

*Extract from:*

# UNITED NATIONS JURIDICAL YEARBOOK

2012

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



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## 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 to the Ministry of Foreign Affairs of [State] regarding the introduction of a weight limitation on United Nations diplomatic bags used by the United Nations Development Programme

SECTION 10 OF THE CONVENTION ON THE PRIVILEGES AND IMMUNITIES OF THE UNITED NATIONS, 1946—VIENNA CONVENTION ON DIPLOMATIC RELATIONS, 1961, PLACES NO LIMITATION ON THE WEIGHT OR THE SIZE OF DIPLOMATIC BAGS—UNILATERAL IMPOSITION OF A WEIGHT LIMIT IS NOT CONSISTENT WITH THE OBLIGATIONS UNDER BOTH CONVENTIONS—MEASURE CONSTITUTES AN ADDITIONAL HARDSHIP FOR THE ORGANIZATION AND, THUS, IS INCONSISTENT WITH ARTICLE 105 OF THE UNITED NATIONS CHARTER

The Legal Counsel of the United Nations presents her compliments to the Ministry of Foreign Affairs of [State] and has the honour to refer to the latter's Note Verbale of [date] addressed to international organizations accredited to [State] regarding the imposition of a 30 kilograms weight limitation on diplomatic bags. The Legal Counsel has the further honour to refer to the exchanges between the United Nations Development Programme (UNDP) and the Ministry on this issue.

In this regard the Legal Counsel wishes to express her concern on the introduction of a weight limitation on United Nations diplomatic bags used by UNDP and to reiterate the relevant provisions of the applicable legal instruments as follows.

[State] is a party to 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 since [date] without any reservations. UNDP is a subsidiary organ of the United Nations and, therefore, an integral part of the Organization.

According to section 10 of the General Convention, "[t]he United Nations shall have the right to use codes and to dispatch and receive its correspondence by courier or in

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

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

bags, which shall have the same immunities and privileges as diplomatic couriers and bags.” The status of diplomatic bags is regulated by article 27 of the Vienna Convention on Diplomatic Relations, 1961 (hereinafter the “Vienna Convention”),\* which provides, *inter alia*, as follows:

“3. The diplomatic bag shall not be opened or detained.

4. The packages constituting the diplomatic bag must bear visible external marks of their character and may contain only diplomatic documents or articles intended for official use.”

In light of the above, it is clear that the Convention places no limitation on the weight or the size of diplomatic bags and a unilateral imposition by the Government of [State] of a weight limit is not consistent with the General Convention or the Vienna Convention and, thus, is contrary to the Government’s obligations under these instruments.

Moreover, such a measure constitutes an additional hardship for the Organization and, thus, is inconsistent with Article 105 of the United Nations Charter, which provides that “the Organization shall enjoy such privileges and immunities as are necessary for the fulfilment of its purposes”. The United Nations Conference on International Organization at San Francisco in 1945, in recommending that Article 105 be included in the Charter stated as follows:

“But if there is one certain principle it is that no Member State may hinder in any way the working of the Organization or take any measures the effect of which might be to increase its burdens”. (Report of Commission IV on Judicial Organization, UNCIO, Documents, Volume 13, p. 705.)

The Legal Counsel wishes to assure the Ministry that the United Nations uses the diplomatic pouch for official purposes and has internal guidelines in place which regulate how the pouch may be used.

The Legal Counsel would therefore be grateful if the Ministry were to ensure that the proposed weight limit not be applied to the United Nations diplomatic bag in [State].

[. . .]

3 April 2012

**(b) Inter-office memorandum to the United Nations Resident and Humanitarian Coordinator and United Nations Development Programme (UNDP) Resident Representative of [State] concerning the non-applicability of [State] Labour Laws to the United Nations**

IMMUNITY OF THE UNITED NATIONS AND ITS OFFICIALS FROM JURISDICTION OF MEMBER STATES—ARTICLES 100, 101 AND 105 OF THE CHARTER OF THE UNITED NATIONS—THE ORGANIZATION MAY NOT RECEIVE INSTRUCTIONS ON HOW TO MANAGE ITS STAFF OR SUBJECT ITS OFFICIALS TO THE LOCAL LABOUR LAWS—SECTIONS 2 AND 18 OF THE CONVENTION ON THE PRIVILEGES AND IMMUNITIES OF THE UNITED NATIONS, 1946—GENERAL ASSEMBLY RESOLUTION 76 (I) OF 7 DECEMBER 1946, APPROVED THE GRANTING OF THE PRIVILEGES AND IMMUNITIES REFERRED TO IN ARTICLES V AND VII OF THE GENERAL CONVENTION TO “ALL

\* United Nations, *Treaty Series*, vol. 500, p. 95.

MEMBERS OF THE STAFF OF THE UNITED NATIONS, WITH THE EXCEPTION OF THOSE WHO ARE RECRUITED LOCALLY AND ASSIGNED TO HOURLY RATES”

1. This is with reference to your memorandum of [date] to the Legal Counsel, in which you requested the Office of Legal Affairs’ (OLA) guidance with respect to the Note Verbale of [State] requiring international organizations, including the United Nations, to adapt their staff contracts to the [date] Labour Law of [State]. You also refer to a number of claims initiated by the United Nations staff members against the United Nations in [State] courts.

2. In this regard we suggest sending a Note Verbale to the Ministry of Foreign Affairs of [State] explaining to the Ministry that the above-mentioned request is not consistent with the status of the United Nations and its officials as provided for in the Charter of the United Nations and in the Convention on the Privileges and Immunities of the United Nations, 1946.\* Please find enclosed a draft Note Verbale to that effect.

[Enclosure]

The Resident and Humanitarian Coordinator of the United Nations presents his compliments to the Ministry of Foreign Affairs of [State] and has the honour to refer to the latter’s Note Verbale [number][date], which requests international organizations to “adapt contracts of their [Nationality] and resident foreign staff members to provisions of the [State] Labour Law”. The Note Verbale further states that “any agreement that contradicts provisions of the [State] Labour Law, does not prevent them from claiming for their rights based on provisions of [State] law”. The Resident and Humanitarian Coordinator has the further honour to refer to the Ministry’s Note Verbale of [date] with “a summon to appear before [City]’s court of labour for the attendance of the [date] hearing”.

In this regard, the Resident and Humanitarian Coordinator wishes to express his concern with the above-mentioned requests as they are not consistent with the status of the United Nations and its officials and is inconsistent with the legal obligations of [State] under the Charter of United Nations, the Convention on the Privileges and Immunities of the United Nations, 1946 (the “General Convention”) and other applicable instruments.

The Resident and Humanitarian Coordinator wishes to reiterate the relevant provisions of the applicable legal instruments as follows.

Article 100 and 101 of the Charter of the United Nations provide as follows:

*“Article 100*

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.

*Article 101*

1. The staff shall be appointed by the Secretary-General under regulations established by the General Assembly.”

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

Thus the Secretary-General of the United Nations, with assistance of the relevant departments and agencies, is the only authority in the Organization responsible for the appointment, dismissal and management of the United Nations staff in accordance with regulations established by the General Assembly. The Organization may not receive instructions on how to manage its staff or subject its officials to the local labour laws. Disputes between United Nations staff members and the Organization are subject to the internal system of administration of justice of the Organization and cannot be submitted to the national courts of Member States.

The immunity of the United Nations and its officials from jurisdiction of Member States is based on the following.

Article 105 of the Charter of the United Nations provides in its paragraph 1 that “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”. Pursuant to paragraph 2 of that Article, officials of the Organization enjoy privileges and immunities as are necessary for the independent exercise of their functions in connection with the Organization.

The above provisions are confirmed and further detailed in the General Convention, to which [State] has been a party since [date], without any reservation.

In accordance with section 2 of the General Convention “the United Nations, its property and assets wherever located and by whomsoever held, shall enjoy immunity from every form of legal process except insofar as in any particular case it has expressly waived its immunity”. According to section 18 (a) of the General Convention, “[o]fficials of the United Nations shall: (a) be immune from legal process in respect of words spoken or written and all acts performed by them in their official capacity”.

It is important to note that by resolution 76 (I) of 7 December 1946, the General Assembly approved the granting of the privileges and immunities referred to in articles V and VII of the General Convention to “all members of the staff of the United Nations, with the exception of those who are recruited locally and assigned to hourly rates.” Therefore, all staff members of the United Nations, regardless of nationality, residence, place of recruitment or rank, are considered officials for the purposes of the General Convention with the sole exception of those who are *both* recruited locally *and* assigned to hourly rates. As a result, the exemption, under article V, section 18 of the General Convention, from legal process applies to United Nations staff members, independent of their nationality, provided they are not assigned to hourly rates.

Under section 34 of the General Convention, the [State] has an obligation to be “in a position under its own law to give effect to the terms of this Convention”.

In this regard the Resident and Humanitarian Coordinator wishes to note that the same legal principles apply to the status of the Specialized and related Agencies and their personnel in [State].

Accordingly, the Resident and Humanitarian Coordinator respectfully requests the Government of [State] and its competent authorities to take all necessary steps to ensure full compliance with its obligations under the Charter of the United Nations, the General Convention and other applicable legal instruments and ensure that the [State] Labour Law is not applied to the United Nations and its officials in [State].



The Resident and Humanitarian Coordinator wishes to reiterate that the United Nations is expressly maintaining its immunity from legal process with respect to the proceedings instituted against it in the [City]'s labour court. In particular, the Resident and Humanitarian Coordinator respectfully requests the competent authorities of [State] to seek dismissal of the case in accordance with the Government's obligations under international law.

[. . .]

April 2012

**(c) Note to the Ministry of Foreign Affairs of [State A] concerning a request to [State B] staff members of the United Nations to leave the country or face possible detention**

REQUESTS TO LEAVE THE COUNTRY ADDRESSED TO THE STAFF MEMBERS OF THE UNITED NATIONS ARE INCONSISTENT WITH THE FUNDAMENTAL PRINCIPLES OF THE INTERNATIONAL CIVIL SERVICE—ARTICLES 100 AND 105 OF THE CHARTER OF THE UNITED NATIONS—POSSIBLE DETENTION OF STAFF MEMBERS WOULD BE CONTRARY TO THE IMMUNITY OF THE UNITED NATIONS AND ITS OFFICIALS FROM JURISDICTION OF MEMBER STATES—SECTION 18 OF THE CONVENTION ON THE PRIVILEGES AND IMMUNITIES OF THE UNITED NATIONS, 1946

The Resident and Humanitarian Coordinator of the United Nations presents his compliments to the Ministry of Foreign Affairs of [State A] and has the honour to refer to an announcement by the [security services in State A] in [City] during a meeting attended by WFP and other United Nations Funds and Programmes as well as by [United Nations Mission] that all [State B] staff of the United Nations must leave [City] by 2 May, 2012 or face possible detention. In this regard the Resident and Humanitarian Coordinator has the further honour to refer to the WFP Note Verbale on this issue addressed to the Ministry of Foreign Affairs, dated 1 May 2012.

The Resident and Humanitarian Coordinator wishes to express his serious concern with the above-mentioned request as it is not consistent with the status of the United Nations and its officials. These measures, if implemented, would seriously impede activities of the United Nations in [State A] and put at risk the implementation of mandates given by its decision-making bodies.

In this regard, the Resident and Humanitarian Coordinator would like to reiterate the relevant provisions of the applicable legal instruments as follows.

In accordance with Article 100 of the Charter of United Nations, “[i]n 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”. This obligation of the United Nations staff corresponds to the obligation of each Member of the United Nations “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”.

Therefore, any requests to leave the country addressed to the staff members of the United Nations are inconsistent with the fundamental principles of the international civil service enshrined in the Charter of the United Nations.

Moreover, such requests are at variance with agreements of [State A] with the United Nations Funds and Programmes, such as the Basic Agreement between the United Nations/FAO on behalf of WFP and [State A] concerning Assistance from the World Food Programme, the Agreement between the United Nations Development Programme and [State A] (hereinafter the "SBAA") as well as the [status of mission agreement].

According to the [status of mission agreement], "[t]he Government undertakes to respect the exclusively international nature of [the United Nations Mission]" (paragraph 7) and "[t]he Joint Special Representative and members of [the United Nations Mission] shall, whenever so required by the Joint Special Representative, have the right to enter into, reside in and depart from [State A]" (paragraph 34).

The SBAA provides in its article X that "[t]he Government shall undertake any measures which may be necessary to exempt the UNDP, its Executing Agencies, their experts and other persons performing services on their behalf from regulations or other legal provisions which may interfere with operations under this Agreement, and shall grant them other facilities as may be necessary for the speedy and efficient execution of UNDP assistance. It shall, in particular, grant them the following rights and facilities:

- (a) Prompt clearance of experts and other persons performing services on behalf of the UNDP or an Executing Agency;
- (b) Prompt issuance without cost of necessary visas, licenses or permits;
- (c) Access to the site of work and all necessary rights of way;
- (d) Free movement within or to or from the country, to the extent necessary for proper execution of UNDP assistance . . .".

With respect to the possible detention of United Nations staff members of [State B] nationality, who do not leave the country as requested, the Resident and Humanitarian Coordinator wishes to emphasize that such actions would be contrary to the immunity of the United Nations and its officials from jurisdiction of Member States.

This immunity is rooted in Article 105 of the Charter of the United Nations, which provides in its paragraph 1 that "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". Pursuant to paragraph 2 of that Article, officials of the Organization enjoy privileges and immunities as are necessary for the independent exercise of their functions in connection with the Organization.

The above provisions are confirmed and further detailed in the Convention on the Privileges and Immunities of the United Nations, 1946 (hereinafter the "General Convention"),\* to which [State A] has been a party since [date], without any reservation. According to section 18 (a) of the General Convention, "[o]fficials of the United Nations shall: (a) be immune from legal process in respect of words spoken or written and all acts performed by them in their official capacity".

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

It is important to note that resolution 76 (I) of 7 December 1946, the General Assembly approved the granting of the privileges and immunities referred to in articles V and VII of the General Convention to “all members of the staff of the United Nations, with the exception of those who are recruited locally and assigned to hourly rates.” Therefore, all staff members of the United Nations, regardless of nationality, residence, place of recruitment or rank, are considered officials for the purposes of the General Convention with the sole exception of those who are *both* recruited locally *and* assigned to hourly rates.

Under section 34 of the General Convention, [State A] has an obligation to be “in a position under its own law to give effect to the terms of this Convention”.

All the above-mentioned norms should be read in light of the fundamental principle formulated by the United Nations Conference on International Organization at San Francisco in 1945 as follows:

“But if there is one certain principle it is that no Member State may hinder in any way the working of the Organization or take any measures the effect of which might be to increase its burdens, financial or other.” (Report of Commission IV on Judicial Organization, UNCIO, Documents, Volume 13, p. 705).

