLA) comments on paragraphs 16 and 38 of the Draft Manual for the Selection, Deployment, Rotation, Transfer and Repatriation of United Nations Military Experts on Missions in United Nations Peacekeeping Operations (the "Draft Manual"), which will replace the Department of Peacekeeping Operations (DPKO) "Guidelines for United Nations Military Observers" issued in 1995. Paragraphs 16 and 38 of the Draft Manual propose that, while United Nations Military Experts on Mission (UNMEM) are traditionally deployed unarmed, exceptions may be authorized by the United Nations Headquarters at the request of the Head of Mission through the Mission's Special Representative of the Secretary-General and based on a Security Risk Assessment. For the purposes of the Draft Manual, UNMEM include United Nations Military Observers, United Nations Military Liaison Officers and United Nations Military Advisers.

2. As DPKO is aware, while there have been exceptions in the past (in particular, the carriage of weapons by Military Advisers in the United Nations Assistance Mission in Iraq (UNAMI)), this would constitute a fundamental change from DPKO's long-standing policy and practice. OLA notes that, for security reasons, several missions, including UNAMI and the African Union/United Nations Hybrid Operation in Darfur (UNAMID), have requested that UNMEM assigned to them be authorized to carry arms. OLA trusts that DPKO and/or the Department of Safety and Security (DSS) have substantiated the view (a) that arming UNMEM would actually decrease their security risk and (b) that the military contingents are inadequate to protect them.

3. While OLA does not object to the proposal, in principle, it recommends that DPKO consider carefully the legal, political, security and practical implications before it proceeds with the proposed change in policy. For its part, OLA would require that the following issues be addressed.

(*a*) While neither the Convention on the Privileges and Immunities of the United Nations* (the "Convention") nor the model status-of-forces agreement ("SOFA") specifically preclude UNMEM from being armed, the provisions of a specific SOFA or status-of-mission agreement ("SOMA") may do so. For example, the agreement between the United Nations and the Republic of Iraq concerning the activities of UNAMI only allows members of UNAMI's guard units as well as United Nations security officers and United Nations close protection officers to possess and carry arms. To the extent that the Draft Manual under consideration is intended to apply to all peacekeeping operations, therefore, it would be necessary to review the applicable SOFA or SOMA, prior to authorizing particular UNMEM to carry arms, to assess whether they can be so armed without violating the terms of the SOFA or SOMA concerned.

(*b*) To the extent that the armed UNMEM would continue to be treated as experts on mission within the meaning of article VI of the Convention, they would potentially be subject to the civil and criminal jurisdiction of the host State if, for instance, they use force outside the scope of their authorization and the Secretary-General exercises his right and duty to waive their immunity. Unlike military personnel of national contingents, they would not be subject to the exclusive jurisdiction of their sending State. The authorization of UNMEM to carry weapons could, therefore, give rise to sensitivities amongst Member States concerning the status of UNMEM personnel. Moreover, from the United Nations perspective, the potential for civil or criminal cases against the United Nations, the individual missions and/or the individual UNMEM, arising out of any particular UNMEM's wrongful use of force, must be weighed deliberately and carefully before any new policy is pursued in this regard.

(*c*) The circumstances in which UNMEM would be authorized to use their weapons would need to be clearly set out in a Directive on the Use of Force, suitably tailored to the particular mission and taking account of the mandate and the specific assignments for which the UNMEM are deployed. Appropriate directives would also need to be issued detailing the type(s) of weapons authorized in the mission area and the applicable arrangements for the transportation, care and storage of the weapons and related ammunition.

(*d*) To the extent that UNMEM are typically serving members of the respective armed forces, it is assumed that they have formal national qualifications to carry and use firearms. This notwithstanding, OLA would advise that DPKO should ensure that appropriate arrangements for firearms proficiency testing and training are established both prior to, and during, the UNMEM's deployment.

4. Based on the foregoing, OLA would suggest that DPKO convene a meeting at the working level to assess the security reasons cited for the change in policy and to address the legal, political and practical implications thereof. Following the meeting, and should DPKO decide to proceed with the inclusion of exceptional procedures to authorize UNMEM to carry arms, as currently proposed in paragraphs 16 and 38 of the Draft Manual, OLA stands ready to assist in drafting or reviewing the necessary provisions in the Draft Manual.

8 June 2010

* United Nations, *Treaty Series*, vol. 1, p. 15 and vol. 90, p. 327 (corrigendum to vo1. 1).

5. Personnel questions

(*a*) Note to the Under-Secretary-General for Management and the Under-Secretary-General for the Department of Field Support concerning the change in casualty reporting status in Haiti

CASUALTY REPORTING STATUS—LIFE INSURANCE CLAIMS—DETERMINATION OF THE OCCURENCE AND DATE OF DEATH IN THE ABSENCE OF A DEATH CERTIFICATE—DISCRETION OF THE SECRETARY-GENERAL TO DETERMINE THE DATE OF DEATH—DISCRETION OF THE SECRETARY-GENERAL TO AWARD, IN THE INTEREST OF THE ORGANIZATION, ALREADY PAID INTER VIVOS BENEFITS TO DECEASED STAFF MEMBERS ON AN *EX GRATIA* BASIS

INTRODUCTION AND SUMMARY OF CONCLUSIONS

1. This is with reference to the Department of Field Support's (DFS) request for advice concerning the criteria to be used by the Secretary-General in deciding whether to change the casualty reporting status arising from the earthquake in Haiti from "missing" to "presumed dead". Based on our discussions with representatives from DFS and the Office of Human Resource Management (OHRM), we understand that the underlying issue of concern is when, for United Nations administrative purposes, can the missing staff members be considered to have died and all ensuing administrative processes commenced.

2. For the reasons explained below, I consider that the Secretary-General may take a policy decision to designate a date from which the missing staff members may be considered to have died for United Nations administrative purposes. The Secretary-General also has the discretion to decide whether inter vivos United Nations benefits paid after a staff member's proven, or assumed, date of death should be off-set or recovered from the death benefits payable, or be considered as payments made on an *ex gratia* basis.

ANALYSIS

3. Normally, any doubt over the date of death of a United Nations staff member is resolved by reference to a Death Certificate issued by the appropriate national authorities. The date of death is set out in the Death Certificate and the cessation of United Nations inter vivos entitlements and the commencement of United Nations death benefits apply from that date. In the current circumstances, however, I understand that it is anticipated that the issuance of Death Certificates by the Haitian authorities may take some time, particularly in cases where no body is recovered. The question arises, therefore, as to whether the Organization may wish to designate a date of death for the purposes of United Nations benefits, prior to receipt of the applicable Death Certificate. In my view, the designation of such a date is within the discretion of the Secretary-General.

4. As we understand that OHRM and DFS are not aware of a similar situation within the Organization in the past, analogies may be drawn from the practices of others. One example identified from our discussions with the United Nations insurance brokers is that, following the events in New York on 9/11, the insurance industry paid claims in the absence of Death Certificates, and notwithstanding the usual wording in insurance policies that an individual must be missing for 365 days before death is assumed. On that

occasion, the insurance market honored claims in respect of individuals present at the affected locations who were missing for more than 30 days. In the absence of evidence to the contrary, the death was assumed to have occurred at the time of the catastrophic incident.[1] Such a position would not seem unreasonable for the Organization to follow.

5. Should such an approach be adopted, it would mean that, with effect from 30 days after the earthquake, staff members who are "missing" since the date of the earthquake shall, absent any evidence to the contrary, be considered for United Nations administrative purposes to have died on 12 January 2010. This approach may give rise to adjustments in the death benefits payable should the actual date of death be amended by a subsequent Death Certificate and/or where inter vivos benefits (e.g., salaries) have already been paid during the 30 day period. In some circumstances, this could lead to a negative balance with monies owing to the Organization.[2] In addition, based on our discussions with OHRM and DFS, we also understand that January 2010 salaries for some deceased staff members have already been paid in full, whereas, in other cases, they have not. Thus, similar adjustments may also arise in respect of deceased staff members whose bodies have been recovered.

6. Accordingly, in view of the potential for adjustments in respect of *all missing and deceased staff members*, a policy decision needs to be taken as to whether inter vivos benefits actually paid after a staff member's proven, or assumed, date of death should be off-set or recovered from the death benefits payable, or be considered as payments made on an *ex gratia* basis.

7. As regards the latter alternative, financial regulation 5.11 provides that "the Secretary-General may make such *ex gratia* payments as are deemed to be in the interest of the Organization, provided that a statement of such payments shall be submitted to the Board of Auditors with the accounts." Financial rule 105.12 further provides, in pertinent part, that "*ex gratia* payments may be made in cases where, in the opinion of the Legal Counsel there is no clear legal liability on the part of the United Nations, payment is in the interest of the Organization." In the current instance, I note that the United Nations Staff Regulations and Rules do not require the Organization to pay inter vivos benefits in respect of any period after a staff member has died. *Thus, there is no clear legal liability on the part of the Organization to make such payments*. Accordingly, such payments may be made if it is determined that it is in the interests of the Organization to do so.

4 February 2010

(*b*) Interoffice memorandum to the Assistant Secretary-General for Human Resources Management concerning the Constitution of the Field Staff Union

Review by the Secretary-General of electoral regulations of staff unions—Electoral regulations of staff unions must extend the membership and the related right to run for office to all staff members, irrespective of whether

[1] In this connection, we understand that the United Nations Life Insurance provider [provider] has confirmed that it will process life insurance claims for deceased United Nations staff members prior to the issuance of an official Death Certificate based on notification of the death provided by the Organization.

[2] Monies due to the Organization may not be recovered from pension benefits.

THEY HAVE SERVED PREVIOUSLY IN A STAFF REPRESENTATIVE CAPACITY—TERM LIMITS FOR STAFF REPRESENTATIVES IN LINE WITH ADMINISTRATION'S RECOMMENDATION

1. I refer to your memorandum of [date] and its attachments, seeking the advice of the Office of Legal Affairs (OLA) on whether the Secretary-General would be in agreement with the electoral regulations as reflected in article 19 of the Constitution of the Field Staff Union (FSU).

2. On the basis of the information provided, we understand that the FSU's recently revised Constitution amended article 19 of the electoral regulations. Article 19 of the electoral regulations, as amended, now requires candidates for election to the office of the President, First Vice President and Second Vice President to have served in an FSU Unit Committee for at least two years. That article also prohibits candidates who have previously served as President or Vice President(s) for two terms from again running for office. You have requested our advice in connection with these two newly introduced requirements of article 19.

3. As you correctly point out in your memorandum, given the right of staff associations to promulgate their own statutes and rules and to freely elect their representatives, the role of the Secretary-General, when agreeing to electoral regulations, is to ensure that such regulations are consistent with the principle of equitable representation set out in staff regulation 8.1(b). Accordingly, it has been the consistent practice of the Administration to limit its review of statutes prepared by staff unions solely to their electoral provisions, which are approved by the Secretary-General when they are fully consistent with the requirements set out in staff regulation 8.1(b).

4. Staff regulation 8.1(b) stipulates, in relevant part, as follows:

> "They [staff representative bodies] shall be organized in such a way as to afford equitable representation to all staff members, by means of elections that shall take place at least biennially under electoral regulations drawn up by the respective staff representative body and agreed to by the Secretary-General."

Staff rule 8.1(c) provides as follows:

> "Each member of the staff may participate in elections to a staff representative body, and all staff serving at a duty station where a staff representative body exists shall be eligible for election to it, subject to any exceptions as may be provided in the statutes or electoral regulations drawn up by the staff representative body concerned and meeting the requirements of staff regulation 8.1 (b)."

5. Pursuant to staff regulation 8.1 (b), staff representative bodies must be organized in such a way as to afford equitable representation to "*all* staff members" (emphasis added). Staff rule 8.1(c) refers to "exceptions" concerning participation of staff in elections to such a body, which exceptions may be provided in the electoral regulations. However, this rule specifically stipulates that those exceptions are subject to "meeting the requirements of staff regulation 8.1(b)", the principal requirement of which is "to afford equitable representation to all staff members".

6. Accordingly, the requirement in article 19 that candidates must have served for a minimum of two years in an FSU Unit Committee before they can run for office would, in our view, undermine and not be consistent with the all-inclusive nature of staff regulation 8.1 (b). The FSU electoral regulations must extend membership and the related right to

run for office to all staff members, irrespective of whether they have served previously in a staff representative capacity.

7. As for the provision in article 19 prohibiting candidates who have previously served as President or Vice President(s) for two terms from again running for office, we would note that this is in line with the Administration's own recommendation to impose term limits for staff representatives. The Administration's recommendation was reflected in the Secretary-General's report entitled "Reasonable time for staff representational activities" of 10 May 1996 (A/C.5/50/64). Following its consideration of this report, the General Assembly decided, in resolution 51/226 of 3 April 1997 on "Human resources management", to limit the period of continuous release of staff representatives to a maximum of four years. In light of the General Assembly's decision, there would be no legal basis to object to the imposition of term limits in respect of those candidates whose election would mean that they would have to be released from their regular functions.

14 October 2010

6. Miscellaneous

(*a*) Interoffice memorandum to the Special Adviser on Gender Issues and Advancement of Women, Office of the Special Adviser on Gender Issues, Department of Economic and Social Affairs, concerning the registration of "Taiwanese" representatives of non-governmental organizations (NGOs) at the fifty-fourth session of the Commission on the Status of Women (1–12 March 2010)

The United Nations considers "Taiwan" for all purposes to be an integral part of the People's Republic of China—The United Nations cannot accept official documentation issued by the "authorities" in "Taiwan", as they are not considered a Government

1. I wish to refer to your memorandum dated [date] to the Legal Counsel attaching a letter [date] from the Permanent Representatives of the [five States] to the Secretary-General drawing his attention to the fact that in March 2009, NGO representatives from "Taiwan" carrying "Republic of China (Taiwan)" passports, were denied United Nations passes to attend the fifty-third session of the Commission on the Status of Women ("CSW"). The Permanent Representatives seek the Secretary-General's confirmation that NGO representatives carrying passports from "Taiwan" will be granted access to the upcoming CSW session in March 2010. In light of this letter you seek our advice as to whether the Department of Safety and Security (DSS) should continue to deny access to NGO representatives carrying official identification issued by the "authorities" in "Taiwan".

2. The status of "Chinese Taipei/Taiwan" in the United Nations is regulated by General Assembly resolution 2758 (XXVI) of 25 October 1971, entitled "Restoration of the lawful rights of the People's Republic of China in the United Nations". By that resolution, the General Assembly decided "to recognize the representatives of [the People's Republic of China] as the only legitimate representatives of China to the United Nations, and to expel forthwith the representatives of Chiang Kai-Shek. [. . .]"

3. Since the adoption of this resolution and in accordance with the decision which it contains, the United Nations has considered "Taiwan" for all purposes to be an integral part of the People's Republic of China, without any separate status. Thus, the "authorities" in "Taipei" are not considered to be a government, enjoy any form of governmental status or to exercise any governmental powers.

4. The Secretariat strictly abides by this decision which in effect means that it cannot accept any form of official documentation issued by the "authorities" in "Taiwan/Taipei".

5. Consequently, the Secretariat cannot accept "Taiwanese" passports as a means of identification for purposes of issuing United Nations passes to delegates for the upcoming session of the CSW.