Therefore, the Resident and Humanitarian Coordinator respectfully requests the Government of [State A] and its competent authorities to take all necessary steps to ensure full compliance with its obligations under applicable legal instruments and ensure that United Nations staff members of [State B] nationality are not impeded in the performance of their functions.

The Resident and Humanitarian Coordinator further requests that any procedural issue that might arise in connection with work permits or any other documents necessary for those United Nations staff members, who acquired [State B] nationality, are resolved in accordance with above-mentioned obligations of [State A].

[. . .]

May 2012

**(d) Note to the Minister of Foreign Affairs of [State] to the United Nations concerning certain labour claims filed against the United Nations Logistics Base in [City] in the Court of [City] by five former individual contractors**

REQUEST TO GOVERNMENT OF [STATE] TO ENSURE FULL RESPECT FOR PRIVILEGES AND IMMUNITIES OF THE UNITED NATIONS—PARAGRAPH 1, ARTICLE 105 OF THE CHARTER—ARTICLE II, SECTION 2 OF THE CONVENTION ON THE PRIVILEGES AND IMMUNITIES OF THE UNITED NATIONS, 1946—JURISDICTIONAL IMMUNITIES OF STATES AND PRIVILEGES AND IMMUNITIES OF INTERNATIONAL ORGANIZATIONS HAVE A DIFFERENT NATURE AND ORIGIN—“COMMERCIAL ACTIVITY” EXCEPTION IS NOT APPLICABLE WITH RESPECT TO THE UNITED NATIONS—DISPUTES MAY BE SUBJECT TO AN APPROPRIATE MODE OF SETTLEMENT BY THE ORGANIZATION

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 request the Permanent Representative to transmit the enclosed Note Verbale to the Ministry of Foreign Affairs concerning certain proceedings before the Court of [City], Labour Section, regard-

ing certain labour claims filed by former Individual Contractors of the United Nations Logistics Base in [City].

The Legal Counsel would also be grateful for the assistance of the Permanent Representative in facilitating the resolution of this matter consistent with the status of the United Nations under the applicable international agreements.

The Legal Counsel of the United Nations avails herself of this opportunity to renew to the Permanent Representative of [State] to the United Nations the assurances of her highest consideration.

[Enclosure]

The Legal Counsel of the United Nations presents her compliments to the Minister of Foreign Affairs of [State] and has the honour to refer to the summonses relating to certain labour claims filed against the United Nations Logistics Base in [City] (UNLB) in the Labour Section of the Court of [City] by five former Individual Contractors of UNLB for a total amount of approximately [amount]. The summonses were received by UNLB on [date] and [date] calling upon representatives of UNLB to attend the hearings relating to the above mentioned proceedings scheduled on [date] and [date].

With the present Note Verbale, the Legal Counsel returns the summonses received and respectfully requests the Government of [State] to promptly take all necessary steps to ensure full respect for the privileges and immunities of the United Nations in [State], in accordance with its obligations under international law. In this regard, the Legal Counsel wishes to recall the applicable legal framework and the corresponding legal obligations of [State] as follows.

The United Nations is an international intergovernmental organization established pursuant to the Charter of the United Nations (hereinafter referred to as “the United Nations Charter”), a multilateral treaty signed on 26 June 1945. As an international organization, the United Nations has been accorded certain privileges and immunities which are necessary for the fulfilment of the purposes of the Organization. Pursuant to Paragraph 1 of Article 105 of the United Nations Charter, “[t]he Organization shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfilment of its purposes.”

The United Nations enjoys the privileges and immunities provided for in the Convention on the Privileges and Immunities of the United Nations, 1946 (hereinafter the “General Convention”) to which [State] has been a party since [date], without reservation. Pursuant to article II, section 2 of the General Convention, “the United Nations, its property and assets wherever located and by whomsoever held, shall enjoy immunity from every form of legal process except insofar as in any particular case, it has expressly waived its immunity. It is, however, understood that no waiver of immunity shall extend to any measure of execution.”

The Legal Counsel further wishes to recall that the United Nations has not waived its immunity from legal process in respect of any legal proceedings in, or before the courts of [State] and is expressly maintaining its immunity in respect of the above-mentioned proceedings currently before the courts of [State]. Pursuant to final article, section 34 of

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

the General Convention, the Government of [State] undertook an obligation to be “in a position under its own law to give effect to the terms of this Convention.”

Any interpretation of the provisions of the General Convention must be carried out within the spirit of the underlying principles of the United Nations Charter, and in particular Article 105 thereof, which provides that the Organization shall enjoy such privileges and immunities as are necessary for the fulfilment of its purposes. Moreover, in accordance with article 26 of the Vienna Convention on the Law of Treaties, 1969\* (hereinafter “the Vienna Convention”), “every treaty in force is binding upon the parties to it and must be performed by them in good faith.”

The Legal Counsel notes further that, in their submissions to the Court of [City], the claimants appear to be arguing a concept of immunity generally applied to sovereign states.

The Legal Counsel wishes to point out that the concepts of jurisdictional immunities of states and the privileges and immunities of international organizations have a different nature and origin. The jurisdictional immunities of states are a part of customary international law that has evolved through the years and recently was codified in the United Nations Convention on Jurisdictional Immunities of States and their Property, 2004.\*\* Under customary international law, when a state acts as a private person in a commercial context (*jure gestionis*), it is not immune from the jurisdiction of the state in which it is acting in that capacity. In such a case, since the state is acting outside of its role as a sovereign power, the immunity does not apply.

Unlike the case with sovereign states, the privileges and immunities of the United Nations are of a treaty law nature and, as explained above, originated in the United Nations Charter and the General Convention. The exception to state immunity in situations where the state is undertaking commercial activities is not provided for under the United Nations Charter or the General Convention with respect to the United Nations. Instead, pursuant to article VIII, section 29 of the General Convention, the Organization shall make provisions for appropriate modes of settlement of, *inter alia*, “disputes arising out of contracts or other disputes of a private law nature to which the United Nations is a party.” Accordingly, there is no “commercial activity” exception under the General Convention that would be applicable with respect to the United Nations.

In this regard, the Legal Counsel wishes to note that the claimants in the above proceedings are therefore not without recourse. In accordance with article VIII, section 29 of the General Convention, disputes arising out of or in connection with the contracts may be subject to an appropriate mode of settlement by the Organization.

Based on the foregoing, the Legal Counsel respectfully requests the Government of [State] to promptly take all necessary steps to ensure full respect for the privileges and immunities of the United Nations in [State], in accordance with its obligations under international law. As a courtesy, a copy of this Note Verbale will also be sent to the Labour Section of the Court of [State].

[. . .]

20 November 2012

\* *Ibid.*, vol. 1155, p. 331.

\*\* General Assembly resolution 59/38 of 2 December 2004. Not yet in force.

## 2. Procedural and institutional issues

### (a) Note to the Permanent Mission of [State] to the United Nations concerning the official and working languages of the United Nations

USE OF OFFICIAL AND WORKING LANGUAGES OF THE UNITED NATIONS SET OUT IN PARAGRAPH 1 OF THE ANNEX TO GENERAL ASSEMBLY RESOLUTION 2(I) OF 1 FEBRUARY 1946—CORRESPONDENCE MANUAL CONFIRMS THAT ENGLISH AND FRENCH ARE THE LANGUAGES TO BE USED FOR COMMUNICATIONS BETWEEN THE SECRETARIAT AND PERMANENT MISSIONS OR GOVERNMENTS

The United Nations presents its compliments to the Permanent Mission of [State] to the United Nations and has the honour to refer to its most recent Note Verbale of [date] concerning the official and working languages of the United Nations. The United Nations would also like to refer to its Note Verbales of [date] and [date] respectively, which are in response to previous communications from the Permanent Mission of [State] on this subject.<sup>\*</sup>

The United Nations would like to recall that it has previously indicated to the Permanent Mission that the use of the official and working languages of the United Nations is set out in General Assembly resolution 2(I) of 1 February 1946. Paragraph 1 of the annex to that resolution provides that, “[i]n all organs of the United Nations, other than the International Court of Justice, Chinese, French, English, Russian and Spanish shall be the official languages, and English and French the working languages of the United Nations.”<sup>\*\*</sup> Paragraph 8 of the annex to that resolution provides that, all resolutions and other important documents of United Nations organs shall be made available in the official languages.

The United Nations would also like to recall that communications between the United Nations Secretariat, its Member States, non-Member States and United Nations system organizations are not documents of United Nations organs within the meaning of General Assembly resolution 2(I) of 1 February 1946. Such communications are regulated by the United Nations Correspondence Manual (ST/DCS/4/Rev.1). The Correspondence Manual confirms that English and French are the languages to be used for communications between the Secretariat and Permanent Missions or Governments. In particular, exhibit 19 confirms English as the language to be used by the Secretariat in communications with the Permanent Mission of [State]. This is also provided for in ST/SG/SER.A/301 (“the Blue Book”).

Consequently, communications that are exchanged between the United Nations Secretariat and a Permanent Mission, or any other United Nations system organization or Government, remain subject to the Correspondence Manual.

By its most recent Note Verbale of [date], the Permanent Mission of [State] makes the point that the communications exchanged between the Permanent Mission and the Special Procedures Branch of the Human Rights Council are “important documents” within the

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<sup>\*</sup> Not reproduced herein.

<sup>\*\*</sup> Pursuant to resolution 3190 (XXVIII) of 18 December 1973, the General Assembly decided to include Arabic among the official and the working languages of the General Assembly and its Main Committees.

meaning of paragraph 8 of the annex to resolution 2(I) of 1 February 1946. Accordingly, the Permanent Mission requests that these documents be translated into the official languages of the United Nations.

However, the United Nations has been informed by the Office of the High Commissioner for Human Rights that when the Secretariat transmits a communication from the Special Procedures mechanism to a Permanent Mission, such a communication is not circulated as an official document of the Human Rights Council. As these communications are not documents of United Nations organs they do not fall within the purview of General Assembly resolution 2(I). They remain communications between a Member State and the Secretariat and as explained above, are subject to the provisions of the Correspondence Manual.

[. . .]

9 February 2012

**(b) Inter-office memorandum to the Officer-in-Charge, Department of Management, concerning the possible conflict of interest arising from concurrent service as member of the Independent Audit Advisory Committee (IAAC), [Function] of the Panel of External Auditors (the Panel), and external auditor for the World Food Programme (WFP)**

LEGAL FRAMEWORK GOVERNING THE IAAC AND THE PANEL—RESTRICTIONS FOR ELIGIBILITY FOR IAAC MEMBERSHIP—CONCURRENT SERVICE AS A MEMBER OF THE IAAC AND [FUNCTION] OF THE PANEL OF EXTERNAL AUDITORS DOES NOT, IN ITSELF, RAISE A CONFLICT OF INTEREST—CONCURRENT SERVICE AS A MEMBER OF THE IAAC AND AS EXTERNAL AUDITOR FOR A PROGRAMME OF THE UNITED NATIONS, I.E., WFP, MAY GIVE RISE TO CONFLICT OF INTEREST—SHOULD IAAC ENGAGE IN THE OVERSIGHT OF WFP ACTIVITIES, RECUSATION SUGGESTED

1. I refer to the memorandum of 7 February 2012 from [Name], then Under-Secretary-General for Management, on the above matter. [Name]'s memorandum notes that [Name], [Title], was elected as [Function] of the Panel in [date], whilst at the same time, continuing to serve as a member of the IAAC. The Department of Management (DM) seeks the Office of Legal Affairs' (OLA) views as to whether [Name]'s membership in the IAAC creates any conflicts of interest with his concurrent [function] of the Panel.

I. [NAME]'S APPOINTMENTS IN THE IAAC AND THE PANEL

A. THE IAAC

2. [Name] was appointed as a member of the IAAC by the General Assembly, in its decision [reference number, date] for a three-year term beginning on [date]. In accordance with paragraph 7 of the Terms of Reference, attached as annex I to General Assembly resolution 61/275, IAAC members may be reappointed for a second and final term of an additional three years. Thus, [Name]'s current term is scheduled to expire on [date], at which point he would be eligible to be reappointed until [date].



## B. THE PANEL

3. There is no formal selection process for Panel members. Rather, external auditors of the United Nations, the specialized agencies and the International Atomic Energy Agency (IAEA) automatically become members of the Panel. [Name] has become a member, and subsequently the [Function], of the Panel, as a result of his status as external auditor to the International Maritime Organization (IMO, until [date]), World Health Organization (WHO, until [date]), United Nations World Tourism Organization (UNWTO, until [date]) and the World Food Programme (WFP, until [date]).

## II. THE LEGAL FRAMEWORK GOVERNING THE IAAC AND THE PANEL

### A. THE IAAC

4. The IAAC was established by the General Assembly “to assist the Assembly in fulfilling its oversight responsibilities” (resolution 60/248 of 23 December 2005, part XIII, paragraph 4). The jurisdiction of IAAC legally extends, strictly speaking, to the entire Organization, including the separately administered funds and programmes. As an operational matter however, we understand that the IAAC has so far limited its activities to the Secretariat only.

5. With a view to ensuring the IAAC’s independence, the General Assembly placed certain restrictions on eligibility for its membership. In particular, pursuant to paragraph 10 of the Criteria for Membership (the Criteria), IAAC members “shall be independent of the Board of Auditors, the Joint Inspection Unit and the Secretariat and shall not hold any position or engage in any activity that could impair their independence from the Secretariat . . . in fact or perception”. Therefore, an IAAC member may not be a member of the Board of Auditors (BoA), the Joint Inspection Unit (JIU) or the Secretariat. However, the Criteria are silent as to membership to the Panel.

### B. THE PANEL

6. The Panel was established by the General Assembly to further “the co-ordination of the audits for which its members are responsible and to exchange information on methods and findings” (see resolution 1438 (XIV) of 5 December 1959). In addition, “[t]he Panel may submit to the executive heads of the participating organizations any observations or recommendations it may wish to make in relation to the accounts and financial procedures of the organizations concerned” (paragraph 2 of the annex to resolution 1438 (XIV)).

7. The Panel is composed of the members of the BoA and the appointed external auditors of the specialized agencies and the IAEA (paragraph 1 of the annex to resolution 1438 (XIV)).

## III. POSSIBLE CONFLICTS OF INTERESTS ARISING FROM CONCURRENT SERVICE AS MEMBER OF THE IAAC AND THE [FUNCTION] OF THE PANEL

8. The Criteria provide that IAAC members shall be independent of the BoA, the JIU and the Secretariat. Our understanding is that [Name] is not a member of any of these entities. The Criteria also provide that IAAC members shall not hold any position or engage in any activity that could impair such independence in fact or perception. In this regard, we note that the General Assembly established the Panel as a *coordinating body*, without



jurisdiction over its members (the BoA and the external auditors of the specialized agencies and IAEA) and their audit responsibilities. Therefore, the Panel does not have any authority over the BoA and it follows that [Name]’s [function] of the Panel does not impair his independence. It appears therefore that [Name]’s concurrent service as a member of the IAAC and as the [Function] of the Panel does not, in itself, raise a conflict of interest.

#### IV. POSSIBILITY OF A CONFLICT OF INTEREST IN SERVING CONCURRENTLY AS A MEMBER OF THE IAAC AND AS EXTERNAL AUDITOR FOR A PROGRAMME OF THE UNITED NATIONS

9. We consider, however, that [Name] oversight functions over WFP may raise certain issues. As discussed in paragraph 3 above, [Name] is a current member of the Panel on account of his audit responsibilities over IMO, WHO, UNWTO and WFP. In this regard, while the IMO, WHO and UNWTO are specialized agencies, and are independent of the General Assembly, WFP is a United Nations programme, jointly administered by the United Nations and the Food and Agriculture Organization. To the extent that the General Assembly exercises oversight authority over WFP, [Name] service as an auditor of the WFP, while at the same time assisting the General Assembly in its oversight responsibilities as a member of the IAAC, may be perceived as giving rise to a conflict of interest.

V. [...]

#### VI. CONCLUSION AND WAY FORWARD

12. In conclusion, we consider that under the existing legal framework, [Name]’s concurrent service as member of the IAAC and [Function] of the Panel does not, in itself, raise conflict of interest issues. However, we consider that potential issues may be raised by [...] his membership of the IAAC while serving as external auditor of WFP [...]

- (i) Regarding his concurrent service as a member of the IAAC and external auditor of WFP, we understand that as an operational matter the IAAC has limited its jurisdiction to the Secretariat, and has so far not engaged in the oversight of funds and programmes including the WFP. Should the IAAC, during the period of [Name]’s membership and while he continues to serve as external auditor of WFP, engage in the oversight of WFP activities, we would recommend that [Name] take steps to avoid any potential conflicts of interest that may ensue, including by recusing himself from any such IAAC activities.
- (ii) [...]

3 April 2012

**(c) Inter-office memorandum to the Chief, Programme Planning and Partnerships Division, United Nations Economic and Social Commission for Asia and the Pacific (ESCAP), concerning the use of ESCAP name and emblem on a conference and exhibition owned and produced by a private company**

ACCEPTANCE OF A *PRO BONO* CONTRIBUTION TO THE UNITED NATIONS REQUIRES THE APPROVAL OF THE CONTROLLER AND THE CONCLUSION OF A FORMAL AGREEMENT—NAMES AND EMBLEMS OF THE UNITED NATIONS SHALL NOT BE USED WITHOUT PRIOR AUTHORIZATION

AND IS GENERALLY PROHIBITED WHEN INTENDED FOR COMMERCIAL PURPOSES—USE OF DOCUMENTS AND PUBLICATIONS MAY BE ALLOWED IF THE UNITED NATIONS PARTICIPATES IN ORGANIZING THE CONFERENCE OR PUBLISHES A PUBLICATION WITH AN OUTSIDE BODY—EXCEPTIONAL AUTHORIZATION TO BUSINESS SECTOR ENTITY DOES NOT APPLY TO THE USE OF THE UNITED NATIONS NAME AND EMBLEM

1. By the memorandum of [date], you have sought clearance from the Office of Legal Affairs (OLA), by [date], for the use of the name and emblem of ESCAP on promotional materials for an event to be organized by [Company], a family-owned business in the publishing and event organization sectors, with a focus on the energy industry. You have informed us that ESCAP will be organizing a sub-regional consultation meeting for South-East Asia as part of the preparatory road map towards the Asia-Pacific Energy Forum, to be convened at the ministerial level in [date]. We understand that ESCAP plans to organize this consultation meeting to coincide with the [Conference, place, date], an event organized by [Company]. You have further stated that [Company] has indicated that it is willing to make in-kind contributions to support the ESCAP sub-regional consultation meeting in [date], including the provision of a meeting room, related support services, such as catering and wireless internet, and free access to the exhibit and conference sessions organized during [Conference]. In return, ESCAP wishes to authorize the display of its logo and name in [Company]'s promotional materials under the category, "Supporting Organization". We understand that such promotional materials include [Conference] Preliminary Show Guide, invitation tickets, advertisements in various publications; and the websites of the [Conference], and of [Name] conference, which we understand is also being organized by [Company].

PROPOSED *PRO BONO* DONATION FROM [COMPANY]

2. Please note that provision of *pro bono* goods and services to the United Nations is governed by the Secretary-General's bulletin, ST/SGB/2006/5 of 22 March 2006, entitled "Acceptance of *pro bono* goods and services", a copy of which has been provided to you.\* Pursuant to the United Nations Financial Regulations and Rules, the acceptance of a *pro bono* contribution shall require the approval of the Controller (see paragraph 10 of the annex to the ST/SGB). Another requirement as set forth in the ST/SGB is the conclusion of a formal agreement between the donor and the United Nations (see *ibid.*, paragraph 18). Such an agreement would address, *inter alia*, responsibilities of the Parties, liabilities, insurance, and recognition to be provided to the donor.

3. In this respect, paragraphs 20 and 21 of the annex to ST/SGB/2006/5 provide as follows:

"Recognition of *pro bono* contributions"

"20. Entities making a *pro bono* contribution should be accorded appropriate acknowledgement or recognition by the recipient for the contribution.

"21. The names and emblems of the United Nations and separately administered organs and programmes of the United Nations shall not be used without prior authorization. In accordance with the established policy, the use of the names and emblems of the United Nations and separately administered organs and programmes of the Unit-

\* Not reproduced herein.

ed Nations by the donor for commercial purposes, including advertisement, display on websites or use in other promotional material, is generally prohibited.”

Therefore, while appropriate acknowledgement should be provided to [Company], pursuant to ST/SGB/2006/5, it would not be appropriate to display the ESCAP name and emblem by [Company] for commercial purposes, including on its promotional materials.

4. Pursuant to paragraph 18 of the annex to ST/SGB/2006/5, an initial draft of an agreement to be concluded with the donor should be prepared by ESCAP in consultation with OLA. We would be prepared to assist your Office with the preparation of the *pro bono* agreement with [Company], once additional information on the proposed donation is provided to us.

ST/AI/189/ADD.21

5. With respect to the use of the United Nations emblem on documents and publications, paragraph 25 of section V of Administrative Instruction ST/AI/189/Add.21, on “Use of the United Nations emblem on documents and publications”, dated 15 January 1979, as amended by ST/AI/189/Add.21/Amend.1, dated 23 January 2008, provides as follows:

“When the United Nations *participates in organizing* a conference or meeting convened by an outside body or when the United Nations jointly publishes a publication with an outside body/bodies, the emblem may be used, in combination with the name ‘United Nations’, if the emblems of other participating bodies are so used on the documents of the conference or meeting or on the publication jointly published with the outside body/bodies” (emphasis added and footnote 1 omitted).

6. Since the United Nations is not participating in the organization of the [Conference] exhibit and conference, in accordance with paragraph 25 of ST/AI/189/Add.21, it is not appropriate to use the ESCAP emblem (which is the United Nations emblem with the name and acronym of ESCAP placed next to the emblem) on the [Conference] Preliminary Show Guide, invitation tickets, advertisement and websites, as requested in your memorandum.

#### UNITED NATIONS/BUSINESS GUIDELINES

7. In addition, you have mentioned in your memorandum that it is your understanding that the request to display the ESCAP emblem on promotional materials for the [Conference, place] and the [Name] conference “meets the necessary requirements and objectives outlined in the Guidelines on Cooperation between the United Nations and the Business Sector, with both parties benefitting from this opportunity.” However, the “Guidelines on Cooperation between the United Nations and the Business Sector”, issued on 20 November 2009 (hereinafter, the “Business Guidelines”), specify in paragraph 14 a) as follows:

“Pursuant to General Assembly resolution 92(I), it has been a long-standing policy of the Secretary-General not to authorize the use of the United Nations Emblem by the Business Sector entity in an unmodified form, or to use the United Nations Emblem in a modified form, e.g., by placing the words ‘United Nations’ or ‘UN’ set above the emblem and the words ‘We Believe’ or ‘Our Hope for Mankind’ set below the emblem. However, an appropriate written communication could be provided to the Business Sector entity, acknowledging or recognizing its contribution to or collaboration with the United Nations.”

The “exceptional” authorization that may be granted to a Business Sector entity, “on a case by case basis”, pursuant to sections 14 (b) and (d) of the Business Guidelines, concern the use of the names and logos of other United Nations entities (defined in paragraph 14 of the Business Guidelines as the “Name and Emblem”), and such exceptional authorization does not apply to the use of the United Nations name and emblem (see paragraph 14 (a), quoted above). Since the ESCAP logo includes the United Nations name and emblem, the exceptions referred to in paragraphs 14 b) and d) are not applicable to the use of the ESCAP logo.

8. Consequently, we regret to inform you that OLA cannot grant authorization to [Company] to use the ESCAP name and logo for the purposes and in the manner you have outlined in your memorandum. However, as mentioned in paragraphs 2 and 3 of this memorandum, above, if [Company] makes an in-kind contribution to the United Nations, appropriate recognition should be given to [Company] in accordance with the policies set out in ST/SGB/2006/5 outlined in paragraph 3 above.

5 July 2012

**(d) Note to the Secretary-General’s Chef de cabinet concerning the participation of Palestine and the Holy See in two upcoming United Nations conferences**

FORMULAS OF PARTICIPATION OF NON-MEMBER STATES IN UNITED NATIONS CONFERENCES—  
“ALL STATE” FORMULA—“VIENNA” FORMULA—SINCE GENERAL ASSEMBLY NEVER TREATED  
PALESTINE AS A STATE, PALESTINE CANNOT FALL UNDER “ALL STATES” FORMULA—HOLY  
SEE HAS ALWAYS BEEN TREATED AS OBSERVER STATE—UNDER “VIENNA FORMULA”, BOTH  
PALESTINE AND HOLY SEE CAN PARTICIPATE AS FULL MEMBERS

1. This is further to our meeting today in which I discussed with you the participation of Palestine and the Holy See in two upcoming United Nations Conferences: the Tenth United Nations Conference on the Standardization of Geographical Names between 31 July to 9 August 2012 (“Geographical Names Conference”) and the Review Conference for the Programme of Action on Small Arms and Light Weapons between 27 August to 7 September 2012 (“Small Arms Conference”).

2. United Nations Conferences are organized according to a variety of formulas of participation. Non-Member States of the United Nations have been able to participate fully in these Conferences through two formulas of participation, the “all States” formula and the “Vienna” formula depending on which formula is decided upon by the General Assembly or the Economic and Social Council under whose auspices United Nations Conferences are usually convened. The Secretary-General in accordance with an understanding adopted by the General Assembly in 1973<sup>\*</sup> follows the practice of the Assembly in implementing the “all States” clause. Thus, were the General Assembly to treat an entity differently to a State, the Secretary-General cannot treat that entity as falling within the “all States” formula, even if that entity has been admitted as a member State of a specialized agency. As the General Assembly has never treated Palestine as a State but as a *sui generis* entity, Palestine cannot fall under the “all States” formula and should continue to participate as

<sup>\*</sup> *Official Records of the General Assembly, Twenty-eighth Session, Supplement No. 30 (A/9030).*

an observer entity in such Conferences. The Holy See on the other hand has always been treated by the Assembly as an Observer State and thus falls under the “all States” formula.

3. Conferences convened under the “Vienna” formula provide for the participation of both Member States and States members of specialized agencies. The “Vienna” formula has long been understood to be a mechanism to provide for treaty or conference participation by an entity the status of which may be in dispute. Thus, if a mandate for a United Nations Conference includes States members of specialized agencies, the Secretary-General has arranged for participation on that basis without independently examining whether the General Assembly regards a member of a specialized agency as a State. The Secretary-General’s review has been limited to whether, as a matter of fact, the entity had been admitted to the specialized agency on the basis that it is a State.

4. Palestine became a member State of the United Nations Educational, Scientific and Cultural Organization (UNESCO) on 23 November 2011. The specialized agencies of which the Holy See is a member include the World Intellectual Property Organization (WIPO), the Universal Postal Union (UPU) and the International Telecommunication Union (ITU).

5. As the Geographical Names Conference has previously been convened under the “Vienna” formula, we would recommend that Palestine and the Holy See as States members of specialized agencies both participate as full members. As the Small Arms Conference is to be convened under the “all States” formula, we would recommend that the Holy See participate as a full member and Palestine as an observer entity.

20 July 2012

**(e) Inter-office memorandum to the High Representative for Disarmament Affairs, Office of Disarmament Affairs (ODA), concerning the provision of grants to external entities from funds in the Trust Fund for Global and Regional Disarmament Activities**

UNITED NATIONS FINANCIAL REGULATIONS AND RULES DO NOT PROVIDE FOR GRANTS FROM TRUST FUNDS TO OUTSIDE ENTITIES TO SUPPORT THE IMPLEMENTATION OF PROJECTS OF SUCH OUTSIDE ENTITIES—EXPRESS MANDATE FROM THE GENERAL ASSEMBLY REQUIRED—INTERIM APPROACHES INCLUDE RELIANCE ON THE CONTROLLER’S DELEGATION OF AUTHORITY OR PROCUREMENT CONTRACTS—AMENDMENT OF THE FUND’S TERMS OF REFERENCE THROUGH SUBMISSION OF A REQUEST FROM ODA TO THE CONTROLLER, ST/SGB/188

1. I wish to refer to your memorandum dated 14 August 2012 as well as discussions between our Offices concerning the Trust Fund for Global and Regional Disarmament Activities (“Trust Fund”) which is used to fund disarmament activities including those related to the Committee established pursuant to Security Council resolution 1540 (2004) and its group of experts.

2. You indicate in your memorandum that voluntary contributions have been received from Member States for purposes of the provision of grants to outside entities that would partner with the Office of Disarmament Affairs (ODA) in support of the implementation of resolution 1540 (2004). ODA accordingly wishes to use the Trust Fund to disburse these funds received from Member States to outside entities and seeks the Office of Legal Affairs’

(OLA) advice concerning obtaining the necessary General Assembly mandate to do so as well as an amendment to the Fund's Terms of Reference (TOR). Our views are as follows:

#### BACKGROUND

3. We would like to recall that the Trust Fund was established on 1 June 1988 by a decision of the Secretary-General. According to a memorandum of 18 April 2001 from ODA, the TOR *inter alia* provides that, "within the various disarmament mandates given by the legislative bodies" the Trust Fund will "promote in-depth studies, organize expert discussions on priority disarmament questions." According to a memorandum from the Director, Office of Programme Planning, Budget and Accounts (United Nations) (OPPBA) dated 3 May 2001, an additional paragraph was added to the TOR which provides as follows:

"To support initiatives and activities in the fields of small arms and light weapons, including post-conflict programmes related to disarmament, demobilization and reintegration of former combatants and weapons collection programmes."