24 February 2010

(*b*) Note to the Chief of Staff, Senior Management Group, concerning an invitation for the film [Title]

Use of name, quotes and image of the Secretary-General in a documentary and its promotion material—New York State Law concerning unauthorized commercial use of name and likeness of public figures—Public figure exception—Use of United Nations name and emblem reserved for official purposes of the Organization—Use of proper titles of individuals—Use of images of United Nations buildings displaying the United Nations emblem—Outside activity of staff members

1. I refer to your Note of [date], seeking the Office of Legal Affairs' (OLA) comments on an invitation to the premier of the documentary, [Title], concerning the work of the sixty-second session of the General Assembly. The film is directed and produced by [the director] who, you have indicated, is a staff member of the Department of Safety and Security (DSS). You have provided two versions of the invitation, one with the Secretary-General's name in the top right corner and the other with his name as well as a quote by him. We understand that [the director] has submitted a formal request to the Executive Office of the Secretary-General (EOSG) to use the version containing the quote by the Secretary-General.

2. You have requested OLA's comments, in particular with respect to the use of the image of the Secretary-General, the United Nations emblem and the General Assembly Hall on the invitation, and in the credits to the film. A form of the invitation is also posted on the official website for the documentary, [Internet address]. It is also used on the poster for the documentary and the DVD cover. You have indicated that the Secretary-General is apparently shown in the film, and is listed as a cast member in the credits. It is not clear whether permission to use such footage was obtained by [the director].

Use of the Secretary-General's name, quotes and image

3. You have informed us that neither the Secretary-General nor the Organization has been involved in the making of this film. Therefore, the use of the Secretary-General's name, quotes and his image/photograph on the poster for the film is inappropriate. Moreover, such use creates the impression that the Secretary-General is involved in the making of the film, or that he is endorsing the film. Accordingly, it is clear that the Secretary-General

can require the filmmakers to remove his name, image and attributed quotations from the poster and any other advertising and promotions for the film and prevent anything that would suggest his endorsement of or involvement in the making of the film.

4. With respect to the use of the Secretary-General's name and likeness in the film itself, it should be noted that state laws in the United States, including the laws of New York State,* protect against the unauthorized commercial use of the name and likeness of public figures. Although the film is said to be a documentary, the ".com" address of the website for the film suggests that it is being promoted as a commercial film. Therefore, sections 50 and 51 of the New York State Civil Rights Law (NYCRL) might be applicable, and a cause of action could exist for invasion of the privacy of the Secretary-General. Such a cause of action might also apply to any unauthorized use of the footage of the Secretary-General contained in the film. However, the producer of the film could claim that the use of the Secretary-General's name and likeness falls under the incidental "public figure" exception under sections 50 and 51 of the NYCRL, since the film is a documentary about arguably newsworthy events, settings and persons, including the Secretary-General. In light of the foregoing, [the director] should be requested to remove the image/photograph and quote of the Secretary-General from the poster for the film. Although it might not be feasible at this stage and although [the director] may be able to claim a use right under the incidental "public figure" exception, you may also wish to request [the director] to remove footage for which the use has not been authorized by the Secretary-General.

Use of the United Nations name and emblem

5. The poster for the film uses the United Nations name in referring to: (i) the President of the sixty-second session of the United Nations General Assembly, and (ii) several "United Nations Ambassadors". With respect to (i), above, since this is a factual statement and the former title of Ambassador [Name], the use would not be objectionable. With respect to (ii), above, it appears that the term "United Nations Ambassadors" refers to the current or former Permanent Representatives to the United Nations who would appear in the film. As the term "United Nations Ambassadors" is incorrect and misleading, the proper titles for these individuals should be used, if at all.

6. The poster for the film contains four United Nations emblems which are portrayed in wrong colour and format. Below each such emblem, the following references are indicated: (i) United Nations Media Accreditation & Liaison Unit, (ii) United Nations Photo Library, (iii) United Nations Archives, and (iv) UNifeed.

7. As you are aware, the use of the United Nations emblem and name is reserved for the official purposes of the Organization under General Assembly resolution 92(I) of 7 December 1946. Since this film is not a United Nations film, the use of the United Nations emblem in any promotion of the film, including on the poster, should not be authorized. Furthermore, any such use of the United Nations emblem would create the impression that the United Nations is involved in the production of the film, or the film is endorsed by the United Nations. In light of the above, [the director] should be requested to take necessary action to ensure that the United Nations emblem is removed from the poster and from any other document relating to the promotion of the film, including the DVD cover.

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* New York Civil Rights Law, sections 50 and 51.

8. In addition, it is not clear whether the four United Nations units referenced in the poster have been involved in the production of the film or have authorized the filmmakers to use archival footage, documents or photographs, all of which constitute United Nations property. Accordingly, we recommend that the Department of Management and the Department of Public Information verify their involvement, if any, in the production the film, including the provision and authorization for the use of any footage, documents or photographs to be included in the film.

9. With respect to the picture of the General Assembly Hall displayed on the poster which also includes the United Nations emblem, while prior authorization is required for its display, in practice, it is difficult to control such usage, since the picture of the General Assembly Hall is readily available on the internet for downloading. In addition, if the film contains any footage of the United Nations that has been obtained through proper authorization, and if such footage displays the United Nations emblem, there can be no objection to the display of the emblem in such context.

Outside activities

10. You have indicated that [the director], the director and producer of the film, is a staff member of DSS. Consequently, the production of the film would constitute an outside activity engaged by the staff member. Outside activities of staff members are governed by staff regulation 1.2 (o) and staff rules 1.2 (r) and (s). In particular, staff rule 1.2 (s) provides as follows:

> "Staff members shall not, except in the normal course of official duties or with the prior approval of the Secretary-General, engage in any outside activities that relate to the purpose, activities or interests of the United Nations. Outside activities include but are not limited to:
>
> (i) Issuing statements to the press, radio or other agencies of public information;
>
> (ii) Accepting speaking engagements;
>
> (iii) Taking part in film, theatre, radio or television productions;
>
> (iv) Submitting articles, books or other material for publication, or for any electronic dissemination."

The foregoing staff regulations and rules are further elaborated in Administrative Instruction ST/AI/2000/13 on "Outside activities". Under the Staff Regulations and Rules and ST/AI/2000/13, outside activities require the prior approval of the Secretary-General. Such approval is usually sought by way of a request from the staff member to the Office of Human Resources Management, through the staff member's Department or Office. Failure to obtain prior approval for an outside activity could constitute misconduct, which could lead to the imposition of disciplinary measures against the staff member concerned. It is not clear whether [the director] has obtained prior approval for such outside activities. You may wish to inquire with [the Assistant Secretary-General for Human Resources Management].

13 October 2010

B. Legal opinions of the secretariats of intergovernmental organizations related to the United Nations

1. International Labour Organization*

Legal Opinions rendered during the International Labour Conference, 99th Session (June 2010)

(*a*) Opinion concerning the attendance of NGOs in Conference committees

In response to a question from the Government Representative of Cuba, the Legal Adviser said that the rules governing the participation in meetings of international non-governmental organizations were set out in article 12(3) of the Constitution of the International Labour Organization, 1946,** and in a number of decisions of the ILO Governing Body (contained in Annex V of the Compendium of rules applicable to the Governing Body). The list of those organizations authorized to attend was established by the Governing Body. International non-governmental organizations of employers and workers did not have the same rights as tripartite members.***

(*b*) Opinion concerning the promotion and the implementation of the Recommendation on HIV and AIDS and the world of work, 2010

During a discussion of the Committee on HIV/AIDS and the World of Work concerning the Discrimination (Employment and Occupation) Convention, 1958 (No. 111),**** a question was raised as to what would be the most strategic means of extending the scope of Convention No. 111 to cover HIV.

A representative of the Legal Adviser explained that there were three options for consideration by the Committee. One would be to review or revise Convention No. 111. He advised against that option since Convention No. 111 was one of the most ratified Conventions and any revision would require member States to ratify the new, revised instrument. Another option would be to pursue the development of a Protocol. However, a Protocol also required ratification and countries that had ratified Convention No. 111, to which the Protocol would be formally attached, would not necessarily ratify a Protocol. The third option would be to strongly encourage member States to make a declaration under article

* A number of Legal Opinions were rendered during the Conference. Two Legal Opinions have been selected for reproduction here. The others can be found in the records of the Conference. See *Provisional Records of the 99th Session of the International Labour Conference* (http://www.ilo.org/ilc/ILCSessions/99thSession/pr/lang—en/index.htm).

** United Nations, *Treaty Series,* vol. 15, p. 40.

*** *Provisional Record No. 3 of the 99th Session of the International Labour Conference*, p. 11, available at http://www.ilo.org/wcmsp5/groups/public/—ed_norm/—relconf/documents/meetingdocument/wcms_141325.pdf.

**** Convention (No. 111) concerning Discrimination in respect of Employment and Occupation, 1958. United Nations, Treaty Series, vol. 362, p. 31.

1(1)(b) of Convention No. 111 to include HIV-related discrimination among the discriminations they undertake to eliminate.*

2. International Fund for Agricultural Development

(*a*) Interoffice memorandum to the Audit Committee concerning legal issues to be considered when developing a Code of Conduct for the Members of the Executive Board of the International Fund for Agricultural Development (IFAD or the Fund)

Codes of Conduct in other specialized agencies of the United Nations—Legal situation in IFAD—Members of the Executive Board are States, not individuals—Representatives are not officials of IFAD and their conduct is not within the organic jurisdiction of any of IFAD's bodies—Discussion of a compatible approach of other multilateral financial institutions within IFAD's legal framework

Introduction

1. For the purpose of the deliberations of the Audit Committee, this memorandum surveys the legal issues—derived from the basic texts of the Fund as well as from the relevant rules of international law—to be considered when contemplating the development of a code of conduct for the Members of the Fund's Executive Board. It analyses these issues and articulates some suggestions on how they could possibly be handled.

2. It has now become common for multilateral financial institutions to adopt codes of conduct for the members of their executive boards. Such codes of conduct invariably are to provide Executive Directors with guidance on ethical standards in connection with their roles and responsibilities in the micro finance institutions. These codes, which apply to the members of Executive Boards, their alternates, and advisors to Executive Directors, typically mandate regular financial disclosure reports, and underline the importance of the observance of the highest standards of ethical conduct.

3. At its 97th session (15–16 September 2009) the Executive Board, while noting [State's] opposition to this idea,[1] agreed that the Audit Committee should proceed with the development of a code of conduct for IFAD's Executive Board members.

4. The multilateral financial institutions that have hitherto adopted codes of conduct for the members of their respective executive boards differ from IFAD in terms of the composition of these bodies, which impacts significantly on the development of a code of conduct for the members of the Executive Board. For the present purposes, it suffices to refer to the multilateral financial institutions, which like IFAD are also specialized agen-

* *Provisional Record No. 13 of the 99th Session of the International Labour Conference*, p. 82, available at http://www.ilo.org/wcmsp5/groups/public/—ed_norm/—relconf/documents/meetingdocument/wcms_141773.pdf.

[1] Decisions and deliberations of the ninety-seventh session of the Executive Board (EB 2009/97/INF.7) para. 41. Available from http://intradev:8015/gbdocs/eb/97/e/EB-2009–97-INF-7.pdf.

cies of the United Nations,[2] i.e., the International Monetary Fund (IMF),[3] the International Bank for Reconstruction and Development—World Bank (IBRD),[4] the International Development Association (IDA),[5] and the International Finance Corporation (IFC).[6] The selection of these institutions as comparators for the purpose of the present memorandum relates to the fact that, unlike the regional international financial institutions, the rules and principles reflected in the 1975 Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character* are of relevance when dealing with the issue of codes of conduct in the specialized agencies. Moreover, as specialized agencies of the United Nations, the Convention on the Privileges and Immunities of the Specialized Agencies** contains relevant rules and principles that apply equally to the IMF, the World Bank, the IDA, the IFC and IFAD, but not to the regional international financial institutions.

The legal situation in the other multilateral financial institutions

(a) The Board members are individuals, not States

5. In three of these organizations the individual composition of their executive organs is first expressed in their denomination, which is referred to simply as "Executive Directors" in the case of the IBRD and "Board of Directors" in IFC. Only in the case of the IMF is the term "Executive Board" used to refer to the executive organ. Still article XII, section 3(b) of the IMF Articles of Agreement*** introduces the office of Executive Directors by stipulating that the Executive Board shall consist of five Executive Directors appointed by the five members having the largest quotas and fifteen shall be elected by the other

[2] Specialized agencies may or may not have been originally created by the United Nations, but they are incorporated into the United Nations System by the United Nations Economic and Social Council acting under Articles 57 and 63 of the Charter of the United Nations.

[3] IMF became a specialized agency of the United Nations on 15 November 1947. Protocol concerning the entry into force of the Agreement between the United Nations and the International Monetary Fund (United Nations, *Treaty Series*, vol. 16).

[4] The World Bank became a specialized agency of the United Nations on 15 November 1947. Protocol concerning the entry into force of the Agreement between the United Nations and the IBRD (United Nations, *Treaty Series*, vol. 16, p. 341).

[5] IDA became a United Nations specialized agency on 27 March 1961. Agreement between the United Nations and the IDA (United Nations, *Treaty Series*, vol. 224, p. 582).

[6] IFC became a specialized agency of the United Nations on 12 February 1957. Agreement between the United Nations and the IBRD (acting for and on behalf of the IFC) on relationship between the United Nations and the IFC (United Nations, *Treaty Series,* vol. 265, p. 312).

[*] A/CONF.67/16 (not yet in force).

[**] United Nations, *Treaty Series*, vol. 33, p. 261.

[***] United Nations, *Treaty Series*, vol. 2, p. 39.

members, with the Managing Director as chairman.[7] One clear indication that the term "Executive Directors" found in the constituent instruments of the other multilateral financial institutions refers to individuals, not States, can be found in the provision concerning succession and vacancies. The charters of those institutions provide that the Executive Directors shall continue in office until their successors are appointed or elected. If the office of an elected Executive Director becomes vacant more than ninety days before the end of his term, another Executive Director shall be elected for the remainder of the term by the members that elected the former Executive Director. While the office remains vacant, the Alternate of the former Executive Director shall exercise his powers, except that of appointing an Alternate.[8] Obviously, there would be no need for any such transitional measures if the members of the Executive Board were States rather than individuals. Another indicator can be found in the provision that states that Executive Directors and their Alternates shall be entitled to remuneration in the form of salary and supplemental allowances at such annual rates as shall be determined from time to time by the Board of Governors.[9] Moreover, there are provisions that specifically speak of "individuals" when referring to the Executive Directors of those institutions.[10]

6. Thus in these multilateral financial institutions the membership of the executive organ is for individuals who are formally called "Executive Directors", not countries.[11]

(b) Executive Directors are officials of the organization

7. The Executive Boards of the Bretton Woods institutions were designed in such a way that Executive Directors' exclusive loyalty would be to the institution rather than to

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[7] Similarly, according to section 4(b) of article V of the Articles of Agreement of the World Bank, there shall be twelve Executive Directors of whom five shall be appointed, one by each of the five members having the largest number of shares, and seven shall be elected according to schedule B by all the Governors other than those appointed by the aforementioned members. It is stated in IDA's charter that the Board shall be composed *ex officio* of each Executive Director of the World Bank who shall have been (i) appointed by a member of the Bank which is also a member of IDA, or (ii) elected in an election in which the votes of at least one member of the Bank which is also a member of IDA shall have counted toward his election. The Alternate to each such Executive Director of the World Bank shall *ex officio* be an Alternate Director of IDA. Finally, by virtue of article IV, section 4(b) of the IFC Articles of Agreement, the Board of Directors of the IFC shall be composed *ex officio* of each Executive Director of the Bank who shall have been either appointed by a member of the Bank which is also a member of the IFC, or elected in an election in which the votes of at least one member of the Bank which is also a member of the IFC shall have counted toward his election. The Alternate to each such Executive Director of the Bank shall *ex officio* be an Alternate Director of the IFC. Any Director shall cease to hold office if the member by which he was appointed, or if all the members whose votes counted toward his election, shall cease to be members of the IFC.