4. In a memorandum to ODA of 14 March 2012 concerning a specific agreement whereby ODA would seek to provide grants to an outside entity, OLA stated as follows:

"... as discussed at our ... meeting, we are of the opinion that the delegation of authority from the Controller to your Office (as per memorandum of 1 August 2010) to issue grants in respect of certain trust funds may not provide a sufficient legal basis for ODA to provide grants to outside entities. In particular, please note that the Terms of Reference for the Trust Fund for Global and Regional Disarmament Activities ... does not expressly authorize the provision of grants. However, we understand that on exceptional basis, and as was explained to us in our recent meeting, ODA has decided to rely on the Controller's delegation of authority in this case, since ODA considers the present undertaking to be urgently needed in order to fulfill its mandate. As we also discussed in our recent meeting, for future endeavors of this nature, OLA recommends that ODA seek approval or endorsement from the General Assembly to provide grants to outside entities."

5. In accordance with the United Nations financial regulation 4.14, trust funds must be administered in accordance with the United Nations Financial Regulations and Rules. In this regard, the TOR provide that the Fund will act "within the various disarmament mandates given by the legislative bodies." Since the provision of grants from trust funds to outside entities to support the implementation of projects of such outside entities is not provided for in the United Nations Financial Regulations and Rules, it would be necessary for ODA, on a long term basis, to obtain a mandate from the General Assembly that expressly allows it to provide grants to outside entities from ODA-administered trust funds. Pending ODA obtaining such a mandate, ODA will have to decide on approaches for utilizing the Fund to fulfill its purpose. These interim approaches are discussed in paragraph 6, below. In addition, there are several avenues available to ODA in order to obtain a mandate from the General Assembly, and these are outlined in paragraphs 7 to 10, below.

#### GRANTS TO BE GIVEN BY ODA PENDING RECEIPT OF A MANDATE FROM THE GENERAL ASSEMBLY

6. Until the above-referenced mandate is provided by the General Assembly, and in order to meet ODA's immediate requirements to give out grants to external entities,

we would note that ODA would have to rely on the Controller's delegation of authority, referred to above, on an *ad hoc* basis. Alternatively, and as we also discussed with representatives of your Office, ODA may wish to engage the services of qualified entities, such as NGOs, through procurement contracts, to carry out projects to fulfill the mandate of the Fund. Certainly, obtaining such services would clearly fall within the definition of procurement under the financial regulation 5.12 and the relevant United Nations Financial Rules thereunder. Such an approach, thus, would be fully consistent with the Financial Regulations and Rules.

#### OBTAINING A MANDATE FROM THE GENERAL ASSEMBLY

7. We note that in the provisional agenda of the General Assembly for the sixty-seventh session of the General Assembly, as contained in document A/67/100, there are a number of agenda items and sub agenda items under section G, "Disarmament". In our view, ODA is best placed to determine the agenda item or sub item under which the General Assembly may consider the matter and provide the necessary mandate.

8. While it is difficult for OLA to suggest specific language for inclusion in a draft resolution, it would be important that the resolution include a request to the Secretary-General to give grants from the Trust Fund to outside entities or permit the use of the Trust Fund to give grants to outside entities to support the implementation of their projects. Member States may also wish to specify specific limitations to the giving of such grants.

9. For purposes of informing the members of the General Assembly, ODA could consider inserting, in an appropriate report of the Secretary-General, information concerning the establishment of the Trust Fund, what it has achieved thus far and the need for the expansion of the Fund's mandate which requires General Assembly approval. It could then request the General Assembly at the present session to consider and adopt an expanded mandate which would allow ODA to amend the Fund's TOR in order to issue grants to outside entities. This process may take longer than the one outlined below.

10. Alternatively, once ODA identifies an appropriate agenda item, ODA could approach some Member States, for example donors States, and explain the current constraints on the use of the Trust Fund. ODA may wish to emphasize that the modifications being sought to the Fund's TOR would only be possible through the adoption of a resolution (or decision) providing a legal basis to provide grants to outside entities and seek their assistance.

#### REVISION OF THE TOR

11. In paragraph 5 of your memorandum of 14 August 2012, ODA has proposed a text to be added to the TOR, concerning the provision of grants to external entities. Once the General Assembly has adopted a resolution (or decision) expressly allowing ODA to provide grants to outside entities from the Trust Fund and certain other trust funds managed by ODA, the authorization set forth in the resolution (or decision) would be reflected into the TOR of those trust funds by an amendment thereof. Such an amendment could be effected in the same manner that the TOR was amended in 2001, i.e., through the submission of a request for amendment from your Office to the Controller who, pursuant to the United Nations Financial Regulations and Secretary-General's bulletin ST/SGB/188 of



1 March 1982 on “Establishment and Management of Trust Funds”, has the authority to approve the amendment of the TOR of the Trust Fund.

12. In this regard, there would be no objection if the proposed text of amendment to the TOR set forth in paragraph 5 of your memorandum was included in the report of the Secretary-General, referred to in paragraph 8 of this memorandum, above. If ODA decides to include the proposed text into the Secretary-General’s report, we would recommend that the text be revised to clarify that the grants would be provided to support the implementation of the outside entities’ projects, and that those projects would not be United Nations projects.

10 October 2012

### 3. Procurement

#### **(a) Inter-office memorandum to the Director, Internal Audit Division, Office of Internal Oversight Services (OIOS), concerning the proper interpretation of financial rule 105.18(a): “not-to-exceed” provision in United Nations contracts**

FINANCIAL RULE 105.18(A) DOES NOT REQUIRE A MAXIMUM CONTRACT PRICE OR A “NOT-TO-EXCEED” PRICE TO BE SPECIFIED IN EVERY CONTRACT CONCLUDED BY THE ORGANIZATION—“NOT TO EXCEED” AMOUNT CAN CREATE UNREASONABLE EXPECTATIONS FOR CONTRACTORS OR SERVICE PROVIDERS—SPECIFYING UNIT PRICE WITHOUT SPECIFYING THE ENTIRE CONTRACT PRICE WOULD BE SUFFICIENT TO COMPLY WITH RULE 105.18(A)—OCCASIONS WHEN SPECIFYING A MAXIMUM CONTRACT PRICE IS ESSENTIAL

1. I refer to an e-mail message from the OIOS to the Office of Legal Affairs (OLA), dated 30 January 2012, requesting OLA’s advice as to the proper interpretation of the financial rule 105.18(a). In essence, as stated in OIOS’ e-mail message to OLA, your Office seeks our advice on whether, pursuant to that financial rule, “every contract [concluded by the Organization] must include a “not-to-exceed” provision (NTE) or other information to determine the contract price.”

2. Financial rule 105.18(a) provides, as follows:

“Written procurement contracts shall be used to formalize every procurement action with a monetary value exceeding specific thresholds established by the Under-Secretary-General for Management. Such arrangements shall, as appropriate, specify in detail:

- (i) The nature of the products or services being procured;
- (ii) The quantity being procured;
- (iii) The contract or unit price;
- (iv) The period covered;
- (v) Conditions to be fulfilled, including the United Nations general conditions of contract and implications for non-delivery;
- (vi) Terms of delivery and payment;
- (vii) Name and address of supplier.”



3. In our view, the provisions of financial rule 105.18(a), quoted above, clearly do not require a maximum contract price or “not-to-exceed” amount to be specified in every contract concluded by the Organization. In fact, from recent commercial claims against the Organization that resulted in arbitration, we have seen that including a “not-to-exceed” amount in a contract can be detrimental to the legal interests of the Organization, as contractors have argued that such a “not-to-exceed” value gives them a right to expect payment of that amount, whether the Organization needs all of the specified goods or services or not. In an arbitration case between [Company] and the United Nations, [Company] claimed damages based on the remaining “not-to-exceed” amount balance, on the ground that the “not-to-exceed” amount was what it would have earned had the contract not been terminated. It advocated that the “not-to-exceed” amount was a guaranteed amount to be purchased by the United Nations, and the United Nations was obliged not to purchase from another vendor before it purchased up to the “not-to-exceed” amount. The tribunal rejected [Company]’s arguments, and the United Nations ultimately prevailed in the case. Nevertheless, given the great variety of contractors engaged by Organization from various jurisdictions, it is impossible to rule out the possibility that the inclusion of a “not-to-exceed” provision in every contract concluded by the Organization can result in similar disputes.

4. In this regard, financial rule 105.18(a)(iii) requires specification of the “contract [price] *or* unit price” (emphasis added). Thus, because financial rule 105.18(a)(iii) allows written contracts to specify either contract prices or unit prices, merely specifying unit prices without specifying the entire contract price would be sufficient to comply with financial rule 105.18(a) and, indeed, may be appropriate in many cases. In other cases, it may be appropriate to specify the maximum contract price together with unit prices.

5. Thus, not every contract concluded by the Organization needs to specify the maximum contract price. For example, if the Organization knows that it needs a particular product, such as vehicle spare parts, for its peacekeeping missions for the next three years, it is sufficient to include a unit-price or unit-price formula for the parts that will be paid during the three-year term of the contract. Since total vehicular spare part needs over the three-year period cannot be forecast, it makes less sense to include a “not-to-exceed” price in the contract that could set unreasonable expectations for the supplier. In such case, the “not-to-exceed” amount serves as an internal administrative ceiling on how much the Organization can spend under the contract, but it need not be included in the contract itself so long as unit prices for the parts are specified. Similarly, where services, such as investment advisory services for the United Nations Joint Staff Pension Fund, are needed for a discrete period of time, the hourly rate for the advisory services need only be specified in the contract. Since it cannot be forecast how much of the advisory services overall would be needed during the three-year period, again, it makes little sense to include a “not-to-exceed” price in the contract, as this could set unreasonable expectations for the service provider as to how much the Organization would pay under the contract.

6. There may be occasions when specifying a maximum contract price is essential. For example, when the Organization engages outside counsel for legal services to assist in arbitral proceedings, such outside counsel is asked to specify a cap on overall fees. This practice has saved the Organization substantial sums when the arbitral proceedings prove to be more complex or take significantly longer than the outside counsel anticipated in trying to bid for the services. Other cases in which such a maximum contract price make

sense include any number of “project” services, such as construction of premises, where the “not-to-exceed” amount being specified in the contract operates as a cost containment, liability limiting mechanism. So, for project based contracts, where overall cost containment is essential, including a “not-to-exceed” value in the contract is appropriate.

7. In light of the forgoing, it is OLA’s view that the Procurement Division should exercise its judgment in deciding whether and when to include a “not-to-exceed” amount, or maximum contract price, in a contract concluded by the Organization, whether for purchase of goods, for the acquisition of services or for a combination thereof.

30 March 2012

**(b) Inter-office memorandum to the Director, Procurement Division,  
Office of Central Support Services (OCSS), Department of Management,  
concerning contract documents included in written contracts  
concluded by the Organization**

INCLUDING UNITED NATIONS’ SOLICITATION DOCUMENTS AND THE CONTRACTOR’S PROPOSAL/BID IN A CONTRACT AS CONTRACT DOCUMENTS CAN OFTEN LEAD TO DIFFERING INTERPRETATIONS OF THE PARTIES’ RIGHTS AND OBLIGATIONS—MORE APPROPRIATE TO EXTRACT RELEVANT PROVISIONS AMENDED AS NECESSARY AND INCLUDE SUCH UPDATED TERMS EITHER IN THE MAIN BODY OF THE CONTRACT OR IN A SEPARATE CONTRACT DOCUMENT—IF NECESSARY TO REFERENCE DOCUMENTS, THEY SHOULD BE LISTED SEPARATELY AND SPECIFY THAT DOCUMENTS ARE REFERRED TO ONLY AS AIDS IN INTERPRETATION AND DO NOT CREATE ANY RIGHTS OR OBLIGATIONS

1. This memorandum concerns the issue of contract documents included in written contracts concluded by the Organization. Pursuant to financial rule 105.18(a), written contracts concluded by the Organization must specify, *inter alia*, the nature and quality of the products or services being procured; the contract or unit price; the period covered; and other relevant conditions, as appropriate. Such terms and conditions can be described either in the main body of the contract or in other documents which are specified as contract documents.

2. Contract documents are a set of documents that form a part of the agreement between the parties whether for purchase of goods, for the acquisition of services or for a combination thereof. These typically include the main body of the contract containing specific commercial and operational provisions relevant to the particular arrangement; appropriate United Nations General Conditions of Contract (“General Conditions”); and other documents necessary to accurately reflect various terms and conditions agreed upon by the parties during negotiations.

3. From recent commercial disputes involving the Organization that were referred to the Office of Legal Affairs for advice, we have seen that including the United Nations’ solicitation documents (e.g., Request for Proposal (RFP), Invitation to Bid (ITB), Request for Quotation (RFQ)) and the contractor’s proposal/bid in a contract as contract documents can often lead to differing interpretations of the parties’ rights and obligations under the contract insofar as the former contains matters of administrative and not contractual nature, and the contractor’s proposal/bid often contain provisions which are either contrary to the United Nations’ privileges and immunities and/or contain the contractor’s caveats

or proposed changes which contradict the United Nations' requirements as described in the United Nations' solicitation document. While it may be easier and faster in preparing contracts to simply bundle up all the documents relating to the procurement and include all of them in the contract as documents constituting the contract, such practice can be detrimental to the legal interests of the Organization. Accordingly, we would recommend against including, as contract documents, the United Nations' solicitation document and the contractor's proposal/bid in their entirety. In our view, it would be more appropriate to extract relevant commercial and operational provisions in the United Nations' solicitation document and the contractor's proposal/bid, amended as necessary to reflect the negotiated arrangement, and include such updated terms either in the main body of the contract or in a separate contract document. In our experience, this practice results in a clearer and more precise understanding of parties' rights and obligations under the contract.

4. In some cases, the Organization may have no choice other than to reference the United Nations' solicitation document and contractor's proposal/bid in order to successfully conclude a contract with a particular contractor. In such cases, the United Nations' solicitation document and the contractor's proposal/bid should be listed separately, and the contract should provide that these documents are referred to only as aids in interpretation of the rights and obligations of the parties under the contract but is not to be construed, for any purposes or under any circumstances, as creating any such rights or obligations. In those cases, the following provision could be included at the appropriate place in the contract:

“The following documents are referred to in this Contract only as aids in interpretation of the rights and obligations of the Parties under the Contract but shall not be construed, for any purposes or under any circumstances, as creating any such rights or obligations: (a) United Nations [Request for Proposals (RFPS-xxxx) // Invitation to Bid (ITB-xxxx)] dated [date], [as amended by Amendment[s] No.xx dated [date [s]]]; and (b) the Contractor's technical and financial proposals in response to [RFPS-xxxx // ITB-xxxx], dated [date], [as clarified by (i) the United Nations' Request for Technical Clarification, dated [date]; and (ii) the Contractor's Clarification Responses for [RFPS-xxxx // ITB-xxxx], dated [date].] The documents referred to in this Article xx are not attached hereto but are known to, and in the possession of, the Parties.”

5. [ . . . ]

6. [ . . . ]

30 March 2012

#### **4. Liability and responsibility of the United Nations**

##### **Inter-office memorandum to the Deputy Controller, concerning the proposed *pro bono* contribution to the Office for the Coordination of Humanitarian Affairs (OCHA) by [Company]**

STANDARD WAIVER AND RELEASE CLAUSE WAIVING ANY CLAIM OR LIABILITY FOR ANY PERSONAL INJURY OR DAMAGE TO PHYSICAL PROPERTY SUFFERED BY THE PERSON WHILE ON THE [NAME]'S CAMPUS IS INCOMPATIBLE WITH THE UNITED NATIONS FINANCIAL REGULATION 3.11—ADDITIONAL GENERAL LIABILITY INSURANCE COVERAGE NAMING THE UNITED NATIONS AS AN ADDITIONAL INSURED ACCEPTABLE—SUBJECT TO CONTROLLER'S

APPROVAL SINCE ACCEPTANCE OF A *PRO BONO* CONTRIBUTION CANNOT DIRECTLY OR INDIRECTLY INVOLVE ADDITIONAL FINANCIAL LIABILITY OF THE ORGANIZATION

1. This refers to a proposed *pro bono* donation of services from [Company] for leadership development services for OCHA. [ . . . ] Among the *pro bono* services to be provided by [Company] to OCHA under these arrangements is an upcoming workshop for Humanitarian Coordinators scheduled to take place at [workshop name] in [place] from [date]. The Office of Legal Affairs (OLA) is assisting OCHA with the negotiation of relevant *pro bono* donation agreements with [Company] and with its related Company, [Name], concerning the *pro bono* donation.

2. In this context, [Company] has provided its standard “[Name] Waiver and Release” which, according to [Company], has to be signed by anyone who stays on the campus of [Name]. The standard waiver and release form included a clause requiring the person signing the form to release [Company] and another Company affiliated with [Company] from any claim or liability for any personal injury or damage to physical property suffered by the person while on the [Name] campus (operated by [Company]), even if such injury or damage resulted from negligence by [Company] and/or the affiliated Company. We informed [Company] that such clause was incompatible with the United Nations financial regulation 3.11, since under this *pro bono* arrangement, the Member States could bear the liability of a claim under appendix D to the United Nations Staff Rules (“Appendix D”) for a staff member signing the release, but the staff member could not offset such a claim by recovering damages from [Company] or the other Company if they were the source of the staff member’s injury, illness or death. (As you recall, under article VI of Appendix D, the United Nations would have a lien against such recovery by the staff member to the extent of amounts paid to the staff member (or his/her beneficiaries) under Appendix D).

3. Since such a clause was not acceptable to the United Nations, OLA together with OCHA negotiated a revised text whereby [Company] would agree to be liable for such a claim or liability up to the limits of [Company]’s general liability insurance coverage, or [amount] per occurrence and [amount] in the aggregate, and that [Company] would maintain such general liability insurance covering the above-referenced amounts and naming the United Nations as an additional insured. Please see the “Insurance” clause in the revised waiver and release form (copy attached).<sup>\*</sup> [Name] has confirmed that the text of the attached revised waiver and release form is agreeable to it. [Company] has provided a copy of the certificate of insurance evidencing the necessary coverage (copy attached).<sup>\*</sup>

4. We consider that the above-referenced insurance coverage would legally be sufficient to protect the United Nations in the present case. Of course, a final decision on this matter requires your Office’s approval, as your Office would have to agree that this proposed arrangement resolves the issue under financial regulation 3.11 that acceptance of such a *pro bono* contribution cannot “directly or indirectly involve additional financial liability for the Organization”.

5. We are pleased that we have been able to work out the terms for an agreement on this element of the overall cooperation with [Company] and the entire [Name] family firms. Given that [Company] and OCHA are anxious to make further progress on the logistical arrangements for the workshop and that [Company] has informed OLA and

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<sup>\*</sup> Not reproduced herein.

OCHA that it cannot finalize those arrangements until confirmation that an agreement has been reached on the terms and conditions of the waiver and release form, we would be grateful for your Office's urgent review and approval of the arrangement described above.

6. [...]

3 October 2012

## 5. Personnel questions

### Inter-office memorandum to the Senior Legal Officer, Office of Operations, United Nations Environmental Programme (UNEP), concerning the proposed secondment of personnel for the Care 4 the Climate (C4C) initiative

SECONDMENT OF PRIVATE SECTOR PERSONNEL TO THE UNITED NATIONS IS NOT CONSISTENT WITH THE UNITED NATIONS STAFF REGULATIONS AND RULES—ST/AI/231/REV.1—USE OF GRATIS PERSONNEL—POSSIBLE CONFLICT OF INTEREST AND OF LOYALTY—GENERAL ASSEMBLY DECISIONS ON “SECONDMENT” TO THE SERVICE OF THE ORGANIZATION AND THE STAFF REGULATIONS AND RULES ARE STRICTLY LIMITED TO SECONDMENT FROM THE SERVICE OF A MEMBER STATE OR ANOTHER INTERNATIONAL INTERGOVERNMENTAL ORGANIZATION—ALTERNATIVE TO ENGAGE THE PRIVATE SECTOR PERSONNEL AS CONSULTANTS ON A PROJECT COOPERATION BASIS

1. I refer to your e-mail message of 31 January 2012, seeking advice on a request received from UNEP Division for Technology, Industry and Economics for an arrangement whereby a private sector individual would be seconded to the C4C initiative by the Foundation for the Global Compact. You have indicated that the C4C initiative is a joint initiative of the United Nations Global Compact Office and UNEP, launched by the Secretary-General in 2007, and aimed at advancing the role of business in addressing climate change. We understand that the Global Compact Office and UNEP are cooperating under a letter of agreement to advance issues relating to climate change in the private sector and that the role of the seconded person would be to “coordinate C4C activities and undertake initiatives that promote sustainability in the C4C companies” (it is not clear to the Office of Legal Affairs (OLA) what is meant by C4C companies). You have also indicated that it has not been decided whether the private sector individual would be seconded to the Global Compact Office, which would in turn second the individual to UNEP and the United Nations Framework Convention on Climate Change, 1992\* (UNFCCC), or whether the individual will be seconded directly to the Global Compact Office, UNEP and UNFCCC. However, it is envisioned that the individual would be seconded as a non-reimbursable loan under ST/AI/231/Rev.1\*\* and that there would be no financial implications for UNEP.

2. From the information provided, we understand that the seconded individual would maintain his or her employment status, rights and benefits with his or her private sector employer, including the payment of salaries and benefits from the employer, while working on C4C projects in the offices of the Global Compact Office, UNEP, and or of the UNFCCC. The documents provided to us indicate that the seconded individual will be subject to “all

\* United Nations, *Treaty Series*, vol. 1771, p. 107.

\*\* Administrative instruction of 23 January 1991, entitled “Non-reimbursable loan of personnel services from sources external to the United Nations common system”.

the policies and procedures that are applicable to full-time personnel on the [United Nations Global Compact (UNGC)] [UNEP] [UNFCCC] premises . . .” We also understand that the seconded person would work under the supervision of the UNGC/UNEP/UNFCCC. Such an arrangement, whereby private sector personnel would be seconded to the United Nations and work under the instructions of the United Nations staff, raises a number of issues, including the use of gratis personnel, which has been limited by decisions of the General Assembly, the possibility of conflict of interest, and of the loyalty of the private sector personnel. OLA has consistently advised that the secondment of private sector personnel to the United Nations and its Funds and Programmes, whereby they would maintain their employment status with their employers is not consistent with the United Nations Staff Regulations and Rules. Therefore, use of such personnel through secondment from the private sector could not be authorized in the context of cooperation activities with the private sector. The General Assembly decisions on “secondment” to the service of the Organization and the Staff Regulations and Rules on the matter are strictly limited to secondment from the service of a Member State or another international intergovernmental organization. (See e.g., staff regulation 4.1, which refers to “a staff member on secondment from government service”). In view of the foregoing, the co-mingling of personnel of the Organization with the private sector would create serious problems under the Charter of the United Nations and the Staff Regulations and Rules. Even if the Foundation for the Global Compact were to be the conduit for the secondment to the United Nations, as it is envisaged under the proposal, it would not change the concerns raised above, because the Foundation is a private entity outside of the United Nations. Moreover, under non-reimbursable loan arrangements made pursuant to ST/AI/231/Rev.1, the borrowed personnel are considered independent contractors and not as having been seconded or loaned to the service of the Organization.

3. Therefore, an alternative to secondment for enhancing programme delivery in the present case appears to be to engage the private sector personnel as consultants, or to use them on a project cooperation basis, rather than on an employment basis. As such, the private sector personnel could remain in the employ of his or her private sector employer and work with the United Nations through a cooperative, project-based agreement. Under such arrangement, the private sector personnel would not work under the United Nations’ supervision, nor would the United Nations staff be supervised by them and they would not work on United Nations premises. Also, such project-based agreements could deal with cost issues, such as travel, and if needed, other reimbursement arrangements, along the lines of the provisions in ST/AI/231/Rev.1. Such an agreement would also require the approval of the appropriate financial and human resources officials. Therefore, we recommend that you consult with the United Nations Office at [City] Human Resources and Finance in this regard.

4. [ . . . ]

23 February 2012

## **6. Other issues relating to peacekeeping operations**

### **(a) Note concerning an allegation of attempted theft against a member of a military contingent**

ATTEMPTED THEFT COMMITTED BY A MEMBER OF A PEACEKEEPING OPERATION AMOUNTS TO BOTH MISCONDUCT UNDER UNITED NATIONS RULES AND ALSO TO A CRIMINAL OFFENCE



UNDER THE LAWS OF THE HOST COUNTRY—PROCEDURES FOR INVESTIGATING MISCONDUCT COMMITTED BY MEMBERS OF NATIONAL MILITARY CONTINGENT—ARTICLE 7 *QUATER* OF THE MODEL MEMORANDUM OF UNDERSTANDING FOR CONTRIBUTION OF RESOURCES TO UNITED NATIONS PEACEKEEPING OPERATIONS—TROOP-CONTRIBUTING COUNTRIES ARE RESPONSIBLE FOR INVESTIGATING ACTS OF MISCONDUCT BY MILITARY PERSONNEL OF THEIR NATIONAL CONTINGENTS AND FOR EXERCISING DISCIPLINARY AUTHORITY—UNITED NATIONS DUTY TO COOPERATE WITH COMPETENT TROOP-CONTRIBUTING COUNTRY AUTHORITIES—RESPONSIBILITY OF THE HOST STATE TO INVESTIGATE AND PROSECUTE ANY CRIMES COMMITTED AGAINST UNITED NATIONS MISSION PERSONNEL—GOVERNMENTS OF THE STATE HOSTING A PEACEKEEPING OPERATION AND TROOP-CONTRIBUTING COUNTRIES MAY AGREE ON ARRANGEMENTS WHEREBY NATIONALS OF A TROOP-CONTRIBUTING COUNTRY MAY BE ALLOWED TO INVESTIGATE CRIMES COMMITTED AGAINST THEIR PERSONNEL IN THE HOST STATE.

1. I refer to your memorandum of [date] forwarding to us a code cable from [United Nations Mission] with an attached preliminary investigation report prepared by the [United Nations Mission]’s Force Provost Marshal (FPM) into an alleged “shoplifting” committed by a member of the [troop-contributing country (TCC)] military contingent at the “[Organization] shop” in [City]. Essentially, it is alleged that following a tip from a shop attendant, the [Nationality of TCC] officer (of the rank of major) was stopped and searched by a [Nationality of the Host State] policeman while leaving the shop, and that he was found to have taken some items from the shop for which he had not paid. The FPM report concludes that there is overwhelming evidence that the officer attempted to shoplift the items. It also concludes that the policeman assaulted the officer and thus inflicted bodily harm on him during the incident. We understand that the [TCC] authorities sent a team to [City] to investigate the alleged assault, although it is not clear if the team’s terms of reference also included investigating the alleged theft.

2. Your memorandum requests our views on issues related to the investigation instituted by the [TCC] authorities, particularly the points mentioned in paragraphs 8, 9 and 10 of the code cable from [United Nations Mission]. It appears that the first query arising from the [United Nations Mission] cable is whether the [TCC] delegation that visited the [United Nations Mission] from [date] is the appropriate authority to conduct the investigation into the incident. Secondly, the Office of Legal Affairs’s (OLA) views are sought on whether the FPM report should be shared with the [TCC] investigation team. Thirdly, we are also requested to advise whether in the event the [TCC] investigation involves interviewing members of the local population, any communications between relevant authorities for access to such local witnesses should be handled by DPKO/DFS or by [United Nations Mission].

3. As a preliminary matter, we note that any attempted theft, including shoplifting, committed by a member of a peacekeeping operation would amount to both misconduct under United Nations rules and also to a criminal offence under the laws of the host country.

4. The procedures for investigating misconduct committed by members of national military contingents are laid down in article 7 *quater* of the Model Memorandum of Understanding for contribution of resources to United Nations peacekeeping operations, the latest version of which has been published as General Assembly document A/C.5/63/18 (the “MOU”).

5. Pursuant to the MOU, troop-contributing countries are responsible for investigating acts of misconduct by military personnel of their national contingents and for exercising disciplinary authority in relation to such misconduct. Moreover, the MOU reaffirms the principle established in the model status-of-forces agreement (A/45/594) between the United Nations and the State hosting a peacekeeping operation, that the TCC shall have exclusive jurisdiction over criminal offences committed in the United Nations Mission area by military members of TCC's national contingent. Clearly, therefore, the responsibility to investigate the theft allegedly committed by a member of the [TCC] contingent of [United Nations Mission]—whether viewed from a disciplinary or a criminal law perspective—lies with the Government of [TCC].