[8] See, for example, article XII, section 3(f) of the IMF Articles of Agreement; and article V, section 4(d) of the IBRD Articles of Agreement (United Nations, *Treaty Series,* vol. 2).

[9] See, for example, section 14 (e).i. of the By-Laws of the IMF. Available at http://www.imf.org/external/pubs/ft/bl/blcon.htm.

[10] *Ibid*., section 14 (h) and (i).

[11] See, for comparison, Ibrahim F.I. Shihata, "Status of the Bank Directors—Memorandum by the General Counsel dated May 27, 1994", in *The World Bank Legal Papers* (The Hague, Boston, London; Martinus Nijhoff Publishers; 2000), p. 653. Written in response to a request by an Executive Director and circulated to all Executive Directors.

their own capitals. Some countries, however, have not consistently abided by this model. This has created some problems. Some directors, moreover, have expressed a sense of having been treated more like ambassadors sent by their capitals than representatives of their constituency members and the institution.[12] Notwithstanding this practice, the fact remains that technically the Executive Directors are international officials. The World Bank General Counsel has explained this situation by pointing out that the status of the Executive Director as an official of the institution does not mean that she/he is detached from her/his government authorities.[13] However, the international status is underscored by the fact that all Executive Directors of the aforementioned institutions, whether elected or appointed, are remunerated by those organisations.[14] Under the by-laws of the respective institutions, Executive Directors and Alternates are required to devote all the time and attention to the business of the Bank that its interests require, and between them to be continuously available at the principal office of the concerned institutions. In 1987 the General Counsel succinctly stated the status of the Executive Directors:

> "An Executive Director, as an official of the Bank who is appointed or elected by a member or members of the Bank, and whose votes depends on voting strength of the member or member who appointed or elected him, owes his duty both to the \bank and his "constituency" and vote on its instructions, but he may not split the votes. However, he is not to act simply as an ambassador of the government or governments which appointed or elected him, and is expected to exercise individual judgment in the interest of the Bank and its members as a whole."[15]

8. The implication of the fact that these Executive Directors are international officials, is to a certain extent illustrated by opinion of the Office of the General Counsel of the United States Department of the Treasury on the question whether the United States Federal Vacancies Reform Act ("Vacancies Reform Act" or "Act"), 5 U.S.C. §§ 3341–3349d (Supp. IV 1998), applies to vacancies in the offices of the United States Executive Director and the Alternate United States Executive Director at the IMF. The opinion concludes that the United States Executive Director and the Alternate United States Director at the IMF and the World Bank are not part of an Executive agency, and therefore vacancies in those offices are not covered by the Federal Vacancies Reform Act.[16]

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[12] See, for example, Eric Santor, "Does the Fund Follow Corporate Best Practice?", in Banque du Canada Working Paper 2006–32 / Document de travail 2006–32, Governance and the IMF. Available from www.bankofcanada.ca/en/res/wp/2006/wp06–32.pdf, pp. 8–9.

[13] "Status of the Bank Directors—Memorandum by the General Counsel dated May 27, 1994" (see pp. 655–656).

[14] See, for comparison, *ibid.,* p. 653–655 and F. Gianviti, "Decision Making in the International Monetary Fund", in *Current Developments in Monetary and Financial Law*, vol. 1, (Washington, D.C., International Monetary Fund, 1999), pp. 31–67, p. 46.

[15] Shihata, Ibrahim F.I., "Prohibition of political activities in the Bank's work, Legal opinion of the General Counsel", in *The World Bank Legal Papers* (The Hague, Boston, London; Martinus Nijhoff Publishers; 2000), p. 244.

[16] United States, Acting Deputy Assistant Attorney General, "Applicability of the Federal Vacancies Reform Act to the Vacancies at the International Monetary Fund and the World Bank", memorandum for the General Counsel of the Department of the Treasury. Available from http://www.usdoj.gov/olc/imfrevised.htm.

9. The conclusion that these Executive Directors are international officials has far reaching legal consequences, the most important being that they are fully subject to the organic jurisdiction of the organization concerned. In other words, their legal status is not regulated by the rules and principles reflected in the 1975 Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character, but by the rules of the organizations and those set out in the Convention on the Privileges and Immunities of the Specialized Agencies, which came into force on 2 December 1948.

(c) The power to regulate the conduct of the Executive Directors

10. As officials of these organizations, their conduct may be regulated by the organization and sanctions administered by such organization in case of non-compliance. It is by virtue of this organic jurisdiction over the Executive Directors that the IMF, IFC and World Bank had the power to promulgate the codes of conduct for the members of their executive organs.

The Legal situation in IFAD

(a) Members of the Executive Board are States, not individuals

11. Contrary to the situation in the IMF, World Bank IDA and the IFC, in IFAD the Executive Board is composed of members "elected from Members from the Fund".[17] Accordingly, when the Governing Council elects members of the Executive Board through the process set forth in schedule II of the Agreement Establishing IFAD[*] (the Agreement), it does not elect any particular individual, but States.[18] The Executive Board acknowledged this particularity at its first session on 14 December 1977, the Executive Board confirmed this when it noted that membership in the Executive Board consisted of the Member States of IFAD.[19] It is to be noted that, unlike the case of the aforementioned organizations, none of the IFAD's basic documents employs the term "Executive Director" to refer to the members of the Executive Board, despite the fact that some used that term colloquially in IFAD. The official denomination used by the Agreement, the By-Laws and most notably rule 7 of the Rules of Procedures of the Executive Board is: "Representative of a Member or Alternate".[20]

(b) Representatives of Members and Alternates are not officials of IFAD

12. The foregoing implies that the representatives of Members and Alternates are not officials of IFAD. This is underscored in section 5 (e) of article 6 of the Agreement and section 5 of the IFAD By-Laws, which state that—unlike the case in the other multilateral financial institutions—the representatives of Members and Alternates of the Executive Board shall serve without remuneration from the Fund. The Governing Council decided

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[17] Section 5(a) of article 6 of the Agreement Establishing IFAD.

[*] United Nations, *Treaty Series*, vol. 1059, p. 191.

[18] See schedule II 3(a)-(c) of the Agreement.

[19] Minutes of the First Session of the Executive Board of IFAD of 6 February 1978 (EB/1), para. 9. Available from http://intradev.ifad.org/ifbibl/.

[20] See article 6, section 5 (e), of the Agreement and section 4 of the By-Laws for the Conduct of the Business of IFAD. Available from http://www.ifad.org/pub/basic/bylaws/e/!04by-la.pdf.

that they shall only be entitled to receive actual expenses incurred for travel by the most direct route to and from the place of the meeting, unless such right is waived by the Member concerned.

(c) Lack of power to regulate the conduct of representatives of Member States

13. As representatives of Members and Alternates, rather than officials of IFAD, the rules and principles reflected in the 1975 Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character apply to the members of the Executive Board. This means that the conduct of those representatives is not within the organic jurisdiction of any of IFAD's bodies, be it the Governing Council, the Executive Board or the President. This lack of organic jurisdiction means also a lack of enforcement power.

A possible approach within IFAD's legal framework

14. The fact that Members of the Executive Board are Member States, not individuals, and that Representatives of Members and their Alternates are not officials of IFAD, does not mean that the objectives pursued by the codes of conduct in other multilateral financial institutions can not be achieved within IFAD's legal framework. In the following paragraphs an approach that is compatible with that framework will be developed for consideration by the Audit Committee.

(a) Legal basis and competent authority

15. The representatives of Members in the Executive Board of the Fund are entrusted by the Member States that have selected them with responsibilities for ensuring that the Fund carries out the mandate prescribed in the Agreement. Therefore, Member States bear the responsibility to ensure that their representatives satisfy the required personal and professional conduct that meets the highest standards. Thus, notwithstanding the fact that IFAD's organic jurisdiction does not extend over the Member States' representatives, the Governing Council has assumed the power to prescribe that each Member and Alternate Member of the Executive Board shall appoint a person competent in the fields of the Fund's activities to represent it on the Board and that each such representative shall serve on the Board at least for one term of the Member or the Alternate Member concerned, unless such Member decides otherwise.[21] This decision expresses the Governing Council's understanding that, notwithstanding the principle of Member States' freedom of appointment, the organization has an interest in requiring Member States to designate representatives who have the necessary technical and personal competencies to serve in the Executive Board. The phrase "a person competent in the fields of the Fund's activities" is employed in section 4 of IFAD's By-Laws. It points to several fundamental elements that are necessary but not sufficient for proper discharge of the responsibilities of the Executive Board, i.e., technical competence, ethical understanding, and communication skills, excellence, humanism, accountability, and altruism. If freedom of appointment of Member States were to entail that they could ignore these elements when designating their representatives in the Executive Board, achievement of the organization's objective and the proper administration of business could not be guaranteed.

[21] Section 4, By-Laws for the Conduct of the Business of IFAD.

Hence, [it is in] the interest of the Fund to require its Member States to designate persons with the necessary competence in the fields of its activities.

16. Admittedly, section 4 of the By-Laws is currently couched in rather broad language, but nothing prevents the Executive Board to propose to the Governing Council to spell out in more details the ethical dimensions of the competencies Member States are expected to ensure when designating their representatives in the Executive Board. The By-Laws were adopted by the Governing Council pursuant to article 6, section 2(f) of the Agreement, which states that the Governing Council may, by a two-thirds majority of the total number of votes, adopt such regulations and by-laws not inconsistent with the Agreement, as may be appropriate for the conduct of the business of the Fund. When delegating its powers to the Executive Board under article 6, section 2(c) of the Agreement, the Governing Council expressly reserved this power. Accordingly, any amplification of section 4 of the By-Laws has to be adopted by the Governing Council. There are nevertheless two aspects of a code of conduct that could only be regulated by the Executive Board. The first aspect concerns the issue of post-service employment within IFAD. It would be the responsibility of the Executive Board to act under article 6, section 8(d) of the Agreement in order to amend the Human Resources Policy in order to stipulate the necessary regulation. Similarly, an Ethics Committee could be established by the Board pursuant to rule 11 of its Rules of Procedures.

(b) Contents of a code of conduct

i. Application

17. Because of the international status of the Executive Directors in the other multilateral institutions, the codes of conduct adopted in these organizations apply to Executive Directors, Alternates and Advisors unless otherwise indicated.[22] With respect to assistants to Executive Directors, the provisions of the Staff Code of Conduct normally apply to assistants in their own offices, and should take such measures as are necessary and appropriate.[23] For reasons derived from the fact that representatives of Members

[22] Code of Conduct for Board Officials of the IBRD, IFC, IDA and the Multilateral Investment Guarantee Agency (MIGA) (together the World Bank Group), para. 1(b). Available from http://siteresources.worldbank.org/BODINT/Resources/CodeofConductforBoardOfficialsDisclosure.pdf; Code of Conduct for the Members of the Executive Board of the IMF, para. 2. Available from http://www.imf.org/external/hrd/edscode.htm; Code of Conduct for officials of the Board of Directors of the European Bank for Reconstruction and Development (EBRD), rule 2. Available from http://www.ebrd.com/about/strategy/general/code1.pdf; Code of Conduct for Executive Directors of the African Development Bank (AfDB) and the African Development Fund (AfDF), article 2. Available from: http://www.afdb.org/fileadmin/uploads/afdb/Documents/Generic-Documents/30716687-EN-CODE-OF-CONDUCT-EDS-ENGLISH.PDF; Code of Conduct for the Board of Directors of the Asian Development Bank (ADB), para. 2. Available from http://www.adb.org/bod/Code-of-Conduct.pdf.

[23] Code of Professional Ethics for the World Bank Group and the International Centre for Settlement of Investment Disputes (ICSID) is under construction. Available from http://web.worldbank.org/WBSITE/EXTERNAL/EXTABOUTUS/ORGANIZATION/ORGUNITS/EXTETHICS/0,,contentMDK:21945064~menuPK:780507~pagePK:64168445~piPK:64168309~theSitePK:593304,00.html; Code of Conduct for EBRD Personnel and Experts, para. 2, available from http://www.ebrd.com/about/strategy/general/code2.pdf; Code of Conduct for Staff of the IMF, para. 1, available from: http://www.imf.org/external/hrd/code.htm; Code of Conduct for Staff members of the AfDB Group, para. 1.2, available from http://www.afdb.org/en/about-us/structure/auditor-generals-office-oagl/integrity-and-anti-corruption/code-of-conduct/.

and Alternates, as well as their assistants are not officials of IFAD, the foregoing cannot be replicated in IFAD. The scope of IFAD's code will have to be restricted to the persons designated as representatives of Members and Alternates.

ii. Basic standard of conduct

18. Typically, the codes of conduct of the other multilateral financial institutions stipulate that the Executive Directors should observe the highest standards of ethical conduct and that in the performance of their duties, they are expected to carry out the mandate of the institution to the best of their ability and judgment, and to maintain the highest standards of integrity. In the case of IFAD, this will have to be articulated differently. A possible articulation could be:

> "Member States shall require that their representatives should observe the highest standards of ethical conduct and that in the performance of their duties, they are expected to carry out the mandate of the institution to the best of their ability and judgment, and to maintain the highest standards of integrity."

iii. Conduct within the IFAD

19. The codes adopted by the other multilateral financial institutions contain provisions stating that the Executive Directors should treat their colleagues and the staff with courtesy and respect, without harassment, physical or verbal abuse. Moreover, they provide that the Executive Directors should exercise adequate control and supervision over matters for which they are individually responsible, and they should ensure that property and services of the institution are used by themselves and persons in their offices for official business only.[24] Clearly, as the prescriptions presume that the Executive Directors are officials of the institution and are resident, they are not relevant to IFAD.

iv. Protection of confidential information

20. Codes of conduct adopted in the other multilateral financial institutions also provide that in line with the rules and guidelines of the organization concerned, Executive Directors have the responsibility to protect the security of any confidential information provided to, or generated by the organization.[25] In the case of IFAD this requirement could be stated as follows by the Governing Council:

> "Member States shall require their representatives to protect the security of any confidential information provided to, or generated by the Fund in accordance with the rules and guidelines of the organisation."

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[24] Code of Conduct for Board Officials of the World Bank Group, para. 5.; Code of Conduct for the Members of the Executive Board of the IMF, para. 4.; Code of Conduct for Officials of the Board of Directors of the EBRD, rule 11; Code of Conduct for Executive Directors of the AfDB and the AfDF, article 4; Code of Conduct for the Directors of the ADB, para. 9.