6. Pursuant to the MOU, the Government of the TCC assures the United Nations that it shall exercise jurisdiction over misconduct and over criminal offences committed by its troops. The MOU further requires that the United Nations cooperate with the competent authorities of the TCC, including national investigations officers (NIOs), in the investigation of misconduct or alleged crimes by troops, and that the United Nations provide necessary liaison with host country authorities in order to facilitate the TCC's access to witnesses who are not part of the TCC's contingent, and also to evidence "not in the ownership or control" of the TCC.

7. The MOU also provides that if the United Nations conducts an investigation into alleged misconduct or serious misconduct of a member of a national contingent, it shall provide its findings and evidence to the relevant TCC, which is obligated to take action to address the matter and to advise the United Nations about the action taken.

8. Accordingly, the Government of [TCC] has the authority and the responsibility to investigate the theft allegedly committed by a member of its national contingent in [United Nations Mission]. If the [TCC] team present in [City] has informed [United Nations Mission] that it has been appointed to investigate this incident, we see no basis to question that team's authority to conduct the investigation on behalf of the [TCC] Government. Moreover, under the express terms of the MOU, the United Nations should provide the FPM investigation report to the [TCC] investigators. Additionally, if the [TCC] investigation involved interviewing witnesses in [City] who are not part of the [TCC] contingent, the United Nations should work with the [TCC] investigators to facilitate such investigation, i.e., by requesting the [Host State] authorities to grant access to local witnesses or to evidence in their possession. Should the [TCC] investigators need to interview witnesses from other [United Nations Mission] contingents or require evidence not in the possession or control of the [TCC] authorities, the United Nations should also liaise with the relevant Governments to facilitate such interviews or access to evidence. In this regard, communications from the United Nations to the relevant Governments may be sent by DPKO/DFS or by [United Nations Mission]. We see no legal impediments to such communications being handled by DPKO/DFS or by [United Nations Mission].

9. The above having been said, we also note that according to the [United Nations Mission] code cable, the [TCC] authorities are investigating the alleged assault but it is not clear if they are also investigating the alleged attempted theft or "shoplifting". In that regard, we note that both as a general legal principle and also in accordance with the [United Nations Mission] status-of-forces agreement executed between the United Nations and [Organization] on the one hand, and the Government of [Host State] on the other, the



Government of [Host State] has the responsibility to investigate and prosecute any crimes committed against [United Nations Mission] personnel. Accordingly, the authority and responsibility to investigate the assault lies with the Government of [Host State]. However, it is open to the Governments of [Host State] and [TCC] to agree on arrangements whereby the [nationals of TCC] may be allowed to investigate crimes committed against [TCC] personnel in [Host State]. While we have no information concerning any such arrangements between the two Governments, we note that it is in the United Nations interests that crimes committed against its peacekeepers be investigated and that those responsible be prosecuted. DPKO/DFS and [United Nations Mission] should verify if any arrangements have been made between the Governments of [TCC] and [Host State] enabling [TCC] to investigate the alleged assault. If such arrangements have been made, DPKO/DFS and [United Nations Mission] should co-operate with such investigation, including by providing the FPM report, insofar as it also relates to the incident in which the assault allegedly occurred.

10. In advising that the FPM report be provided to the investigating authorities, we note that while the report includes witness statements from two shop attendants, nothing suggests that either of the attendants gave their statements on the understanding that their names would be kept confidential, or that the statements would not be provided to government authorities who might have to deal with this matter. We also note that the only other witness statements attached to the report were made by five [TCC] soldiers. We therefore see no legal considerations that would dictate that the witness statements not be provided to the [TCC] authorities, especially given the requirements in articles 7.12 and 7.13 of the MOU, that preliminary investigation reports and administrative reports conducted by the United Nations be provided to the TCC.

6 February 2012

**(b) Inter-office memorandum to the Director of the Investigation Division,  
Office of Internal Oversight Services (OIOS), concerning a report of possible  
misconduct involving members of a military contingent**

THE UNITED NATIONS IS OBLIGATED TO INFORM THE GOVERNMENT OF THE TROOP-CONTRIBUTING COUNTRY CONCERNED OF ALLEGED MISCONDUCT, SUBJECT TO THERE BEING “PRIMA FACIE GROUNDS” INDICATING THAT THE MEMBERS OF THE CONTINGENT COMMITTED MISCONDUCT—THE OBLIGATION APPLIES IRRESPECTIVE OF WHERE THE ALLEGED MISCONDUCT MAY HAVE BEEN COMMITTED, AS LONG AS THE CONTINGENT WAS ON ASSIGNMENT WITH A UNITED NATIONS MISSION—NOTIFICATION WILL ENABLE THE STATE GOVERNMENT TO EXERCISE EXCLUSIVE OR DISCIPLINARY JURISDICTION, CONSISTENT WITH ITS OBLIGATIONS

1. This is with reference to your memoranda, dated [ . . . ] and [ . . . ], requesting the Office of Legal Affairs’ (OLA) advice on whether reports of misconduct by national contingent members that occur outside the mission to which they are deployed, require notification by the United Nations to the Government of the troop-contributing country (TCC) concerned.

2. OIOS’ query has arisen in the context of alleged misconduct committed in [State] by [TCC] soldiers serving with [United Nations Mission]. OIOS has taken the view that, under the relevant Memorandum of Understanding with the relevant troop-contributing

country (TCC MOU), the United Nations would not have an obligation to notify the Government of [TCC] of such alleged misconduct. OIOS notes in this respect that the TCC MOU “defines misconduct with an express reference to status-of-forces agreements” and that the “[United Nations Mission] status-of-forces agreement, in turn, limits the territory of the agreement to [Host State].”

3. Pursuant to article 3 of the Memorandum of Understanding between the United Nations and the Government of [TCC] contributing resources to [United Nations Mission], dated [ . . . ], as amended on [date] (MOU),<sup>1</sup> the MOU “[establishes] the administrative, logistics and financial terms and conditions to govern the contribution of personnel, equipment and services provided by the [TCC] in support of [United Nations Mission]” (MOU). Notably, article 7.12 of the MOU requires that “[i]n the event that the United Nations has *prima facie* grounds indicating that any member of the Government’s national contingent has committed an act of misconduct or serious misconduct, the United Nations shall without delay inform the Government.”

4. Article 7.12 of the MOU does not draw a distinction as to whether the alleged misconduct was committed in the mission area, or in another country. Thus, as a legal matter, article 7.12 of the MOU would apply in respect of any misconduct committed by a member of the contingent, irrespective of where it may have been committed. In this regard, we would also note that in articles 7.22 and 7.23 of the MOU the Government provides assurances to the United Nations that it will exercise jurisdiction in respect of crimes, offences or other acts of misconduct committed by the members of the military contingent while they are assigned to the military component of [United Nations Mission]. Again, articles 7.22 and 7.23 of the MOU do not draw a distinction as to the location of the crime, offence or other misconduct. Rather, the determining criterion here is that the crime, offence or other misconduct must have been committed by the member of the contingent whilst on assignment with [United Nations Mission]. In this regard, we would note that, even if the members of the contingent concerned were on vacation in [State], as stated in your memorandum, we do not think that this fact would negate their status as being on assignment with [United Nations Mission].

5. For the reasons set out above, the United Nations is obligated to inform the Government of [TCC] of the alleged misconduct, subject, of course, to there being “*prima facie* grounds” indicating that the members of the contingent committed misconduct. Should such *prima facie* grounds exist, such notification will then enable the Government of [TCC] to exercise exclusive or disciplinary jurisdiction, consistent with its obligations under articles 7.22 and 7.23 of the MOU.

6. [ . . . ]

25 May 2012

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<sup>1</sup> The MOU was amended on [date] to include into the MOU clauses addressing sexual exploitation and abuse, on the basis of General Assembly resolution 61/267B. The MOU, referred to in this memorandum, is for [Nationality] infantry battalions. While we do not know as to whether the soldiers in this case formed part of such battalions, we note that the provisions in the MOU are standard provisions and would also apply in the context of other MOUs for the provision by the Government of [State] of troops to [United Nations Mission].

## 7. Miscellaneous

### **Inter-office memorandum to the Officer-in-charge and Chief Legal Adviser, Legal Affairs Programme of the United Nations Climate Change Secretariat with respect to the legal status of Western Sahara and whether the Kingdom of Morocco can host a project activity within the territory of Western Sahara**

LEGAL OPINION PROVIDED BY THE LEGAL COUNSEL ON 29 JANUARY 2002 ON THE LEGAL FRAMEWORK CONCERNING THE EXPLOITATION OF MINERAL RESOURCES IN A NON-SELF-GOVERNING TERRITORY AND SETTING OUT THE APPLICABLE PRINCIPLES CONCERNING ANY ECONOMIC ACTIVITIES IN NON-SELF-GOVERNING TERRITORIES—CURRENT STATUS OF WESTERN SAHARA IS THAT OF A NON-SELF-GOVERNING TERRITORY, UNDER THE *DE FACTO* ADMINISTRATION OF MOROCCO—TWO-LIMB TEST WITH RESPECT TO THE CARRYING OUT OF FOREIGN ECONOMIC ACTIVITIES IN NON-SELF-GOVERNING TERRITORIES

1. This is in reference to your memorandum of [date] in which you advise that the United Nations Framework Convention on Climate Change (UNFCCC) Secretariat received a request concerning a proposed Clean Development Mechanism (CDM) project activity to be hosted by the Kingdom of Morocco in Western Sahara. In response to the request, the UNFCCC Secretariat replied, on behalf of the Chair of the CDM Executive Board, that in light of, *inter alia*, the Advisory Opinion of the International Court of Justice of 16 October 1975\* and a number of United Nations Security Council and General Assembly resolutions which raise questions with regard to the sovereignty of the Kingdom of Morocco over Western Sahara, it was doubtful whether a CDM project activity could be implemented by the Kingdom of Morocco in Western Sahara. We note that in its letter of [date], the Government of the Kingdom of Morocco has taken issue with the response of the UNFCCC Secretariat. You seek our advice with respect to the legal status of Western Sahara, and consequently whether the Kingdom of Morocco can host a project activity within the territory of Western Sahara.

2. As you may be aware, the legal status of the Territory of Western Sahara, and of Morocco in relation to the Territory, was addressed in a legal opinion provided by the United Nations Legal Counsel on 29 January 2002 at the request of the Security Council (S/2002/161) (“the opinion”). As noted in the opinion, Western Sahara, formerly a Spanish protectorate since 1884, was included in the list of Non-Self-Governing Territories in 1963, and has the status of a “Non-Self-Governing Territory under Chapter XI of the Charter”.

3. Regarding the position of Morocco *vis-à-vis* Western Sahara, as noted in the opinion, on 14 November 1975, a Declaration of Principles on Western Sahara was concluded in Madrid between Spain, Morocco and Mauritania (“the Madrid Agreement”), whereby “the powers and responsibilities of Spain, as the administering Power of the Territory, were transferred to a temporary tripartite administration”. However, as noted in the opinion, the Madrid Agreement

“did not transfer sovereignty over the Territory, nor did it confer upon any of the signatories the status of an administering Power, a status which Spain alone could not have unilaterally transferred. The transfer of administrative power over the Territory

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\* *Western Sahara, Advisory Opinion, I.C.J. Reports 1975, p. 12.*

to Morocco and Mauritania in 1975 did *not* affect the international status of Western Sahara as a Non-Self-Governing Territory” (emphasis added).

As stated in the opinion, following the withdrawal of Mauritania from the Territory in 1979, Morocco, which is “not listed as the Administering Power of the Territory in the United Nations list of Non-Self-Governing Territories, and has therefore, not transmitted information on the Territory in accordance with Article 73 (e) of the Charter of the United Nations”, has administered the Territory of Western Sahara alone. As such, based on the foregoing, Morocco has the status of a *de facto* administrator of the Territory.

4. As noted in the opinion, the question of Western Sahara has been dealt with both by the General Assembly, as a question of decolonization, and by the Security Council, as a question of peace and security. We note that in its recent resolution 2044 (2012) of 24 April 2012, the Security Council “reaffirmed its commitment to assist the parties to achieve a just, lasting and mutually acceptable political solution, which will provide for the self-determination of the people of Western Sahara in the context of arrangements consistent with the principles and purposes of the Charter”. However, until such time as a political solution is reached, the current status of Western Sahara is that of a Non-Self-Governing Territory, under the *de facto* administration of Morocco.

5. As set out by the opinion, the legal regime applicable to Non-Self-Governing Territories is provided by Article 73 of the Charter and by resolutions of the General Assembly relating to decolonization and economic activities in Non-Self-Governing Territories. As summarized in the opinion,

“[t]he principle that the interests of the peoples of Non-Self-Governing Territories are paramount, and their well-being and development is the “sacred trust” of their respective administering Powers, was established in the Charter of the United Nations and further developed in General Assembly resolutions. . . . In recognizing the inalienable rights of the peoples of Non-Self-Governing Territories to the natural resources in their territories, the General Assembly has consistently condemned the exploitation and plundering of natural resources and any economic activities which are detrimental to the interests of the peoples of those Territories and deprive them of their legitimate rights over their natural resources. The Assembly recognized, however, the value of economic activities which are undertaken in accordance with the wishes of the peoples of those Territories, and their contribution to the development of such Territories”.

6. While the opinion focuses on the legal framework concerning the exploitation of mineral resources in a Non-Self-Governing Territory, it sets out the applicable principles concerning any economic activities in Non-Self-Governing Territories. It refers to resolutions of the General Assembly under the agenda item “Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples”, which called upon administering Powers to ensure “that all economic activities in Non-Self-Governing Territories under their administration did not adversely affect the interests of the peoples of such Territories, but were directed towards assisting them in the exercise of their right to self-determination”. The opinion notes an “important evolution of this doctrine” and refers to a distinction drawn by the General Assembly between activities that are detrimental to the peoples of these Territories and those directed to benefit them. It refers to paragraph 2 of General Assembly resolution 50/33 of 6 December 1995 in which the General Assembly affirmed “the value of foreign economic investment undertaken *in collaboration with the peoples of the Non-Self-Governing Territories and in accordance with their wishes in order to*

*make a valid contribution to the socio-economic development of the Territories*” (emphasis added), which position has been affirmed in later resolutions.

7. The opinion concludes that “recent State practice, though limited, is illustrative of an *opinio juris* on the part of both administering Powers and third States: where resource exploitation activities are conducted in Non-Self-Governing Territories *for the benefit of the people of those Territories, on their behalf or in consultation with their representatives*, they are considered compatible with the Charter obligations of the administering Power and in conformity with the General Assembly resolutions and the principle of ‘permanent sovereignty over natural resources’ enshrined therein” (emphasis added).

8. We are unaware of the precise nature of the proposed CDM project activity in Western Sahara, or of how the proceeds generated by it will be used. However, we understand that, as a “wind farm”, the project is an economic activity which is likely to have a significant impact on certain natural resources of the Territory, not least in terms of the amount of land used to host the wind farm, and the effect of the installation of wind farm on the physical environment, but also in terms of generating electricity and creating a resource that can be traded and sold.

9. We are not in a position to advise on the interpretation of the Kyoto Protocol\* to the UNFCCC, and are not aware of any practice concerning Non-Self-Governing Territories under it. Nevertheless, based on the foregoing analysis, it is our view that principles of international law described above establish a two-limb test with respect to the carrying out of foreign economic activities in Non-Self-Governing Territories: first, such activities must be for benefit of the people of those Territories; and second they must be carried out on their behalf, or in consultation with their representatives. The question whether Morocco can host the project activity in Western Sahara would thus depend on the interpretation of the UNFCCC and its Protocol, and whether the CDM project is consistent with principles of international law concerning economic activities in a Non-Self-Governing Territory. Whether the above-mentioned conditions are met in this case is of course a question of fact on which we are not in a position to advise.

28 June 2012

## **B. LEGAL OPINIONS OF THE SECRETARIATS OF INTERGOVERNMENTAL ORGANIZATIONS RELATED TO THE UNITED NATIONS**

### **1. International Fund for Agricultural Development**

(Submitted by the General Counsel of the International Fund for Agricultural Development)

#### **(a) Memorandum concerning safeguards for the long-term viability and continuity of the International Fund for Agricultural Development (IFAD or the Fund) operations**

IMPACT OF GRANT FINANCING—DEBT SUSTAINABILITY MECHANISM (DSF GRANTS)—IFAD BASIC DOCUMENTS REQUIRE THE FUND TO ALWAYS ENSURE AT LEAST “BREAK-EVEN”—

\* United Nations, *Treaty Series*, vol. 2303, p. 148.

PERIODIC REVIEW OF THE ADEQUACY OF RESOURCES (REPLENISHMENT)—FINANCIAL PRUDENCE—WHETHER THE EXECUTIVE BOARD SHOULD CONTINUE TO APPROVE DSF GRANTS BEFORE THE GOVERNING COUNCIL HAS SECURED BINDING LEGAL COMMITMENTS FROM THE MEMBER STATES TO COMPENSATE THE FUND

1. *The issue:* At the 122nd session of the Audit Committee (23 March 2012) I was asked whether there are any legal provisions in the Fund's basic documents that address the question whether the organization should "break-even"; in other words, whether it is mandatory for the organization to always ensure that at any time its forecasted revenues at least equal to its estimated total costs. This question was posed in the context of the impact of grant financing, in particular the debt sustainability mechanism ("DSF grants") on the financial soundness of the Fund. The present memorandum elaborates in more details on my initial oral response given at the aforementioned session.

2. The Agreement Establishing IFAD ("Agreement")\* as well as various rules, regulations and policies adopted thereunder, contains safeguards for the long-term viability of the Fund and the continuance of its operations, from which it can be derived that *the basic documents require the Fund to always ensure at least "break-even"*. Broadly speaking these safeguards can be divided between those concerning the periodic review of the adequacy of the Fund's resources and those that are designed to ensure financial prudence in its operations.

3. *Periodic review of the adequacy of resources ("Replenishment"):* According to article 4.3. of the Agreement, in order to assure continuity in the operations of the Fund, the Governing Council shall periodically, at such intervals as it deems appropriate, review the adequacy of the resources available to the Fund. If the Governing Council, as a result of such review, deems it necessary or desirable, it may invite member States to make additional contributions ("replenishment contributions") to the resources of the Fund.

4. *Financial prudence:* As regards to the rules, regulations and policies designed to ensure financial prudence in the operations of the Fund, mention should be made of (i) the prohibition to write-off certain claims, (ii) the General Reserve, (iii) the constraints on investment, (iv) commitment policy, (v) the lending terms, (vi) the mitigation of credit risk, (vii) the grant ceiling for ordinary grants, and (viii) the duty to ensure long term viability when approving DSF grants.

5. *i) Prohibition to write-off certain claims:* An analysis of the Agreement and IFAD's other basic legal documents show that the power to approve the reduction or "writing-off" of a contribution pledge or of loan obligations has not been attributed to any of its governing bodies. In particular, regulation X.3 stipulates as follows: "*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.*" As regards loan obligations, mention should also be made of the fact that the Governing Council has set a limit to the Executive Board's authority to amend the terms of a loan for the purpose of resolving arrears. Thus, paragraph 32(g) of the Lending Policies and Criteria requires that when considering settlement plans the Executive Board secures the "original Net Present Values (NVP) of the loan".

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



6. *ii) General Reserve:* The General Reserve, which by virtue of Governing Council resolution 168/XXXV (2012) now features as financial regulation XIII, was established by the Governing Council in 1980 to address the potential risk of over-commitment of IFAD resources as a result of exchange rate fluctuation, possible delinquencies in the receipt of loan service payments, and possible delinquencies in the recovery of amounts due to the Fund from the investment of its liquid assets.<sup>1</sup> In 1999, the Governing Council recognized the need to provide further cover for the Fund against the potential over-commitment risk resulting from a diminution in the value of assets caused by fluctuations in the market value of investments. In establishing the General Reserve, the Governing Council authorized the Executive Board to approve future transfers from IFAD's resources up to a ceiling of US\$100 million, taking into account the Fund's financial position. The Governing Council also decided that the ceiling of the General Reserve could be amended from time to time by the Executive Board.<sup>2</sup>

7. *iii) Constraints on investment:* The Governing Council have set stringent tests to be abided by if and when the President decides to use his discretion to invest resources not immediately needed for disbursement 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." 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 the meaning of the terms "constraints". In other words, if the President cannot 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 excluded 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. *iv) Commitment policy:* The Agreement grants the authority to approve agricultural financing by the Fund to the Executive Board,<sup>3</sup> and from the outset it requires the Board to pay due regard to the long-term viability of the Fund and the need for continuity in its operations and to decide from time to time the proportion of the Fund's resources to be committed in any financial year in any of the three forms of financing.<sup>4</sup> Acting under this provision at its thirty-fourth session of the Executive Board decided that "only actual payments received in the form of cash or promissory notes will be included in committable resources. The value of instruments of Contribution against which payment in the form cash or promissory notes has not yet been made will be excluded from

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<sup>1</sup> Governing Council resolution 16/IV (1980).

<sup>2</sup> Governing Council resolution 111/XXII (1999).

<sup>3</sup> Agreement establishing IFAD, article 7.2(c) and (d).

<sup>4</sup> *Ibid.*, article 7.2(b), first sentence.

committable resources.”<sup>5</sup> In other words, although instruments of contribution are in law binding legal commitments similar to the loan agreements concluded with member States, the Executive Board opted to restrict the determination of the resources available for commitment to actual payments.

9. *v) Lending terms:* Article 7.2(d) of the Agreement provides that decisions with regard to the selection and approval of projects and programmes shall be made by the Executive Board and that such decisions shall be made on the basis of the broad policies, criteria and regulations established by the Governing Council. The Lending Policies and Criteria adopted by the Governing Council at its second session (1978) exclude the possibility of charge- or interest-free loans. As a matter of fact, when determining the applicable interest to loans on intermediate and ordinary terms, the long-term effect of the rates are duly taken into account.<sup>6</sup> This confirms that the lending terms form an indispensable tool among the Fund’s instruments for exercising financial prudence.

10. *vi) Mitigation of credit risk:* The Governing Council acknowledges the potential of falling victim to credit risk in the Fund’s operations, i.e. the risk of loss of principal or loss of a financial return stemming from a borrowing member State’s failure to repay a loan or otherwise meet a loan obligation. In order to mitigate this risk the Governing Council has decided that the allocation to any single recipient country shall not exceed ten per cent (10%) of the Fund’s total annual lending, or such other per cent as may be determined by the Executive Board, to be applied flexibly depending on resource availability.<sup>7</sup>

11. *vii) Grant ceiling for ordinary grants:* As mentioned earlier, financing by the Fund may take the form of loans, grants and DSF grants. Obviously, because of the primary difference between loans and grants (a loan must be repaid, usually with interest; while a grant does not have to be repaid) the long-term viability and continuity of operations cannot be assured if no limit is set to the proportion of grants. Indeed, when the Fund was being set up some delegates felt that “the matter of proposing a substantial increase in the proportion of grants should be considered carefully as grants might, in some cases, not ensure effective use of resources and a high proportion of grants might jeopardize the continuing operation of the Fund over the long run.”<sup>8</sup> In the event the following was included in article 7.2(b) of the Agreement:

“The proportion of the Fund’s resources to be committed in any financial year for financing operations in any of the forms referred to subsection (a) shall be decided from time to time by the Executive Board with due regard to the long-term viability of the Fund and the need for continuity in its operations. The proportion of grants shall not normally exceed one-eighth of the resources committed in any financial year.”

<sup>5</sup> IFAD, minutes of the thirty-fourth session of the Executive Board, document EB/34 of 30 November 1988.

<sup>6</sup> See, for example, IFAD’s lending terms and conditions: Interest rate for the year 2010 for loan on ordinary and intermediate terms, contained in section D of document EB 2009/98/R.14.

<sup>7</sup> IFAD, Lending Policies and Criteria adopted by the Governing Council at its second session on 14 December 1978, paragraph 24, second sentence. Available from <http://www.ifad.org>.

<sup>8</sup> IFAD, Report of the meeting of interested countries on the establishment of IFAD on the work of its second session, document WS/3879/C of 10 November 1975.



12. This provision contains two imperatives. First, the Executive Board should bear a continuous responsibility to ensure the long-term viability of IFAD. Second, that the Fund shall be viable on a long-term basis and that the resources base provided by the initial contributions and the additional contributions made during each replenishment, as well as other resources, should not be depleted by the provision of too high a proportion of those funds as grants or, by commitment of all the available resources in a short period of time, as loans.<sup>9</sup>

13. *viii) Duty to ensure long-term viability when approving DSF grants:* Since the creation of the DSF-grant as the third form of financing of IFAD, the fourth sentence of the amended article 7.2(b) of the Agreement provides that “[a] debt sustainability mechanism and the procedures and modalities therefore shall be established by the Executive Board and financing provided thereunder shall not fall within the above-mentioned grant ceiling”. On its face this suggests that there is no limit to the proportion of financing that can be given in the form of DSF grants. This is, however, only apparent because the first sentence of article 7.2(b) reads that “[t]he proportion of the Fund’s resources to be committed in any financial year for financing operations in any of the forms referred to in subsection (a) shall be decided in from time to time by the Executive Board with due regard to the long-term viability of the Fund and the need for continuity in its operations.” The function of this provision is for the Board to determine how much of the Fund’s resources it can commit each financial year, without compromising the long-term viability of the Fund. To enable the Executive Board to discharge this responsibility the Executive Board regularly considers a document entitled “Resources Available for Commitment”, to decide how much of the resources of the Fund it would like to commit (as loans, grants and DSF grants) having regard to the long-term viability of the Fund. In other words, the Board is required to make a determination. Based on management’s own calculation the document states an amount that is considered available. In so doing management makes assessment that the Board may or may not necessarily agree with. Therefore, it is incumbent upon management to supply the Executive Board with the information that should enable the latter to consider impact on DSF grants on the long-term viability and continuity of operation. Inherent in article 7.2(b) is that the Executive Board should abstain from approving DSF grants if that would erode the long-term viability and continuity of the Fund.

14. It seems that the current assumption is that member States will compensate the Fund for the foregone principal and interest. Indeed, the Consultation on the Seventh Replenishment of IFAD’s Resources recommended that “IFAD member States, particularly those that are major contributors of official development assistance, should agree to compensate IFAD fully for principal repayments foregone as a result of application of the debt sustainability framework within a pay-as-you-go mechanism as adopted in IDA 14.”<sup>10</sup> In 2007, the Executive Board endorsed the concept of a pay-as-you-go compensation mechanism, through which member States would compensate the Fund for the value of the reflow and interest forgone in the previous replenishment period through con-

<sup>9</sup> Notes on the legal aspects of self-sustainability, Legal Opinion of 17 May 1996.

<sup>10</sup> IFAD, Report of the consultation on the seventh replenishment of IFAD’s resources (2007–2009), document GC 29/L.4 of 25 January 2006.

tributions in addition to core replenishment contribution.<sup>11</sup> *However, to date there exist no legally binding commitments to any member State to compensate.* As is known neither the Executive Board nor the Governing Council can impose any financial obligation on any member State, which is why the assumption that the Fund will be compensated cannot be based solely on the endorsement of the Consultation report by the Governing Council or the Executive Board's approval of the document on the DSF Framework. *Given article 7.2(b), first sentence—if it is assessed that continuing with the DSF grants beyond the Tenth Replenishment would erode long-term viability of the Fund and the need for continuity in its operations—it would be questionable whether the Executive Board should continue to approve DSF grants before the Governing Council has secured binding legal commitments from the member States to compensate the Fund.* Moreover, in light of the fact that according to the commitment policy the value of legally binding instruments of contribution against which payment in the form cash of promissory notes has not yet been made will be excluded from committable resources, even upon obtaining such binding legal commitment only the paid contribution may count for calculating the resources available for commitment.

21 May 2012

**(b) Inter-office memorandum to the Chairman of the  
Evaluation Committee concerning [State]'s request to attend  
the upcoming Evaluation Committee session as an observer**

LEGAL FRAMEWORK REGULATING WHETHER NON-IFAD MEMBERS CAN ATTEND MEETINGS OF THE EVALUATION COMMITTEE AS OBSERVERS—LIMITED AUTHORITY OF THE EVALUATION COMMITTEE AND THE PRESIDENT TO GRANT OBSERVER STATUS—DECISIONS REGARDING THE PARTICIPATION OF NON-IFAD MEMBERS IN EVALUATION COMMITTEE MEETINGS ARE WITHIN THE COMPETENCE OF THE EXECUTIVE BOARD

INTRODUCTION

I refer to your e-mail of 19 November 2012 regarding the opinion of the Office of the General Counsel (LEG) concerning [State]'s request to attend the upcoming Evaluation Committee (hereinafter EC or the Committee) meeting as an observer.

A. LEGAL FRAMEWORK

As a subsidiary body established by the Executive Board and tasked to prepare certain deliberations and decision-making by the Executive Board, the Evaluation Committee performs only those functions and has only those authorities given to it by the Executive Board. Therefore to answer the question whether representatives of non-IFAD members can attend meetings of the Evaluation Committee, reference has to be made to the Terms of Reference and Rules of Procedure of the Evaluation Committee and to the Rules of Procedure of the Executive Board.