[25] Code of Conduct for Board Officials of the World Bank Group, para. 4; Code of Conduct for the Members of the Executive Board of the IMF, para. 5; Code of Conduct for Officials of the Board of Directors of the EBRD, rule 10; Code of Conduct for Executive Directors of the AfDB and the AfDF, article 15; Code of Conduct for the Board of Directors of the ADB, para. 7.

vi. Public statements

21. In IFAD, the Executive Board operates exclusively on a collective basis and the representatives of Members and Alternates are not externally recognizable as such. It would appear that since the representatives remain officials of the designating Member States, unlike in the case of the other multilateral institutions,[26] in IFAD no useful purpose will be served by a stipulation that states that when making public statements or speaking to the media on Fund-related matters, representatives should make clear whether they are speaking in their own name or on behalf of the Executive Board.

vii. Conflicts of interest

22. It is common for codes of conduct of multilateral financial institutions to provide that in performing their duties, Executive Directors will carry out their responsibilities to the exclusion of any personal advantage, and that they should avoid any situation involving a conflict, or the appearance of a conflict, between their personal interests and the performance of their official duties. The codes further provide that if such a conflict arises, Executive Directors should promptly inform the Ethics Committee and withdraw from participation in decision-making connected with the matter. If the conflict is potential rather than actual, Executive Directors should seek the advice of the Ethics Committee of the Board about whether they should recuse themselves from the situation that is creating the conflict or the appearance of conflict.[27]

23. It is to be presumed that, as they are serving government officials, the persons that represent Member States in IFAD's Executive Board are subject to the professional codes of conduct of their State and that by virtue thereof they are supposed to avoid conflicts of interest as described above. This presumption could be restated in the following terms in an IFAD code:

> "Member States shall ensure that they have appropriate rules and procedure in place to ensure that their representatives will carry out their responsibilities to the exclusion of any personal advantage, and that the representatives shall avoid any situation involving a conflict, or the appearance of a conflict, between their personal interests and the performance of their official duties. Similarly, for the event that such a conflict arises, Member States shall require that their representatives should promptly inform the national authority and withdraw from participation in decision-making connected with the matter."

24. It must be conceded, however, that from a pure legal standpoint, applying the concept of conflict of interest to the representatives of Member States is somewhat contradictory. As these representatives are officials of their governments, they owe loyalty to those governments and act upon the latter's instructions. Thus requiring a person that is

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[26] Code of Conduct for Board Officials of the World Bank Group, para. 2(4)(c); Code of Conduct for the Members of the Executive Board of the IMF, para. 6; Code of Conduct for Officials of the Board of Directors of the EBRD, Rule 2(c); Code of Conduct for Executive Directors of the AfDB and the AfDF, article 11; Code of Conduct for the Directors of the ADB, para. 7.

[27] Code of Conduct for Board Officials of the World Bank Group, para. 18; Code of Conduct for the Members of the Executive Board of the IMF, para 7; Code of Conduct for Officials of the Board of Directors of the EBRD, rule 3(a) and (b); Code of Conduct for Executive Directors of the AfDB and the AfDF, article 12; Code of Conduct for the Board of Directors of the ADB, para. 4(a) and (b).

executing a government instruction in an IFAD meeting on account of something related to their personal life, does not fully fit into the image of a delegate. It must be presumed that the Member State, irrespective the personal circumstances of its envoy, is the master of the contents of the instruction and will thus be able to manage the conflict of interest at the national level, without the need for this to reflect in any meeting of IFAD.

viii. Personal financial affairs

25. Multilateral financial institutions provide varyingly that Executive Directors should not use, or disclose to others, confidential information to which they have access, for purposes of carrying out private financial transactions.[28] To capture this principle the Governing Council could state in the code to be developed that:

> "Member States shall require their representatives to avoid having any direct of indirect financial interest in an IFAD operation and not to use information obtained in the discharge of their duties which is not otherwise available to the public for the purpose of directly or indirectly furthering their personal interests or the personal interests of any other person or entity including but not restricted to where this might lead to actual or perceived preferential treatment."

ix. Disclosures

26. Given that the representatives of Member States are not remunerated by IFAD nor are officials of the Fund, IFAD has no legal authority to require financial disclosure in the same way as is done by the other multilateral financial institutions. However, it is to be expected that government officials of the level of the persons eligible for designation as their representative are already subject to requirements under national law to make written disclosure to a compliance officer of any financial or business interests of their own or their immediate family members. Unlike persons who are officials of a multilateral institution, such representatives remain bound by such national requirement while serving on the Executive Board. Thus in the case of IFAD the following provision could be conceived:

> "It is incumbent upon the Member States to have mechanisms in place to ensure that their representatives, upon assumption of office, make written disclosure to a competent authority of any business interests of their own or their spouses that may give rise to a conflict of interest in IFAD. Upon the request of the Executive Board the Member shall share that information with the President."

x. Gifts and entertainment

27. Similar as with regard to financial disclosure, it must be presumed that in regard to acceptance of favours, gifts and entertainment,[29] representatives of Member States are

[28] Code of Conduct for Board Officials of the World Bank Group, para. 8 (b)(i)-(iii); Code of Conduct for the Members of the Executive Board of the IMF, para. 8; Code of Conduct for Officials of the Board of Directors of the EBRD, Rule 8; Code of Conduct for Executive Directors of the AfDB and the AfDF, article 14(i) and (ii); Code of Conduct for the Executive Directors of the ADB, para. 5.

[29] Code of Conduct for Board Officials of the World Bank Group, para. 10; Code of Conduct for the Members of the Executive Board of the IMF, para. 10; Code of Conduct for Officials of the Board of Directors of the EBRD, rule 7; Code of Conduct for Executive Directors of the AfDB and the AfDF, article 16; Code of Conduct for the Executive Directors of the ADB, para. 8.

required under national laws to exercise tact and judgment to avoid the appearance of improper influence on the performance of their official duties. It must be equally presumed that the ordinary courtesies of international business and diplomacy may be accepted, but substantial and unusual gifts, favours and entertainment, as well as loans and other services of significant monetary value, should not be accepted. Therefore, for the same reasons as stated in relation to financial disclosure, a provision stating the responsibility of the Member State should suffice:

> "It is incumbent upon Member States to have rules in place in regard to acceptance of favours, gifts and entertainment by their representatives and that they are required under national laws to exercise tact and judgment to avoid the appearance of improper influence on the performance of their official duties."

xi. Post-IFAD employment

28. As representatives of Member States remain officials of their countries, unlike in the other multilateral financial institutions, IFAD lacks the legal authority to require that when negotiating for, or entering into an arrangement concerning, prospective employment outside the Fund, representatives should not allow such circumstances to affect the performance of their duties.[30] However, IFAD has an interest in ensuring that where involvement in a Fund matter could be, or could be perceived as, benefiting the prospective employer, regardless of whether there is detriment to the Fund or their constituents, representatives should recuse themselves and be replaced from the corresponding session or item. Thus the Governing Council could provide as follows:

> "Member States shall require that when negotiating for, or entering into an arrangement concerning, prospective employment outside the Fund, representatives should not allow such circumstances to affect the performance of their duties. They shall ensure that where involvement in a Fund matter could be, or could be perceived as, benefiting the prospective employer, regardless of whether there is detriment to the Fund or their constituents, representatives should recuse themselves and be replaced from the corresponding session or item."

29. The other multilateral financial institutions also have a cooling-off period for post-service employment with the institution.[31] In the case of the Fund this can be achieved in the following way by a provision in the human resources policy adopted by the Executive Board:

> "In the exercise of his appointment and contracting authority under the Agreement, the President shall not consider eligible for appointment as a staff member or contracting as a consultant or for any representative of a Member State who has served on the Board less than two (2) years following the end of such service."

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[30] Code of Conduct for Board Officials of the World Bank Group, para. 9(c); Code of Conduct for the Members of the Executive Board of the IMF, para. 11; Code of Conduct for Officials of the Board of Directors of the EBRD, rule 6(a)-(b); Code of Conduct for Executive Directors of the AfDB and the AfDF, article 17(i)-(ii); Code of Conduct for the Executive Directors of the ADB, para. 6(a).

[31] Code of Conduct for Board Officials of the World Bank Group, para. 9(e); Code of Conduct for the Members of the Executive Board of the IMF, para. 11; Code of Conduct for Officials of the Board of Directors of the EBRD, rule 6(c); Code of Conduct for Executive Directors of the AfDB and the AfDF, article 17(iii); Code of Conduct for the Executive Directors of the ADB, para. 6(b).

(c) Ethics Committee

30. A non-plenary Ethics Committee of the Board to consider matters relating to the codes of conduct is also standard in the other multilateral financial institutions. In addition, Ethics Committees are authorized to them the Board on ethical aspects of conduct, including the conduct of their Alternates, Advisors and assistants. It is common for the codes to provide that General Counsel of the institution, or if absent his/her representative, shall be the permanent secretary of the Committee. It appears that the Asian Development Bank differs from this rule. In that institution the Secretary of the institution acts as Secretary of the Ethics Committee. The meetings of the Ethics Committee shall be restricted to members only and the permanent secretary of the Committee except at the Committee's invitation. The responsibility of the Ethics Committees is to consider any alleged misconduct by an Executive Director, and any matters brought to its attention by the compliance officer concerning the disclosures made by Executive Directors about any actual or potential conflict of interest. The Executive Director concerned shall, in all cases, be given the opportunity to present his/her views to the Committee. If the Ethics Committee concludes that misconduct has been committed, and taking into account both the nature and seriousness of the misconduct and the Executive Director's prior record of conduct, the members of the Committee shall make recommendations to the Executive Board regarding whether a warning should be issued to an Executive Director, and whether such warning should be conveyed to the Governor(s) of the Member State (or States) that appointed, elected or designated the Executive Director.

31. As stated above, in IFAD, a similar Ethics Committee could be established by the Board pursuant to rule 11 of its Rules of Procedures. In the other institutions such Ethics Committees operate as follows. Upon receiving the recommendations of the Ethics Committee, the Executive Board would consider which of the following actions to take: (i) no further action in the matter; (ii) issuance of a warning to the Executive Director; or (iii) issuance of a warning to the Executive Director and transmittal of the warning to the Governor(s) of the member country (or countries) that appointed, elected or designated the Executive Director. The Executive Director concerned shall, in all cases, have the opportunity to present his/her views to the Committee of the whole, but shall not participate in the deliberations on the case.[32] Given that no sanction will have to be imposed by, but rather that the Member State concerned will be informed of any recommended action, there is no legal objection against replicating the above system within IFAD. The question is, however, whether such Committee would be needed in IFAD, given that the Executive Board is not composed of individuals but of Member States. Thus in the case of IFAD such a Committee would not be overseeing activities of officials of the organization itself, but of representatives of Member States, although it would have no power over such representatives.

[. . .]

5 October 2009

[32] Code of Conduct for Board Officials of the World Bank Group, para. 17(c); Code of Conduct for the Members of the Executive Board of the IMF, para. 12; Code of Conduct for Officials of the Board of Directors of the EBRD; Code of Conduct for Executive Directors of the AfDB and the AfDF, article 18(iv); Code of Conduct for the Executive Directors of the ADB, para. 10.

(*b*) Concept note to the Executive Management Committee (EMC) regarding managing partnerships with Member States in contribution arrears

IRREVOCABLE OBLIGATION OF MEMBER STATES TO SUBMIT PAYMENT OF INITIAL CONTRIBUTIONS—IFAD'S JUSTIFIED AND UNWAVERING CLAIM TO RECEIVE REPLENISHMENT CONTRIBUTIONS—REDUCTION OR EXEMPTION OF CONTRIBUTIONS IS NOT PERMITTED—EXTINCTIVE PRESCRIPTION—THE PASSAGE OF TIME IS NOT DEEMED TO EXTINGUISH THE CLAIM OF LIQUIDATED SUMS—ATTRIBUTION OF PROJECT FINANCING TO A MEMBER STATE WITH CONTRIBUTION ARREARS—OBLIGATION TO SEEK FINALITY IN ACCORDANCE WITH CUSTOMARY INTERNATIONAL LAW—DISPUTES REGARDING CONTRIBUTION ARREARS MAY BE REFERRED TO THE INTERNATIONAL COURT OF JUSTICE FOR AN ADVISORY OPINION

A. Background

1. In response to a request made during the EMC meeting of [date], this concept note will address the issue as to how the Fund should manage partnerships with Member States in contributions arrears.

2. According to the information that has been received by this Office from the Finance Committee (FC), at present, 48 Member States have made commitments that have not been fulfilled. Of these 48 Member States, 4 Member States have unfulfilled initial resources commitments totalling approximately [sum]. On the other hand, all these Member States have unfulfilled replenishment commitments totalling approximately [sum]. In summary, unpaid contribution and replenishment commitments attain approximately [sum]. This outstanding amount poses significant challenges to the funding capacity of IFAD.

3. Unlike the case of loan arrears, at present the Fund has not formulated a policy on how to deal with contribution arrears owed by Member States. According to the information provided by FC, the settlement of contribution arrears has so far been mainly pursued on a case by case basis with Member States. However, the overall issue has never been followed up by senior management. Given the implications that unpaid contribution commitments could have to the Fund's operations, it is recommended that the Fund addresses this question without any further delay.

B. Summary of conclusions

4. Although a more detailed analysis of the recommendations put forward by this Office is provided below, at this conjecture, a summary of the conclusions of this paper shall be articulated.

5. Firstly, IFAD has the legal right to receive the amount that was committed to its benefit by a Member State in the instrument of ratification, acceptance, approval, or accession deposited by the Member State during the course of the initial contributions of IFAD. The irrevocable obligation is registered with the international treaty giving rise to IFAD and carries a very significant political and legal weight. As far as replenishment contributions go, IFAD also maintains a justified and unwavering claim to receive the full amount. On this matter, perhaps the advisability of reorganizing or restructuring the future Governing Council replenishment resolutions may be explored so that they clearly set out the commitments for Member States in unequivocal terms.

6. Moreover, the Agreement Establishing IFAD* (the Agreement) does not permit approving reductions of, or "forgiving", contribution commitments. Section 3 of regulation X of the Financial Regulations of IFAD is a clear example of the foregoing.

7. Furthermore, the reporting system currently being implemented by IFAD, through the President's reports to the Governing Council on the status of contributions, needs to be overhauled, reformed and developed in order to better engage IFAD's governing bodies in a more assertive and complete reporting system. In this way, reference is made to the reporting systems of other international financial institutions, like the International Monetary Fund (IMF), where reporting mechanisms include enforcement measures that compel the Member State to act with regards to its contribution arrears. The recommendation of implementing similar reporting systems is therefore submitted.

8. On the other hand, IFAD can attribute project financing to a Member State whom has contribution arrears if it wishes to; there are no legal impediments that would prevent IFAD from doing so.

9. Finally, customary international law instructs that IFAD is held to an obligation to seek finality on the issue concerning a Member State's contribution arrears. The obligation to seek finality implies that IFAD and the Member State must establish a communication channel in furtherance of the aim to seek a peaceful settlement to the Member State's contribution arrears. It is of course possible that a Member prefers that a third party is asked to rule on the question as to whether they owe a contribution. In this case, and without pre-empting what the decision of the Executive Board or the Governing Council may be, considering IFAD is an international organization, the Executive Board or the Governing Council may opt to refer the dispute to the International Court of Justice for an advisory opinion.

C. Legal analysis

I. IFAD's right to receive contribution commitments

10. IFAD's right to receive contribution commitments must be distinguished between initial contribution commitments versus replenishment commitments. Indeed, as shall be demonstrated, the obligation to contribute to the initial resources of the Fund carries more weight than the commitment a Member State has made with regards to replenishment contributions.

11. Following the creation of IFAD, the Agreement establishing IFAD provided that original Members in categories I or II were bound to contribute to the initial resources of IFAD, the amount expressed in their instrument of ratification, acceptance, approval or accession (section 2 a) of article 4 of the Agreement). In this way, the contribution amount specified by the Member in its instrument of ratification, acceptance, approval or accession was registered and formed a part of the treaty that gave rise to IFAD. It is equally worth mentioning that the Agreement is registered with the United Nations Treaty Section. As a result, the obligation to pay the amount specified in the instrument of ratification, acceptance, approval or accession is an inherent and irrevocable obligation that falls upon Member States. The legal weight of this assertion is further compounded by the fact that nothing, including the termination of the operations or the distribution of the assets

* United Nations, *Treaty Series*, vol. 1059, p. 191.

of the organization, could possibly exempt a Member State from contributing to the initial resources of IFAD.

12. Article 4, Section 2 a) of the Agreement was later amended by resolution 86/XVIII of the Governing Council in 1995, so that henceforth there is no obligation for Members from category I and II to contribute to the initial resources of IFAD. Therefore, contributions to IFAD are now voluntary and any new Member State shall specify in its instrument of ratification, acceptance, approval or accession the amount of its voluntary contribution. It is worthy to recall that the majority of Member States in contribution arrears are Members from category II who were originally bound to contribute to the initial resources of IFAD. In any case, the fact that contributions are now voluntary does not diminish in any way the obligation mentioned above.

13. Other than the initial contributions and the voluntary initial contributions mentioned in paragraphs 5 and 6 above, section 3 of article 4 of the Agreement stipulates that in order to assure the continuity of the Fund, the Governing Council may invite Members to make additional contributions to the resources of the Fund (the replenishment contributions). Moreover, resolution 22/V of the Governing Council reiterates the position taken in previous Governing Council resolutions by stipulating that, in order to make a contribution in the context of the Replenishment of IFAD, the contributing Member shall deposit with IFAD, as soon as possible, an instrument of contribution confirming the Member's commitment to contribute to IFAD's resources. In light of the above, it can be asserted that IFAD has a legal right to receive the replenishment contribution committed for its benefit if the criteria mentioned above are satisfied.[1] The legal obligation to fulfill replenishment contribution towards the Fund arises once an instrument of contribution has been deposited with the Fund.

II. Waiver of contribution commitment

14. Having established the obligatory nature of the commitments mentioned above, it is necessary to determine if any of the organs of the Fund may waive or "forgive" totally or impartially a contribution commitment to the Fund. It is of course inherent in IFAD's legal personality that it may waive a claim owing to it by a party, including its Member States, provided that the power to waive is neither expressly nor implicitly excluded. An analysis of the Agreement and of IFAD's other basic legal documents shows that the power to approve the reduction or "writing off" of a contribution commitment has not been attributed to any of its governing bodies and seems to be excluded by the very legal structure of the organization. Indeed, the Agreement does not foresee or address the situation of arrears in contribution commitments and as such, it does not propose any explicit solutions with regards to these scenarios. In this regard, two situations must be distinguished: a) the overdue initial contributions, and b) the replenishment contributions.

15. As mentioned earlier, initial contributions are considered to be irrevocable obligations registered with the international treaty giving rise to IFAD. Therefore, initial contributions committed to IFAD in an instrument of ratification, acceptance, approval, or accession and deposited pursuant to the Agreement carry a very significant political and legal weight. The amount of an initial contribution cannot be reviewed or revisited with-

[1] Governing Council resolution 154/XXXII (2009).

out revisiting and modifying the treaty establishing IFAD. The foregoing proves to be a rather unlikely scenario. On the other hand, replenishment contributions pose a different dynamic. This Office had previously opined, in an Office memorandum dated [date], that arrears in payments against instruments of contribution and promissory notes made during the course of the replenishment contributions may be reconsidered by a decision of the Governing Council. Hence, it would seem feasible for the Governing Council to authorize the "writing off" of arrears in payments against an instrument of contribution or a promissory note. Nevertheless, a careful reading of the Agreement and the aforementioned Office memorandum clearly establish the illusory nature of such an authorization by the Governing Council. Indeed, section 3 of article 4 of the Agreement, which forms the legal basis to replenishment resolutions and the contributions it ensues, stipulates that the replenishment contributions are made in the spirit of reviewing the adequacy of the resources available to the Fund, in the aim of exploring the advisability of seeking additional contributions from Member States. Moreover, the power to approve replenishment resolutions and any modification therewith, is a power that is reserved with the Governing Council in light of resolution 86/XVIII of the Governing Council. Therefore, if the Governing Council were to authorize reductions in replenishment contributions, it would by corollary have to conclude that the replenishment contributions it initially authorized are no longer necessary to ensure the adequacy of the Fund's resources. Furthermore, just like the Office memorandum clearly asserted, the waiver of a replenishment contribution would lead to accusations of discriminatory practice as well as hamper the delicate balance between contributions made from Member States in categories A, B, and C. For these reasons, it is hard to fathom how the Governing Council may ever authorize the waiver of replenishment contributions.

16. Hence, in the absence of an authorization emanating from the Governing Council, the obligation to contribute to IFAD's resources, except where so provided under general international law, remains steadfast. In support of this argument, the Financial Regulations of IFAD provide valuable insight. In particular, paragraph 3 of regulation X stipulates that:

> "The President may, after full investigation, with the approval of the Executive Board, authorize the writing-off of losses of cash, supplies, equipment and other assets, other than arrears of contributions or payments due under loan or guarantee agreements and shall inform the Executive Board."

17. The above provision notes that the power of writing off contribution commitments owed to IFAD is not within the President's ambit of powers and it reiterates the principle that the Fund does not "forgive" arrears in contributions.

18. To further buttress this argument, one may wish to consider the provision dealing with the option of commensurate modification that can be found in several replenishment resolutions,[2] most recently in paragraph 14 a) of the Governing Council resolution 154/XXXII on the Eighth Replenishment of IFAD's resources:

> "(a) Option of Commensurate Modification. In the case of an undue delay in the deposit of an instrument of contribution or in payment or of substantial reduction in its contribution by a Member, any other Member may, notwithstanding any provision to the contrary in this resolution, at its option, after consultation with the Executive

[2] See also Governing Council resolutions 141/XXIX (2006), 130/XXVI(2003), 119/XXIV(2001), 87/XVIII, 56/XII, and 37/IX.

> Board, make a commensurate modification, ad interim, in its schedule of payment or amount of contribution. In exercising this option, a Member shall act solely with a view to safeguarding the objectives of the replenishment and avoiding any significant disparity between the relative proportion of Members' total contributions until such time that the Member whose delay in the deposit of an instrument of contribution and/or payment or reduction in its share causing such a move by another Member has acted to remedy the situation on its part or the Member exercising the option revokes its decision taken under this provision."

19. Clearly, the commensurate modification option is not intended to lead to an actual reduction of contribution commitments already made. Instead, it is a measure put at the disposal of IFAD Members in order to apply collective and persuasive pressure on Members who delay either depositing their instrument of contribution or paying their contribution, or who choose to substantially reduce their contribution commitments. Indeed, in exercising this option, the Member shall act solely with a view to safeguard the objectives of the replenishment. Moreover, it should also be noted that the application of the commensurate modification option is limited in terms of time and scope. Firstly, the exercise of this option shall be limited until such time that the Member whose delay in the deposit of an instrument of contribution and/or payment or reduction in its share has acted to remedy the situation. Secondly, the scope of the commensurate modification option is also limited in terms of proportions, i.e., a Member shall only make a commensurate modification in its schedule of payment or amount of contribution. From the foregoing, the commensurate modification option put aside, no other reduction in contribution amounts or payments thereof are permitted according to IFAD's basic legal documents.

III. Termination of obligations under international law

20. In the absence of any provision in the Agreement that would allow IFAD's governing bodies to forgive contribution commitments, the non-fulfilment of a contribution commitment may only be possible where a Member holds the right to invoke one or more of the conditions precluding wrongfulness under international law or any of the conditions under which treaty obligations can be suspended or terminated.

21. It should be noted that according to international law, and more specifically the 1969 Vienna Convention on the Law of Treaties[*] (hereby, Vienna Convention), the application of which is limited to States only, and the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations,[**] a State can suspend or terminate the application of a legal obligation under the following circumstances: (i) there is a material breach by any contracting party, in which case the party concerned may suspend or terminate the application of the obligation in relation to the defaulting party, (ii) external circumstances dictate a supervening impossibility of performing the duty imposed by the treaty, (iii) there happens to be a fundamental change in circumstances, and (iv) the emergence of a new peremptory rule of general international law renders any conflicting obligation void.

22. In any case, should a Member State choose not to fulfill its contribution commitments, the burden of demonstrating and proving that one of the grounds of suspension

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[*] United Nations, *Treaty Series*, vol. 1155, p. 331.

[**] A/CONF.129/15 (not yet adopted).

or termination mentioned above is satisfied rests upon it. Otherwise, IFAD's legal right to receive the full contribution commitments shall remain intact and in full force.

IV. Assertion of IFAD's claim under international law; the question of extinctive prescription

23. In order to address the question as to whether the Fund still has a claim under international law against Members in contribution arrears, recourse is had to the decisions of international tribunals in similar matters. One of the main considerations that international tribunals take into account is the question of "loss of the right to invoke responsibility". This question is governed by different, overlapping and competing legal concepts, such as waiver, acquiescence and extinctive prescription.[3] However, what is relevant to IFAD's situation is the concept of extinctive prescription.

24. Under general international law, the concept of extinctive prescription is based on the rationale that the lapse of time may lead to the elimination of legal positions. Despite the recognition in a great number of decisions that extinctive prescription is a ground for loss of claims[4] no fixed time-limits have ever been agreed upon. As such, this concept is applied on a case to case basis with considerable flexibility, and it involves the balancing of all relevant circumstances.[5]

25. One concern of the rules relating to delay is that additional difficulties may be caused to the respondent State due to the lapse of time; for instance, concerns over the collection and presentation of evidence.[6] Accordingly, a claim will not be inadmissible on grounds of delay, unless the circumstances are such that the respondent State has been seriously disadvantaged. While arbitral practice does not allow for a clear-cut definition of when defendant States are held to be at a disadvantage, the basic rationale was succinctly expressed in the *Loretta G. Barberie* case, where the arbitrator's views were that, delay in presenting claims would "produce certain inevitable results, among which are the destruction or obscuration of evidence by which the equality of parties is destroyed". In contrast, the argument for delay has been rejected in circumstances where the respondent State could not establish the existence of any prejudice on its part, namely where it has:

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[3] See James Crawford, "Loss of Right to Invoke", in *The International Law Commission's State Responsibility Articles: Introduction and Overview*, Daniel Bodansky and John R. Crook (The American Society of International Law, American Journal of International Law, 2002).

[4] *Certain Phosphate Lands in Nauru (Nauru* v. *Australia), I.C.J. Reports 1992*, p. 250, para. 20.

[5] Applied to specific cases, a lapse of more than 30 years did not constitute a bar against presenting a claim. See, for example, Tagliaferro Case, 1903, United Nations, *Reports of International Arbitral Awards*, vol. X, p. 593; Giacopini Case, 1903, United Nations, *Reports of International Arbitral Awards*, vol. X, p. 594. However, in the *Loretta G. Barberie* v. *Venezuela*, the arbitrators held 15 years to constitute an unreasonable delay giving rise to prescription (John Bassett Moore, *History and digest of the international arbitrations to which the United States has been a party, together with appendices containing the treaties relating to such arbitrations, and historical legal notes*, United States and Venezuelan Claims Commission Opinions, 1889–90, vol. 4, pp. 4199–4203 (Washington, Government Print Off., 1898). Available from http://www.heinonline.org/HOL/Page?collection=beal&handle=hein.beal/hdi0004&id=967).

[6] See James Crawford, "Loss of Right to Invoke".

(i) always been cognizant of the claim, and (ii) was in a position to collect and preserve evidence relating to the claim.[7]

26. International courts generally engage in a flexible weighing of relevant circumstances in any given case, taking into account such matters as the conduct of the respondent State and the importance of the rights involved. The decisive factor is whether the respondent State has suffered any prejudice as a result of a delay, in the sense that the respondent could have reasonably expected that the claim would no longer be pursued.[8] It has been established that the requirements for exacting contractual (liquidated) claims differ from non-contractual (non-liquidated) claims.[9] Accordingly, unless there is an express waiver or an abandonment of claims, it cannot be admitted that a respondent State could not have expected that a liquidated claim will not be pursued. IFAD's claim is a liquidated claim, and therefore, this principle would apply.

27. Unlike the payment of unliquidated sums, in the case of liquidated sums, the passage of time is not deemed to extinguish the claim. The distinction between liquidated and unliquidated sums of money plays an important role in answering the question as to what brings about the discharge of payments of monetary obligations. In particular, the time at which the payment of liquidated claim should be made depends on the terms of the instrument. The general rule is that time is not of the essence unless: the express terms of the instrument require otherwise, the nature of the instrument requires a contrary conclusion, or finally, if the debtor's delay becomes a fundamental breach. Where time is of the essence, exact compliance is required and the courts are reluctant in finding a waiver of the term.[10] Although IFAD's replenishment resolutions do not expressly state time to be of the essence, Members commit to making payments within the replenishment period, which is normally a three-year period unless a Member State and IFAD agree to a different time frame. Indeed, when the Members deposit their instruments of contributions, they specify a time frame within which they will make their replenishment contributions. Accordingly, the commitment to pay within the specified time frame is a binding commitment. Failure to pay in due time does not extinguish the obligation but rather triggers the secondary obligation to pay the amount due plus compensation in the form of monetary interest.

28. Moreover, it is submitted that it cannot be validly claimed that there has been any delay in presenting claims. It is clear from the practice of the Governing Council that IFAD has consistently affirmed its claims to outstanding contributions. This is most evident in the Governing Council resolutions of IFAD's replenishment, which starting with the Second Replenishment, invariably urge those Members, which have not yet paid the full share of their previous contributions to the resources of the Fund, to adopt effective measures to complete such payments as soon as possible.[11] It could therefore be argued that the extinctive prescription is pre-empted or interrupted where the holder of a right exercises that right. Previously, having studied the progress report on the First Replenishment (GC 6/L.7), the Governing Council appealed to all Members to meet their financial obligations

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[7] See *Tagliaferro case,* R.I.A.A vol.X, p.592 (1903); and Stevenson R.I.A.A.,vol.IX, p.385 (1903).

[8] See James Crawford, "Loss of Right to Invoke".

[9] *Ibid*.

[10] F.A Mann, *The Legal Aspect of Money*, Fifth Edition (Oxford, Clarendon Press, 1992).

[11] See preamble of Governing Council resolutions 37/IX and more recently resolutions 119/XXIV (2000), 130/XXVI (2003), 141/XXIX (2006) and 154/XXXII (2009).

to IFAD in a timely manner. In this regard, it is useful to recall that in *Certain Phosphate Lands in Nauru*, the International Court of Justice held it to be sufficient that Nauru had referred to its claims in bilateral negotiations with Australia in the period preceding the formal institution of legal proceedings in 1989.[12]

V. Responsibility of the president to seek finality

29. The President being the legal representative of IFAD is responsible for conducting the business of the Fund, under the control and direction of the Governing Council and the Executive Board. This responsibility entails, *inter alia*, the duty to collect contribution arrears due to the Fund. As such, in order to fulfill his duties to the Fund, the President has the discretion to explore, as well as put in place, internal dispute settlement processes, including negotiations and other amicable dispute settlement options. However, in the event the President encounters problems in collecting the aforementioned arrears through an amicable process, then he may explore other settlement options envisaged under the Agreement so as to seek finality on the matter.

30. As a matter of fact, starting with the First Replenishment resolution, the Governing Council has consistently entrusted both the President and the Executive with significant responsibilities with respect to the Fund's replenishment consultations and activities. In this regard, paragraph 4 of resolution 147/XXXI of the Governing Council instructs that: "The President of IFAD is requested to keep the Executive Board informed of the progress of the deliberations of the Consultation"; and paragraph 5 provides that: "The President of IFAD is requested to provide such assistance to the Consultation as may be necessary for the effective and efficient discharge of its functions." Moreover, paragraph 22 of resolution 154/XXXII of the Governing Council provides that: "The President of the Fund shall be requested to submit to the thirty-third session and subsequent sessions of the Governing Council reports on the status of commitments, payments and other relevant matters concerning the replenishment. The reports shall be submitted to the Governing Council together with the Executive Board's comments, if any, and its recommendations thereon."

31. Furthermore, the resolutions also determine that the Executive Board shall periodically review the status of contributions and shall take such actions, as may be appropriate, for the implementation of the said resolutions.[13] The above mentioned replenishment resolutions determine the proactive role the President (in conjunction with the Executive Board) is assigned in view of ensuring contribution payments. The replenishment resolutions therefore task the President with important initiatives in this regard. Most importantly, the President is to submit reports that highlight the status of contribution arrears, in the overall objective of enforcing the Fund's right to receive its contribution commitments. The scope of these powers is broad enough to encompass powers to submit recommendations and enforcement measures in the reports. On this point, the current reports of the President on the status of contribution payments lack assertiveness and present shortcomings.

32. As a matter of fact, if one were to examine recent reports on the status of contributions to the Fund's replenishments, say for example the report on the Sixth Replenishment

[12] *Certain Phosphate Lands in Nauru*.

[13] Governing Council resolution 22/V (1982).

of IFAD's resources (GC 29/L.3), or the report on the status of contributions to the Seventh Replenishment of IFAD's resources (GC 32/L.4), one would appraise a very factual assessment of contribution commitments, and the payments thereof, for a specific replenishment cycle. In this way, the reports do highlight arrears in contribution commitments in a non-targeted fashion, albeit such disclosure is limited to the contribution commitments of a specific consultation period. What is absent however is the lack of any recommendations arising from the President or Executive Board in the aim of enforcing the Fund's right to receive the contributions that were committed to its benefit. The reports are thus devoid of any enforcement recommendation mechanisms. This reality stands in contrast to the practice adopted by other international financial institutions, most notably the IMF, where a very thorough process of reporting is implemented to safeguard the payment of the IMF's financial obligations.

33. According to the IMF's reporting mechanism, enforcement measures can go as far as notifying the member that unless the overdue obligations are settled promptly, a complaint will be issued to the Executive Board,[14] followed by further ultimate sanctions, such as suspension of voting and representation rights and procedures on compulsory withdrawal.[15] Other enforcement measures comprise of sending communications to all IMF Governors and the heads of selected international financial institutions regarding the Member's continued failure to fulfill its financial obligations to the IMF. It is also worthy to note that the IMF's system of reporting is more rigorous and targeted than IFAD's system of reporting. The Fund may seek guidance in the targeted approach of the IMF: immediate and prompt communications are sent to the Member State informing them of their contribution arrears and urging action in a well-defined timeframe. Failure to comply promptly results in further communication by management to the Governor stressing the seriousness of the failure to meet obligations and urging full settlement. The Fund, on the other hand, has been complacent in stressing and urging the payment of its contribution arrears.

34. A preliminary glance at the practice adopted by other international financial institutions demonstrates that other measures being proposed or implemented include calling upon the Member State to explain and justify, to the Executive Board, their failure to pay contribution arrears, coupled with urging the Member State to propose a plan of settlement or a schedule of payment for its contribution arrears. Whatever the case may be, the President may wish to decide on the course of action on a case by case basis. What should be considered however is the fact that a very thorough, rigorous and targeted system of reports and recommendations is paramount in safeguarding the payment of the Fund's financial obligations, as well as being an efficient pre-emptive measure that prevents further escalations and/or corrective measures.

35. Against this background, it is incumbent on the President to act under the provisions of the replenishment resolutions in order to present options to the Board, and ulti-

[14] See IMF, *Review of the Fund's Strategy on Overdue Financial Obligations* (15 August 2008).

[15] It is important to note that amendments to the Articles of Agreement of the IMF were necessary in order to implement the new rigorous reporting system that is followed through by the above mentioned sanctions. See Joseph Gould, "The IMF Invents New Penalties", Towards More Effective Supervision by International Organizations; Essays in Honour of Henry G. Schermers, Volume I, Martinus Nijhoff Publishers, p. 127-147. At this conjecture, this Office has not examined the need to amend the Agreement Establishing IFAD in order to implement a more rigorous reporting system, followed by tougher sanctions.

mately to the Governing Council, for dealing with contributions arrears. In this context, consideration must be given to the possibility that delinquent Members may have a different view about the existence of any obligations, in which case a formal legal determination of whether such obligation exists will be required. As such, in the advent of a dispute, the need to interpret the application of the provisions of the Agreement may arise. In such a situation, the provisions of article 11 of the Agreement are insightful:

> Section 1(a) "Any question of interpretation or application of the provisions of the Agreement arising between a Member and the Fund or between Members of the Fund shall be referred to the Executive Board for a decision . . ."
>
> Section 1(b) "Where the Executive Board has given a decision . . . any Member may require that the question be referred to the Governing Council, whose decision shall be final. Pending the decision of the Governing Council, the Fund may, so far as it deems necessary, act on the basis of the decision of the Executive Board."

36. It is of course possible that the Member in question prefers that a third party is asked to rule on the question as to whether they owe a contribution. In this case, and without pre-empting what the decision of the Executive Board or the Governing Council may be, considering IFAD is an international organization, the Executive Board or the Governing Council may opt to refer the dispute to the International Court of Justice for an advisory opinion. Such an advisory opinion will undoubtedly be premised on general principles of international law, as outlined earlier. Whereas an advisory opinion is not binding, it is persuasive and may inform the Fund on the next cause of action, as well as any enforcement mechanisms.

D. Recommendation

37. To recapitulate, IFAD has the legal right to receive the amount that was committed to its benefit by a Member State in the instrument of ratification, acceptance, approval, or accession deposited by the Member State during the course of the initial contributions of IFAD. The irrevocable obligation is therefore registered with the international treaty giving rise to IFAD. As a result, the commitment made by a Member State carries a very significant political and legal weight. As far as replenishment contributions go, IFAD also maintains a justified and unwavering claim to receive the full amount. On this matter, perhaps the advisability of reorganizing or restructuring the future Governing Council replenishment resolutions may be explored so that they clearly set out the commitments for Member States in unequivocal terms. Moreover, the Agreement does not permit approving reductions of, or "forgiving", contribution commitments. Section 3 of regulation X of the Financial Regulations of IFAD is a clear example of the foregoing. Nevertheless, IFAD can attribute project financing to a Member State whom has contribution arrears if it wishes to. There are no legal impediments that would prevent IFAD from doing so. Finally, customary international law instructs that IFAD is held to an obligation to seek finality on the issue concerning a Member State's contribution arrears.

38. The obligation to seek finality implies that IFAD and the Member State must establish a communication channel. In furtherance of this objective, the following actions may be considered: (i) establishing channels of communication with the Government of the Member State having contribution arrears, (ii) specifying that the purpose of the discussions is to reach an agreement on a procedure to bring closure to the Member State's

contribution arrears, and (iii) indicating that any follow-up action is subject to the submission of reports pertaining to points (i) and (ii).

39. In summary, the reporting system currently being implemented by IFAD needs to be overhauled, reformed and developed in order to better engage IFAD's governing bodies in a more assertive and complete reporting system.

40. As a last resort, IFAD may have to brace itself for circumstances where there exists a steadfast difference of opinion with Member states on the issue of their contribution commitments. It should be recalled that the advisable solution to this impasse resides in engaging countries in dispute resolution mechanisms, as foreseen in the relationship agreement between the United Nations and IFAD. In this way, IFAD may seek an advisory opinion from the International Court of Justice. According to this recommendation, IFAD and the Member State in question shall agree upon the procedure whereby a legal issue shall be presented to the International Court of Justice, as well as how the International Court of Justice may decide upon the question(s) put before them in their advisory opinion.

17 November 2009

(*c*) Interoffice memorandum concerning the representation of Member States on the Executive Board

HIERARCHY OF THE SOURCES OF LAW OF IFAD—MEMBERS OF THE EXECUTIVE BOARD ARE STATES NOT INDIVIDUALS—ONLY ONE REPRESENTATIVE PER MEMBER STATE AND ALTERNATE MEMBER STATE OF THE FUND

1. INTRODUCTION

In connection with the 98th session of the Executive Board legal advice has been sought by the Representative of [member] on the Executive Board concerning the representation of a Member State on the Executive Board.

It is the policy of the Office of the General Counsel to only provide formal legal opinions when requested by a competent body of the Fund and not to individual representatives of members of such organs, or when an issue comes to its attention which merits the consideration by that organ. However, in light of the circumstances and on the request of the precedent, this Office has agreed to exceptionally issue the present opinion based on a bilateral request.

In order to provide an answer to the above query a general overview of the legal documents and the hierarchy of the Fund's sources of law will be first carried out.

2. GENERAL BACKGROUND

Under international law a State may send a delegation to an organ or to a conference in accordance with the rules of the Organization. Similarly, Member States may designate permanent representatives to represent them in the various organs of an international organization. A Member State may specify in the credentials issued to its permanent representative that he is authorized to act as a delegate to one or more organs of the Organization. Under international law, it is presumed that unless a Member State provides oth-

erwise, its permanent representative may act as a delegate to organs of the Organization for which there are no special requirements as regards representation. The general rules of international law apply subject to the specific rules adopted by the international organization concerned.[1] In the case of IFAD, there are three main documents that regulate, *inter alia*, the attendance at meetings of the Executive Board: the Agreement Establishing IFAD (the Agreement),[**] the By-Laws for the Conduct of the Business of IFAD and the Rules of Procedure of the Executive Board.

2.1. The Agreement

The powers and functions of the Executive Board are delineated by the Agreement. The Agreement constitutes the basic law of the Fund, and every decision must conform to it. No action may be proposed or decision made by the Executive Board or by any other governing body in conflict with its provisions.

2.1.1. Members of the Executive Board are States, not individuals

Article 6, section 5 (a) of the Agreement provides that the Executive Board shall be composed of 18 members (i.e., 18 Member States) and up to 18 alternate members (i.e., 18 alternate Member States) elected from the Members of the Fund at a session of the Governing Council. Members of the Executive Board shall serve for a term of three years. Thus, contrary to the situation in the International Monetary Fund (IMF), the International Development Association (IDA) and the International Finance Corporation (IFC), in IFAD the Executive Board is composed of members "elected from Members of the Fund".[2] Accordingly, when the Governing Council elects members of the Executive Board through the process set forth in schedule II of the Agreement, it does not elect any particular individual, but States.[3] The Executive Board acknowledged this particularity at its first session on 14 December 1977.[4]

Each member and alternate member attending a session of the Board shall be represented by the designated representative. In this respect it is to be noted that, unlike the case of the aforementioned organizations, none of IFAD's basic documents employ the term "Executive Director" to refer to the representative of a member of the Executive Board, despite the fact that term is colloquially being used in IFAD. The official denomination used by the Agreement, the By-Laws and most notably rule 7 of the Rules of Procedures of the Executive Board is: "Representative of a Member or Alternate".[5]

Whereas article 6, section 2 (a) of the Agreement clearly foresees that for the purpose of representation on the Governing Council each member shall appoint one Governor as its principal representative and an alternate, the number of representatives for the Execu-

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[1] See the rules reflected in *Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character,* 1975 (not yet in force).

[**] United Nations, *Treaty Series*, vol. 1059, p. 191.

[2] Section 5(a) of article 6 of the Agreement.

[3] See schedule II 3(a)-(c) of the Agreement.

[4] Minutes of the first session of the Executive Board of IFAD of 6 February 1978 (EB/1), para. 9.

[5] See article 6, section 5 (e) of the Agreement and section 4 of the By-Laws for the Conduct of the Business of IFAD.

tive Board is not specified. Indeed, article 6, section 5 (e) of the Agreement refers to "representatives of a member or of an alternate member of the Executive Board" by using the term in plural.

2.2. The By-Laws for the Conduct of the Business of IFAD (By-Laws)

The By-Laws for the Conduct of the Business of IFAD, adopted by the Governing Council pursuant to article 6, section 2(f) of the Agreement, are intended to be complementary to the Agreement and shall be construed accordingly.[6] This means that article 6, section 5 (e) of the Agreement is to be taken into consideration when interpreting the other rules regarding Executive Board representation and participation. In particular, section 4 of the By-Laws provides the following:

> "Each member and alternate member of the Executive Board shall appoint a person competent in the fields of the Fund's activities to represent it on the Board. Each such representative shall serve on the Board for at least one term of the member or the alternate member concerned, unless such member decides otherwise."

The above provision of the By-Laws deals with the issue of who is to be the representative of a Member/Alternate on the Board and has two main functions. The first function is to establish competency in the fields of the Fund's activities as a fundamental requirement of the person to be appointed. Considering the nature of IFAD as an international financial institution, expertise is therefore demanded in such area and it is also essential that the person to be appointed be familiar with the documentation dispatched by the Fund requiring action by the Executive Board. The second function is to allow Executive Board Members to identify the person authorized to exercise the membership rights, including voting, on behalf of the Executive Board Member represented.

2.3. The Rules of Procedure of the Executive Board

The Rules of Procedure of the Executive Board, adopted by the Executive Board at its first session in 1977, are an additional instrument to the Agreement and the By-Laws, and regulate the procedural aspects of the Board sessions. More specifically, while the By-Laws deal with the issue of who is to be the representative of a Member on the Board, on the other hand the Rules of Procedure of the Executive Board concern the participation in the Executive Board sessions.

In this regard rule 7 of the Rules of Procedure states that:

> "Each member and alternate attending a session of the Board shall be represented by the representative whose name shall be communicated to the President by the official channel established by the State concerned [. . .]."

The requirement that the communication has to be done by the official channel relates to section 2.1 of the By-Laws, which prescribes that each Member State shall designate an appropriate official entity for communication between itself and the Fund in connection with any matter arising under the Agreement. A communication between the Fund and such entity shall constitute a communication between the Fund and the Member.

It is to be noted that although the Executive Board could have decided to permit more than one representative to participate in the Board Room in the course of its sessions, like

[6] Preamble of the By-Laws for the Conduct of the Business of IFAD.

it is permitted in the Governing Council to the Governors and their alternates, it expressly declined to do so. Indeed, during the first session of the Executive Board (14–15 Dec. 1977), the Board decided that in accordance with the Rules of Procedure each Member (State) and Alternate Member (State) would have only one representative present at a Board meeting. In addition, when a Member suggested during the session that advisers be invited to the Board meeting to assist the Executive Board Representative on a specific issue, the proposal was not accepted.[7]

3. Rule 8 of the Rules of Procedure of the Executive Board

Pursuant to rule 8 of the Rules of Procedure, the Executive Board may also invite representatives of cooperating international organizations and institutions or "any person", including the representatives of other Members of the Fund, to present views on any specific matter before the Board. The term "any person" employed in the aforementioned provision is wide enough to encompass officials from both Executive Board Members and Non-Executive Board Members. A confirmation of this assertion is provided in the minutes of the [session] [date] of the Board, where rule 8 of the Rules of Procedure had been employed to allow [Member's] official attend the meeting as an observer, when [Member] was already represented as a Board Member.

In the course of the said session, a policy was adopted under rule 8 by the Board, whereby the President was authorized to admit, at his discretion, one observer per Board session. The observer is to be admitted upon the request of either a Member State represented on the Board or an organization/institution.

4. Conclusions

IFAD rules abide by the principle of international law that each country is free to determine its representation to organs of an international organization. In the context of the Executive Board, the terms "member" and "alternate member" refer to the Member State of the Fund being elected from the members of the Fund, every three years at the annual session of the Governing Council, to sit on the Board. Each Executive Board member and alternate member must designate a representative competent in the fields of the Fund's activities to represent it on the Board. The representative has the right to exercise the membership rights attributed to the Member State represented, including voting. The member and the alternate member shall communicate the name of the representative to the President by the official channel established by the State concerned.

In addition, the Board may also invite any person, including officials of members already represented on the Board, to attend or express views on any specific matter before the Board. Obviously, these officials will not have the same status as the representatives of the Members of the Board.

18 December 2009

[7] Minutes of the first session of the Executive Board, p. 3, para. 7.

(*d*) Interoffice memorandum to the Finance and Administration Department regarding permissibility of the investments of the Fund's resources in a non-Member State

SECURITY LIQUIDITY—IMMUNITY OF INVESTMENTS OF INTERGOVERNEMENTAL ORGANIZATIONS—IN THE ABSENCE OF AGREEMENT WITH NON-MEMBER STATE, SECURITY REQUIREMENT IS NOT MET

I refer to the question raised during the financial briefing of [date] concerning the Fund's exposure to non-Member's banks (mostly government guaranteed) of [. . .] through IFAD's external managers. This Office was asked to advise on the permissibility of the investments of the Fund's resources in a non-Member State. It is assumed that IFAD retains title to assets so invested. For the following reasons this Office considers that the answer to this question ought to be negative:

1. The primer legal provision that governs the issue of the permissibility of the investments of the Fund's resources in a non-Member State can be found in financial regulation VIII.2, which stipulates (*inter alia*) that in investing the resources of the Fund the President shall be guided by the paramount considerations of security liquidity.

2. The critical term in the relevant part of financial regulation VIII.2 is "security". This term should be interpreted to encompass not only the quality of the asset type but also the legal framework surrounding an investment. For the present purposes, suffice it to note that one of the elements that determine the legal security of investments of intergovernmental organizations is the availability of a regime of immunity that protects those assets against interference pursuant the local law. Such immunity serves to protect the resources of the organization against attachment, execution and other judicial measures that could deprive the Fund from the free disposal of its assets and keep them available for when needed to finance the operations.

3. In the absence of an agreement with a non-Member State to guarantee the immunity of the Fund's resources in the territories of such a country, it cannot be said that such resources meet the requirement of security that is prescribed in financial regulation VIII.2.

4. In addition to the issue of security of the assets themselves, there is an additional concern related to the ability to invoke immunity from jurisdiction in case a dispute with any vendor or supplier of service that is not located in a Member State. Precisely to mitigate this risk, section 8 of the General Terms and Conditions for the Procurement of Services directs that the privileges and immunities enjoyed by the Organization under the Agreement Establishing IFAD,[*] the Headquarters Agreement with Italy and the Specialized Agencies Convention shall not be deemed to have been waived. Obviously, this prescript is rendered useless whenever the Fund contracts with a supplier who is located in a jurisdiction that does not accord privileges and immunities to the organization.

5 May 2010

[*] United Nations, *Treaty Series*, vol. 1059, p. 191.

(*e*) Interoffice memorandum to the Investment and Finance Advisory Committee regarding legal considerations when dealing with downgraded and under-performing government bonds in the investments of IFAD

Involvement of the Fund in investment activities as a not-for-profit institution—Investment should only be considered with respect to funds that are not immediately needed for operations and administrative expenditures—Investment is discretionary not obligatory—Security and liquidity criteria—Meagre returns are not alone a reason to retreat

1. Recent stress on the credit rating of certain countries as well as the overall decline of returns on government bonds held in the Fund's investment portfolio prompted the question as to whether affected holdings should be liquidated, and more generally, whether the investment policy should allow greater flexibility in order to maximize returns.

2. The present note purports to supply some legal considerations that are relevant for the reflections, deliberations and answering the foregoing question.

3. At the outset, the nature of the Fund as an inter-governmental organization should be emphasized. As such, the Fund's function is to serve a specified global public good, namely financing agricultural development in developing countries. Inherent in this is that the Fund is not a profit-seeking institution. This frames in a far-reaching way the parameters for its involvement in investment activities, in particular its risk appetite and the types of asset that it can hold in its portfolio.

4. One of the first implications of IFAD's nature in this context is that any investment, if made at all, is necessarily a subsidiary activity. Indeed, this is clearly stated in the Financial Regulations adopted by the Governing Council, which state that the "President may place or invest cash funds, not needed immediately for the Fund's operations or administrative expenditures" (financial regulation VIII.1).

5. Two issues spring to the fore from the latter provision. First and foremost, investment of resources should only be considered with respect to the funds that are not immediately needed for operations (loans and grants) and administrative expenditures. Secondly, even when the foregoing condition is met, investment remains discretionary, not obligatory!

6. The Financial Regulations set further stringent tests to be abided by if and when the President decides to use his discretion to invest resources not immediately needed for disbursing under loans and grants or for administrative expenditures. Financial regulation VIII. 2 states:

> "In investing the resources of the Fund the President shall be guided by paramount considerations of security and liquidity. Within these constraints the President shall seek the highest possible return in a non-speculative manner".

7. The first sentence of the above provision clearly conveys the message that security and liquidity are the most important criteria that any investment should comply with. This is experienced by the term "constraints". In other words, if the President can not ensure that an investment is secure and liquid, he should refrain from authorizing the investment. This is logical because he needs to ensure that the resources are available whenever they are needed for making disbursements or for making payments to defray the costs of the organization. By way of illustration, and stated in simplified terms, this excludes investment in assets and in equities on long term bonds that can only be liquidated at a lower

price than that for which they have been acquired. Moreover, the second sentence of the quoted provision indicates that return maximization only comes into play if, and as long as, liquidity and security is guaranteed. Even then, any pursuit of return optimization should be undertaken in a non-speculative manner.

8. Foregoing analysis holds important keys for dealing with downgraded credit ratings of governments and declining returns on government bonds.

9. As far as the holdings of downgraded government bonds are concerned, the foregoing seems to imply that unless the resources involved are immediately needed for releasing funds for the purpose of disbursements or paying corporate bills, they should not be sold if that implies recovering less funds than were used to purchase them. Similarly, this may require holding those assets to maturity in order to recover the nominal value of the bonds. Since technically governments do not go bankrupt, mere downgrading of credit rating does not necessarily mean a risk by default. In fact, IFAD does not provision against pledges for replenishment when a government's credit rating is downgraded.

10. Regarding the declining returns on certain holdings of government bonds the foregoing implies that meagre return is not alone a reason to retreat. Such retreat would only be justified if it means substituting high yield assets that are at least as secure and liquid for the low yielding ones.

15 December 2010

3. United Nations Industrial Development Organization

(*a*) Interoffice memorandum regarding legitimation cards: residency requirements for citizenship of [State]

Residency requirements for the purposes of qualifying for citizenship are a domestic matter and have no bearing on the obligations assumed by a government under the Headquarters Agreement

1. I refer to your interoffice memorandum of [date], asking me to seek urgent clarification from the [State's] authorities on a recent amendment to the law on citizenship, in terms of which periods of residence under title of a legitimation card will no longer count as residence for the purposes of qualifying for [State's] citizenship. You also propose a draft note verbale to the [State's Ministry] in this connection.

2. Having consulted the protocol office of the [Ministry], I wish to confirm that, as in the past, an individual must still reside in [State] for a minimum of 10 years in order to become eligible for citizenship. What has changed since [date] is that at least five of the 10 years must be based on a residency title other than a legitimation card (e.g., a [residency title] or residency permit).

3. You state that the Staff Council believes that the amendment "can be interpreted as violating Section 29 of Article X of the Headquarters Agreement concerning residence of non-[State] UNIDO staff stationed in the Host Country". You also suggest that the amendment will affect long-serving staff members retroactively.

4. In the view of this Office, these arguments do not provide a sufficient basis for questioning the amendment. Firstly, we do not think that the new law can reasonably be inter-

preted as "violating" the provisions of section 29. Indeed, the new law, being an entirely domestic [State's] matter, has no bearing on the obligations assumed by the Government under section 29—i.e., to facilitate entry into and sojourn in the territory of [State] and to place no impediment in the way of departure from or transit through the country—all of which remain unchanged.

5. Secondly, the general principle prohibiting retroactive changes in the law to the detriment of individual rights is not applicable in the present situation. The Headquarters Agreement does not deal with citizenship or permanent residence, much less grant staff any rights in this respect. It cannot therefore be argued that the new law retroactively alters the rights of staff. Finally, it should also be noted that the new provision does not impinge on the right of abode of retired officials, which is conferred under section 37(i).

6. I trust that the above provides the clarification sought by the Staff Council. However, should you so wish, I would be willing to request a meeting between the Staff Council and representatives of the [Ministry] and [citizenship department] in order to explore the possibility of a practical solution for long-serving staff.

(*b*) Interoffice memorandum regarding an invitation to the Director-General to become a member of the Wise Persons Group of the [organization]

Outside activities of staff members—Role of an international civil servant—Staff should avoid any action which may adversely reflect on their status, or on the integrity, independence and impartiality which are required by that status—Mechanisms for the exchange of ideas and information

1. This is in response to your e-mail of [date], requesting advice in connection with the letter, dated [. . .], inviting the Director-General to become a member of the Wise Persons Group of the [organization].

2. The invitation explains that the [organization] is a global organization representing the gas industry. It notes that the Wise Persons Group was created by the [organization] in [year] and consists of a handful of renowned specialists and experts in the energy sector who are called upon, at specific occasions, to provide their views on energy-related issues or suggest topics that the [organization] should take up. The invitation further notes that one or two members of the group would typically participate as a speaker or moderator at major [organization] events, such as the [organization] Symposium scheduled to take place in [city] in [month] this year. The travel costs related to such activities are covered by the [organization].

3. I will begin by recalling certain basic principles relevant to what are commonly termed the "outside activities" of officials of UNIDO. Article 11(4) of the Constitution of UNIDO provides, *inter alia*, that the Director-General and staff "shall refrain from any action that might reflect on their position as international officials *responsible only to the Organization*". In like vein, staff regulation 1.1 (which also applies to the Director-General) states that, by accepting appointment, staff "pledge themselves to discharge their functions and to regulate their conduct with *only the interests of the Organization in view*", while staff regulation 1.3 enjoins staff to avoid any action "which may adversely reflect on their status, or on the integrity, *independence and impartiality* which are required by that status" (emphasis added).

4. In my view, the above-quoted provisions indicate that the Director-General should decline the invitation to become a member of the Wise Persons Group and should not accept travel funds from the [organization]. While the [organization] and UNIDO may share some common ground, the [organization]'s objectives and interests will naturally differ from those of UNIDO and other United Nations agencies in areas such as renewable energy, climate change and the environment. Even if the Director-General would serve on the Wise Persons Group in a purely advisory capacity, the group remains a body established and funded by the [organization]. An actual or perceived conflict between the interests of UNIDO and those of the [organization] would almost certainly arise.

5. The [organization]'s letter mentions that the Chairman of the [organization] was previously a member of the Wise Persons Group. However, since the chairman of the [organization] is not an international civil servant, his situation cannot be compared to that of the executive head of a specialized agency and should therefore not be treated as a precedent.

6. It should be added that the Director-General does not necessarily have to be a member of the Wise Persons Group in order to provide the [organization] with his views on energy-related issues. An exchange of information and ideas can be achieved through other mechanisms. Depending on the circumstances, cooperation with NGOs can take various forms, including consultative status in UNIDO in accordance with General Conference decision GC.1/Dec.41, and working arrangements under article 19 of the Constitution. There would also be no objection to the Director-General's accepting a speaking engagement at an [organization] event.

7. In conclusion, my suggestion would be for the Director-General to thank the [organization] for its invitation and to explain that, while the rules of the Organization prevent him from becoming a member of the Wise Persons Group, he would be interested in exploring other appropriate avenues for cooperation on matters of mutual interest, including the possibility of a speaking engagement.

(*c*) Interoffice memorandum regarding recognition of Pacte Civil de Solidarité by UNIDO

Recognition of new forms of civil union—Change of personal status under national law—No definition of "marriage", "spouse" or "dependent spouse" in staff regulations—Pacte Civil de Solidarité certificate equivalent to marriage certificate

1. I refer to your e-mail of [date] to LEG concerning the above-mentioned subject. Attached to your e-mail was an interoffice memorandum from [Name], dated [. . .], and its attachments, i.e., a dependency status form for the year 2010, indicating a change in status from single to married, and a certificate issued by the [State] Consul-General in [city], attesting to the staff member's conclusion of a *Pacte Civil de Solidarité* in [city] on [date].

2. Your e-mail includes the text of a draft reply to [Name], who is a national of [State], by which UNIDO would recognize his change in marital status. You ask whether the draft reply gives rise to legal comments.

3. As [UNIDO Office] is aware, the possible recognition of new forms of civil union such as the PACS gives rise to certain policy and legal questions. These questions need to be addressed, from case to case, on the basis of the provisions of the staff regulations and rules

of UNIDO, as well as applicable national law, general principles of law (e.g., the principle of non-discrimination), case law, and best practice in the United Nations system.

4. We understand that the staff member's PACS has resulted in a change of personal status under national law. The question that arises is whether UNIDO can give effect to that change by recognizing him as married for the purposes of entitlements. In this regard, I note that the staff regulations and rules of UNIDO do not define "marriage" or "spouse", and that staff rule 106.15(a) defines "dependent spouse" in gender-neutral terms and without reference to the type of union at issue. The staff regulations and rules thus pose no barrier to recognition of the PACS in the present case.

5. There appears, therefore, to be no reason why UNIDO should not accept the staff member's PACS certificate as equivalent to a marriage certificate. This conclusion is consistent with recent jurisprudence of the International Labour Organization Administrative Tribunal on the matter (see Judgment No. 2860). Your proposed reply to the staff member consequently gives rise to no legal comments or concerns.

[. . .]

(*d*) External e-mail message regarding the Basic Cooperation Agreement between UNIDO and the Government of [State]

Definition of discovery in light of patent right on traditional knowledge—Objective of UNIDO's patent rights is to enable all member States to benefit from them—Language services—Liability of the Organization only in the case of gross negligence—Functional immunity of UNIDO and its officials

1. This is in reply to your e-mail of [date] to [Name], seeking clarification regarding certain provisions of the draft Basic Cooperation Agreement between UNIDO and the Government of [State].

2. Your first question concerns article IV (10), which provides as follows:

> "10. Patent rights, copyrights and other similar rights to any discoveries or work resulting from UNIDO assistance under this Agreement shall belong to UNIDO. Unless otherwise agreed by the Government and UNIDO in each case, however, the Government shall have the right to use any such discoveries or work within the country free of royalty or any charge of similar nature."

3. You ask what constitutes a discovery where traditional knowledge exists but is not patented, and how such cases are treated. In fact, to the best of my knowledge we have had no such case in UNIDO. The rights envisaged in this article include, for example, a patent in a new industrial product or application, or copyright in a report or document prepared for a project. The reason provision is made for such rights to belong to UNIDO is to enable all member States to benefit from them. The intention would not be to claim unfair ownership rights over traditional knowledge. I believe it would be possible to address particular concerns the Government may have in this regard when designing specific projects, all of which require Government approval.

4. The second article you mention is article VII (2)(b), which reads:

> "(b) Appropriate local secretarial and clerical help, interpreters, translators and related assistance;"

5. You ask into which languages interpretation or translation would be required, and whether an Anglophone country would be given a Spanish or French-speaking representative who would require interpretation on a day-to-day basis. As I understand it, the clause refers to interpreters and translators required for interpretation and translation from or into a local language. Since English is a working language of UNIDO, I am able to assure you that all our field staff are fluent in that language.

6. The third clause you seek clarification on is article XI(2), which provides:

> "2. Assistance under this Agreement being provided for the benefit of the Government and people of [State], the Government shall bear all risks of operations arising under this Agreement. It shall be responsible for dealing with claims, which may be brought by third parties against UNIDO, its officials, or other persons performing services on their behalf, and shall hold them harmless in respect of claims or liabilities arising from operations under this Agreement. The foregoing provision shall not apply where the Government and UNIDO have agreed that a claim or liability arises from the gross negligence or willful misconduct of the above-mentioned individuals."

7. You request examples of each of the situations referred to in this article. I should perhaps first mention that our experience here is limited as such claims do not often arise in practice. However, claims and liabilities could arise, for example, from damage to property (e.g., damage to rented premises caused by accident or act of God); injury to third parties (e.g., an accident involving a member of the public); or dispute with commercial companies (e.g., an alleged infringement of intellectual property rights).

8. While every precaution is taken to avoid disputes, claims and liabilities, they cannot be ruled out completely. Given that UNIDO and its officials enjoy functional immunity, article XI(2) aims to ensure that such claims and liabilities will be handled by the Government, except where the claim or liability in question is the result of gross negligence or willful misconduct. In those situations (i.e., where there is gross negligence or willful misconduct), the risk is borne by the Organization and/or the individual concerned.

9. You also ask why the paragraph refers to gross negligence rather than simply to negligence. The reason UNIDO does not accept liability for ordinary negligence under its Basic Cooperation Agreements is that this might expose the Organization to claims and liabilities which it is not equipped to handle and which would drain its resources. UNIDO nevertheless has comprehensive liability insurance, which covers damage or injury attributable to persons for whom UNIDO is responsible. Depending on the circumstances, such insurance may result in an appropriate settlement without involving the Government.

[. . .]

(*e*) Internal e-mail message regarding the Basic Cooperation Agreement between UNIDO and the Government of [State]

Obligation to notify UNIDO of the ratification of an agreement, regardless of the passage of time—Conclusion of the agreement is a condition for delivery of technical assistance by UNIDO

1. I refer to [Name]'s e-mail of [date] to my assistant concerning the above-mentioned subject. Attached to her e-mail was a letter from the [Ministry] of [State] dated [. . .].

The Ministry—in response to the Director-General's reminder letter of [date]—requests to know why they should ratify an Agreement that was concluded more than 20 years ago.

2. UNIDO Representative in [city] may inform the [Ministry] of [State] in writing that under article XIV of the Basic Cooperation Agreement of [date], the Government of [State] has an obligation to notify the ratification of the Agreement to UNIDO. The passage of time does not revoke this obligation. The conclusion of this Agreement has been a condition for delivery by UNIDO of technical assistance to [State]. In other words, the provision of technical assistance to a recipient country should be based on a sound legal basis. The General Conference of UNIDO gave a mandate to the Director-General of UNIDO on 12 December 1985 (GC.1/Dec.40) to conclude such Agreements with recipient countries.

3. I have copied below article XIV of the Agreement for your information.

4. Finally, I would note that, according to our Infobase, UNIDO has no recent or ongoing projects in [State], and no projects are in the pipeline. This might explain the purpose of the Ministry's letter.

Article XIV. General Provisions[*]

1. This Agreement shall be subject to ratification by the Government and shall come into force upon receipt by UNIDO of notification from the Government of its ratification. Pending such ratification, it shall be given provisional effect by the Parties. It shall continue in force until terminated under paragraph 3 below. Upon the entry into force of this Agreement, it shall supersede existing agreements concerning the provision of assistance to the Government out of UNIDO resources and concerning any UNIDO office in the country, and it shall apply to all assistance provided to the Government and to any UNIDO office established in the country under the provision of the Agreements now superseded.

2. This Agreement may be modified by written agreement between the Parties hereto. Any relevant matter for which no provision is made in this Agreement shall be settled by the Parties in keeping with the relevant resolutions and decisions of the appropriate organs of UNIDO. Each Party shall give full and sympathetic consideration to any proposal advanced by the other Party under this paragraph.

3. This Agreement may be terminated by either Party by written notice to the other and shall terminate sixty days after receipt of such notice.

4. The obligations assumed by the Parties under articles V (concerning project information) and IX (concerning the use of assistance) hereof shall survive the expiration or termination of this Agreement. The obligations assumed by the Government in any supplementary agreement concluded pursuant to article III, paragraph 2 (concerning support costs of the UNIDO Representative), under articles X (concerning privileges and immunities), XI (concerning facilities for implementation of UNIDO assistance) and XIII (concerning settlement of disputes) hereof shall survive the expiration or termination of this Agreement to the extent necessary to permit orderly withdrawal of personnel, funds and property of UNIDO and of any persons performing services on its behalf under this Agreement.

[*] Translation from the French language provided by the Secretariat.

(*f*) Internal e-mail message regarding an exchange of letters between UNIDO and [United Nations agency]

NATURE OF AN AGREEMENT NOT DETERMINED BY ITS TITLE BUT BY ITS CONTENT—AGREEMENT OR WORKING ARRANGEMENT IN THE FORM OF AN EXCHANGE OF LETTERS SUBJECT TO ARTICLE 19 OF UNIDO'S CONSTITUTION—NON-BINDING JOINT DECLARATION NOT SUBJECT TO ARTICLE 19 OF THE CONSTITUTION

1. I refer to your e-mail of [date] concerning the above-mentioned subject. You state that "from [your] reading and consultation with [UNIDO Office], [you] cannot see that we need to enter into a formal relationship agreement in order to have an exchange of letters between the Director-General of UNIDO and the Secretary-General of [United Nations agency] to which a programme of cooperation outlining 3 to 4 areas of potential joint projects would be attached from our side." You asked me if I agreed with your interpretation.

2. I wish to inform you that the nature of an agreement is not determined by its title, e.g., Exchange of Letters, but by its contents, i.e., the concrete rights and obligations that the parties assume. I cannot formulate any opinion on the nature of the cooperation agreement (the exchange of letters) without seeing and examining its contents.

3. I do not see any ambiguity in article 19 of the Constitution of UNIDO which may require an interpretation. If UNIDO intends to conclude an Agreement with [United Nations agency], a United Nations system organization, in the form of an exchange of letters identifying 3 to 4 areas of cooperation, then the exchange of letters falls within paragraph 1 (a) of article 19 of the Constitution. If UNIDO intends to conclude a working arrangement in the form of an exchange of letters regulating the activities of the two agencies concerning a specific joint project, such as a joint study or a technical assistance project in a recipient country, then the exchange of letters falls under article 19 (2) of the Constitution and as such requires compliance with article 19 (1) of the Constitution. The Secretariat may have skipped the Industrial Development Board approval step foreseen in article 19 (1) of the Constitution for a number of working arrangements in the past, but this practice is not supported by the Constitution.

4. If you want to merely record the intentions of the parties in certain areas, then you may prepare a non-binding joint declaration or a letter of intentions. For this document you do not need to follow the steps foreseen in article 19 of the Constitution.

5. In light of the above, it is advisable to conclude a Relationship Agreement with [United Nations agency], a United Nations system organization, and base the cooperation between the United Nations agencies on a firm legal basis from the beginning in accordance with article 19 of the Constitution.

(*g*) Interoffice memorandum regarding the interpretation of staff rule 109.05(b)

INTERPRETATION OF STAFF RULES AND REGULATIONS—APPLY THE MOST RATIONAL INTERPRETATION THAT FLOWS FROM THE PLAIN AND ORDINARY SENSE OF THE LANGUAGE USED IN CONTEXT, IN LIGHT OF OBJECT AND PURPOSE, LEGISLATIVE HISTORY AND RELEVANT

PRACTICE—THE FLIGHT CHOSEN MUST NORMALLY FOLLOW THE SHORTEST ROUTE AND BE THE LEAST COSTLY ON THAT ROUTE

1. This is with reference to your e-mail of [date] requesting my interpretation of the phrase "most direct and economical route" in staff rule 109.05(b), as well as to your follow-up e-mails of [dates] on the same subject, the last of which forwarded a table summarizing the relevant practices of other international organizations.

2. Staff rule 109.05 concerns the route, mode and standard of transportation to be used when traveling at the expense of the Organization. Paragraph (b) of staff rule 109.05 determines the route and mode of transportation. It reads:

> "(b) Travel shall be by *the most direct and economical route* and mode of transportation unless it is established to the satisfaction of the Director-General that the use of an alternate route or mode is in the best interests of the Organization." (Emphasis added)

3. I understand from your e-mail of [date] that when the mode of travel is by air, the most direct route is no longer necessarily the most economical. This has led to recent difficulties in applying the rule. You therefore ask whether, for the same standard of accommodation,

> "a) both of the above criteria (namely, 'direct' and 'economical') have the same weight and none of them has a priority over the other (which would imply that when the amount of the air fare is to be approved, the route and the price should be equally considered and the balanced solution found), or
>
> b) the 'most direct' prevails over 'economical' (which implies that the most direct route must be taken irrespectively of the price difference between the available comparable options, even in cases when the price difference between the options is very considerable)."

Interpretation of regulations and rules

4. Before explaining what, in our opinion, is the meaning of staff rule 109.05(b), it is necessary to say a few words on how we approach such interpretative questions. In accordance with general principles, we seek to give to regulations and rules the most rational interpretation that flows from the plain and ordinary sense of the language used in its context. If more than one interpretation is possible, or if a provision is otherwise ambiguous or obscure, regard may be had to the object and purpose of the provision, its legislative history and any relevant practice in implementing it. Since regulations and rules should provide certainty, interpretations that make for a certain result are preferred over uncertain ones. There is also a presumption that regulations and rules are intended to produce reasonable rather than unreasonable or absurd results.

Air travel by the most direct and economical route

5. To ascertain the correct meaning and effect of staff rule 109.05(b) one should begin with a careful parsing of the rule. Where the mode of transportation is by air, staff rule 109.05(b) requires that staff must travel by the "most direct and economical route" unless it is established that the use of an alternate route is in the best interests of the Organization. As used in the rule, the modifiers "most direct and economical" form an adjectival phrase

which describes the word "route". In other words, the route flown must be both the most direct and the most economical.

6. In ordinary usage, the expression "most direct" means "shortest" (in distance or time), while "most economical" means "least costly" or "most cost-effective". From your e-mails it would seem that these are the meanings which everyday practice at UNIDO attaches to the terms. The main issue, however, is not so much what each expression means individually but what they mean together as joint modifiers of the word "route".

7. The perceived difficulty, or even absurdity, in requiring an air route to be, simultaneously, the *most direct and economical* is, as already stated, that the most economical route in absolute terms might not be the most direct one. However, the conflict between these two requirements is more apparent than real. This is because the phrase *most direct and economical* is in fact capable of a rational and sensible construction which avoids any internal inconsistency or absurdity. Under this interpretation, *the flight selected must follow the shortest route and be the least costly on that route*.

8. We believe the above interpretation to be the correct and only reasonable interpretation of staff rule 109.05(b) as it applies to travel by air. The interpretation does not imply, as you have phrased it, that the criterion of directness "prevails" over economy. Rather, it allows the two criteria to be reconciled without necessarily assigning priority to either. Nor does it imply that "the route and the price should be equally considered and [a] balanced solution found", such a construction being problematical not least because of its inherent uncertainty and because the rule makes no provision for a "balanced solution".

9. The general rule regarding the route of travel is not absolute. Under staff rule 109.05(b), the most direct and economical route is to be taken *unless it is established to the satisfaction of the Director-General that the use of an alternate route or mode is in the best interests of the Organization*. The possibility of an alternate route might address situations where, for example, the most direct and economical route involves travel on an unsafe carrier, or where considerable financial savings can be achieved by using a slightly longer route. In the latter case, the alternate route should most likely not be significantly more onerous, i.e., should not be very much longer or entail additional stopovers, since it is presumably not in the Organization's best interest to cause undue hardship to its staff. It should be noted that exceptions to the most direct and economical route would constitute discretionary administrative decisions that may be appealed pursuant to chapter XII of the staff rules.

Conclusion

10. In summary, our main conclusions are:

(i) That the most reasonable interpretation of the requirement in staff rule 109.05(b) that air travel must be by the most direct and economical route is that the flight chosen must normally follow the shortest route and be the least costly on that route; and

(ii) That a route other than the most direct and economical route can be approved where it is in the best interests of the Organization to do so.

(*h*) Interoffice memorandum regarding the optimal modality for operating UNIDO Desks

No requirement to conclude a specific agreement to facilitate cooperation with the United Nations—Cooperation with other bodies does require a specific agreement

1. Reference is made to your e-mail of [date], which requested advice on the optimal modality to operate the UNIDO Desks under UNIDO's full authority and responsibility. In particular, it is asked whether the absence of a specific agreement with UNDP would constitute a legal impediment for the continued smooth operation of the UNIDO Desks. The short answer is No.

2. It appears that the basis for the query is the understanding that development of joint programmes with UNDP and other United Nations agencies has not been preconditioned on the existence of specific agreements between agencies. This understanding is correct, *but only in so far as the United Nations* (including its funds and programmes) is concerned.

3. Article 19 of the Constitution and the General Conference's Guidelines for the Relationship of UNIDO with Intergovernmental, Governmental, Non-Governmental and Other Organizations, Annex to GC.1/Dec.41 (12 December 1985), not only require cooperation with the *specialized agencies and other organizations of the United Nations system* but also that such cooperation "shall be based on agreements concluded separately with each of the agencies and organizations". See Guidelines, paragraph 1. Among other things, such agreements "shall provide a basis for[. . .] (b) Co-ordination and co-operation, including joint action, in the planning and implementation of technical assistance programmes, studies, research and other activities".[1] All such agreements with the specialized agencies and United Nations system organizations require the approval of the Industrial Development Board.

4. The above does not apply in the case of the United Nations. In the case of the United Nations (including its funds and programmes, which, despite enjoying a certain degree of autonomy, are subsidiary organs of the United Nations), the legal basis for cooperation derives from article 18 of the Constitution and the UNIDO-United Nations Relationship Agreement (17 December 1985), as well as the relevant provisions of the Charter of the United Nations. *Accordingly, there is no legal impediment that would prevent UNIDO from operating the UNIDO Desks without a specific agreement with UNDP.*

5. As it is known, the General Conference has requested the Director-General to conclude an appropriate operational and administrative arrangement with UNDP, consistent with the recommendations of the joint terminal evaluation of the implementation of the

[1] The Guidelines further require that agreements with the specialized agencies and other United Nations system organizations *shall* provide a basis for the exchange of information on on-going and planned activities; reciprocal representation in meetings of appropriate bodies; and minimizing duplication of activities or programmes. Pursuant to the Guidelines, relationship agreements have been concluded with FAO (4 May 1990), ILO (14 September 1987), UNESCO (5 June 1989), WHO (30 October 1989), IAEA (9 October 1987), and IFAD (5 June 1989).

Cooperation Agreement with UNDP.[2] The evaluation team recommended the conclusion of a memorandum of understanding with UNDP that defines operational and administrative arrangements at the country level, including provisions for UNIDO desks. Such a working arrangement with UNDP may be concluded by the Director-General without the formal approval of the Board.

[2] GC.13/Res.7 (11 December 2009) provides, in relevant part, as follows: "The General Conference . . . 4. Requests the Director-General: . . . (b) To conclude an appropriate operational and administrative arrangement with UNDP in 2010, consistent with the findings and recommendations of the joint terminal evaluation and taking into account the requirements of Member States. In this regard, particular attention should be placed on the review of the functioning of UNIDO desks established within UNDP premises and the role of UNIDO desks . . .".