<sup>11</sup> IFAD, Proposed arrangement for implementation of a debt sustainability framework of IFAD, document EB/2007/90/R.2 of 21 March 2007.

With respect to participation to the EC meetings, the Terms of Reference and Rules of Procedure of the EC (EB 2011/102/R.47/Rev.1) provide the following:

“2.6. The meetings of the Evaluation Committee shall be open to the Director of the Office and such staff members of the Fund as the President may, from time to time, designate, as well as other staff of the Office when its Director decides that they should attend as resource persons, except in relation to the matters foreseen in paragraph 3.1(k) below.

2.7. Executive Board members who are not members of the Evaluation Committee may also, as observers, attend meetings except when matters foreseen in paragraph 3.1(k) below are discussed.”

Section 4.1 of the document (“Final provision”) further provides that:

“[ . . . ] In conformity with rule 11.3 of the Rules of Procedure of the Executive Board and with exception of rule 25 [i.e. Appointment]) and 29 [i.e. Method of suspension] of the same, unless otherwise determined in the present Terms of Reference, the said Rules of Procedure of the Executive Board should apply, *mutatis mutandis*, to the proceedings of the Evaluation Committee.”

In this respect, rule 8 of the Rules of Procedure of the Executive Board stipulates as follows:

“In addition to the representatives of members and alternates and the President, the meetings of the Board shall be open only to such staff members of the Fund as the President may, from time to time, designate for that purpose. The 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 of any specific matter before the Board.”

Rule 8 of the Rules of Procedure of the Executive Board is not applicable *mutatis mutandis* in this case. Indeed, when in May 2011 the Executive Board approved the TOR of the EC, it specifically determined the extent of the Committee’s authority with regard to invitation of observers to its meetings.

## B. THE AUTHORITY TO INVITE OBSERVERS

### (a) Authority of the EC to grant observer status

The Committee is a subsidiary body of the Board, to which the EB may refer any question related to the evaluation functions in the Fund, for which the EB is responsible under the Agreement Establishing IFAD. In addition, the EC has the permanent responsibilities set out in the Terms of Reference and Rules of Procedure of the Evaluation Committee (EB 2011/102/R.47/Rev.1) which were approved by the Executive Board in May 2011.

According to the TOR of the EC, the authority of the Committee to invite observers at its meetings is limited to the Executive Board members who are not members of the Evaluation Committee. As a result, the EC has no capacity to entertain [State]’s request, as its capacity was limited by the Board.

(b) *Authority of the President*

We have also reviewed the possibility for the President to consider the request but must conclude that also the President's capacity in this matter is limited. At its sixty-second session in December 1997, the Executive Board gave a limited delegation to the President, authorizing him, at his discretion, to invite one observer to attend any particular session of the Board. Such observer is to be admitted upon the request of either a member State represented on the Board or a cooperating international organization or institution. The invitation is limited to only once per person and as indicated above, is limited to sessions of the Board. In other words, by its own terms this authorization is given for the sessions of the Executive Board only, not for subsidiary bodies.

In the absence of a delegation of the authority to invite representatives of non-member States to participate in the session of the Committee, it must be concluded that the Executive Board has reserved this power. We therefore consider that neither the Evaluation Committee, nor the President is authorized to decide on [State]'s request.

(c) *Authority of the Executive Board*

Given that the Executive Board neither delegated to the EC nor to the President the authority to invite non-IFAD members as observers, the matter of whether [State] (or any other non-IFAD member) may, or may not, attend as an observer at the meetings of the EC rests with the Board.

C. CONCLUSION

For the reasons discussed above, decisions regarding the participation of non-IFAD members to EC Meetings are within the competence of the Executive Board.

20 November 2012

**(c) Internal communications concerning a non-member State's request to make a statement during the Governing Council (GC)**

RULES CONCERNING THE PARTICIPATION OF NON-MEMBERS AT THE SESSIONS OF THE GC—A STATE WHOSE MEMBERSHIP APPLICATION HAS BEEN APPROVED BY THE GC CONTINUES TO BE A NON-MEMBER STATE UNTIL THE DEPOSIT OF ITS INSTRUMENT OF ACCESSION—A NON-MEMBER STATE MUST BE AUTHORISED BY THE CHAIRMAN OF THE GC TO BE ABLE TO MAKE A STATEMENT IN THE GC—A NON-MEMBER STATE MUST BE INVITED BY THE PRESIDENT OF THE GC TO DESIGNATE AN OBSERVER TO PARTICIPATE IN THE SESSION OF THE GC AND ITS MEETINGS

Dear [Name],

We understand that [State] wishes to make a statement at the GC after the approval of its membership.

According to article 13, section 1(c) of the Agreement Establishing IFAD (AEI),<sup>\*</sup> States that are not listed in schedule 1, such as [State], may after approval of their membership by the GC, become parties to the AEI by depositing an instrument of accession. We understand that [State] will not be able to deposit its instrument of accession before the GC and therefore will not become a full fledged member of IFAD at the time the GC approves its application. As a non-member State, [State] will have the following options:

1. *Making a statement only* (excluding participation to the GC proceeding).

According to rule 27 of the Rules of Procedures of the GC, the Chairman of the GC *inter alia* directs the discussions and accords the right to speak. According to this rule, the Chairman, in the exercise of his function and under the authority of GC, may give the right to speak to the representative of [State].

2. *Observer.*

According to rule 43 of the Rules of Procedures of the GC, the Governing Council may invite any non-member State or grouping of States eligible for membership pursuant to article 3, section 1 of the AEI, to designate an observer to participate in the proceedings of the GC. The authority to invite non-member States has been delegated to the President in consultation with the Executive Board (resolution 77/6) and thereafter the Executive Board authorized the President to invite members States as observers (EB/31, 16 October 1987). Please note that even if the President invites [State] as observer, it does not imply that [State] will have the right to speak at the GC. Again, the observer will have to seek the right to speak from the Chairman of the GC in accordance with rule 27 of the Rules of Procedures of the Governing Council.

To sum up, it is important that the Secretariat informs [State] that if they wish to make a statement at the GC, they must be authorized by the Chairman. In addition, if they wish to participate in the session of the GC and meetings, they should inform the President who may invite them to designate an observer to the GC. Should the [representative of State] observer wish to make a statement, he/she must be given the right to speak by the Chairman of the GC.

10 February 2012

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<sup>\*</sup> United Nations, *Treaty Series*, vol. 1059, p. 191.

## 2. United Nations Industrial Development Organization

(Submitted by the Legal Adviser of the United Nations  
Industrial Development Organization)

### (a) Internal e-mail message concerning a request for amendment of [Title] Grant Agreement

EXPRESS CHOICE OF LAW IN A CONTRACT WITH THE UNITED NATIONS OR ITS SPECIALIZED AGENCIES COULD IMPLY OR RESULT IN WAIVER OF PRIVILEGES AND IMMUNITIES AND THEREFORE IS NOT ACCEPTED—GRANT AGREEMENT, UNIDROIT PRINCIPLES AND GENERALLY ACCEPTED PRINCIPLES OF INTERNATIONAL LAW SUFFICIENT TO ADDRESS GAPS—APPLICABLE LAW TO BE DECIDED BY ARBITRAL BODY—ARTICLE 33 (1) OF UNCITRAL RULES—ARTICLE 33 OF THE PERMANENT COURT OF ARBITRATION OPTIONAL RULES FOR ARBITRATION INVOLVING INTERNATIONAL ORGANISATIONS AND STATES

Reference is made to your e-mail of [date], which forwarded the comments from [Name], legal officer of the [subsidiary body of an international organization]. I wish to comment as follows.

1. [The Legal Officer] first raises the following question: “I am not aware of any legal principle preventing an international organisation to state in a contract that the interpretation of the contract will be done in the light of the law of country X”.

2. The law and practice of the United Nations, including a specialized agency of the United Nations (like UNIDO), is quite clear on this subject; an express choice of national law in a contract is not accepted because it could imply or result in the waiver of the Organization’s privileges and immunities. Please find attached a published opinion from the Office of Legal Affairs<sup>1</sup> of the United Nations, which may be forwarded to [Name] for his information.

3. [The Legal Officer] also raises a separate point. After referring to the [Intergovernmental Organization]’s practice, he states that “a reference to some national contract law is *necessary* in case there would be a gap in the contract or a divergence of interpretation” [emphasis supplied].

4. We disagree. The Grant Agreement, the International Institute for the Unification of Private Law (UNIDROIT) Principles and generally accepted principles of international law are sufficient to address any gaps. Should a legal gap arise, however, an arbitral body would still have the authority to decide on the applicable law in accordance with the conflicts-of-law rules that apply to it. Please refer to the above-mentioned legal opinion from the United Nations Office of Legal Affairs, which refers to article 33(1) of the United Nations Commission on International Trade Law (UNCITRAL) Rules.\*\*

5. Moreover, in the specific case of the Financial and Administrative Framework Agreement (FAFA) between the [Intergovernmental Organization] and the United Nations, to which UNIDO has acceded, it has been agreed that, in the event that a dispute cannot

<sup>1</sup> See *United Nations Juridical Yearbook, 1994* (United Nations publication, Sales No. 00.V.8), p. 449.

\* Attachment not reproduced herein.

\*\* Available from <http://www.uncitral.org/>.

be amicably settled, the arbitration shall be in accordance with the Permanent Court of Arbitration Optional Rules for Arbitration Involving International Organisations and States.\* These Optional Rules are based on the UNCITRAL Rules and provide in relevant part as follows:

Applicable law

Article 33

1. In resolving the dispute, the arbitral tribunal shall apply the rules of the organization concerned and the law applicable to any agreement or relationship between the parties, and, where appropriate, the general principles governing the law of international organizations and the rules of general international law.

2. This provision shall not prejudice the power of the arbitral tribunal to decide a case *ex aequo et bono*, if the parties agree thereto.

6. In conclusion, the text proposed by the UNIDO Office of Legal Affairs is consistent with the law and practice of the United Nations as well as the FAFA. In so far as UNIDO is concerned, there is no necessity to specify a national law in the contract.

[ . . . ]

**(b) Internal e-mail message concerning guardianship/adoption  
by [Name] [State]**

WHETHER GUARDIANSHIP ESTABLISHES DEPENDENCY STATUS OF CHILDREN UNDER THE STAFF RULES—STAFF RULE 106.15(b)(iii), A CHILD FOR WHOM THE STAFF MEMBER ASSUMES LEGAL RESPONSIBILITY AS A MEMBER OF THE FAMILY MAY INCLUDE A STAFF MEMBER’S WARD—GUARDIANSHIP CERTIFICATE TOGETHER WITH DOCUMENTARY EVIDENCE OF SUPPORT WOULD ENTITLE STAFF MEMBER TO RECEIVE DEPENDENCY ALLOWANCE

1. This is with reference to your e-mail of [date], regarding a staff member who has assumed guardianship of his brother’s two minor children. At issue is whether the guardianship establishes the dependency status of the children under the staff rules. In particular, you ask for advice “as to whether the Organization may recognize the children and authorize the payments of dependency benefits in respect of the two children on the basis of staff rule 106.15(b)(iii)”.

2. According to the relevant provisions of staff rule 106.15, in particular paragraph (b)(iii), a dependent child will include, where adoption is not possible, “a child for whom the staff member assumes legal responsibility as a member of the family”. As with other dependent children (i.e. natural, adopted or step children), such a child should be under the age of 18 years or, if in full-time attendance at a school or university (or similar educational institution), under the age of 21 years. Further, the child must receive main and continuing support from the staff member, which is defined as more than one half of their total support.

3. My reading of staff rule 106.15(b)(iii) is that “a child for whom the staff member assumes legal responsibility as a member of the family” may include a staff member’s ward, i.e. a child in respect of whom a staff member has been appointed legal guardian by a court

\* Available from <http://www.pca-cpa.org>.



of competent jurisdiction. In the present case, the staff member has submitted a guardianship certificate, issued by the High Court in [City A], appointing him as the guardian of his nephew and niece until their age of majority (21 years). Although we have not seen the original, the certificate appears to be genuine and there is no obvious reason to doubt its authenticity.

4. As you point out, the guardianship certificate states that the children may not be taken beyond the jurisdiction of the court without prior permission except for occasional visits. The guardian must also inform the court promptly about any change in address of the children. The purpose of these legal requirements is to ensure that the court is able to maintain supervision over the guardianship. At any rate, the fact that the staff member resides in [City B] and the children in [State] has no impact on his duties, rights and liabilities as guardian. Under the law of [State] (section 24 of the Guardians and Wards Act of [year]), “[a] guardian of the person of a ward is charged with the custody of the ward and must look to his support, health and education, and such other matters as the law to which the ward is subject requires”. The staff member’s duties as guardian thus include the provision of maintenance and financial support to the children, should they require it.

5. In my view, the guardianship certificate largely satisfies the requirements of staff rule 106.15(b)(iii) for recognition of the children as the staff member’s dependents: as they are not orphans, the children cannot be adopted; as his nephew and niece, they are members of his family; and, as their guardian, he is legally responsible for them.

6. I say “largely satisfied” as your e-mail indicates that one important issue remains outstanding. Under staff rule 106.15(c) the staff member must still certify that he provides main and continuing support for the children and to this end produce “documentary evidence satisfactory to the Director-General”. Should the staff member make the certification and produce the required documentary evidence, I believe that he would be entitled to receive dependency allowances in respect of the children in accordance with provisions of staff rule 106.16.

**(c) Inter-office memorandum regarding a legal opinion on social security arrangements in respect of project personnel at [UNIDO International Centre]**

[UNIDO INTERNATIONAL CENTRE] HAS NO LEGAL OBLIGATION TO CONTRIBUTE TO [STATE]’S SOCIAL SECURITY SYSTEM ON BEHALF OF ITS PERSONNEL—INVIOLABILITY OF UNIDO PREMISES—MANDATORY CONTRIBUTIONS FOR SOCIAL SECURITY SCHEMES ARE A FORM OF DIRECT TAXATION—PERSONNEL MUST BE ENGAGED AND ADMINISTERED IN ACCORDANCE WITH UNIDO REGULATIONS, RULES AND DIRECTIVES AND ARE RESPONSIBLE, AS INDEPENDENT CONTRACTORS, FOR THEIR OWN SOCIAL SECURITY ARRANGEMENTS—A PARTY MAY NOT INVOKE THE PROVISIONS OF ITS INTERNAL LAW AS JUSTIFICATION FOR ITS FAILURE TO PERFORM A TREATY

1. I refer to your e-mail of [date] concerning social security arrangements in respect of project personnel at the [(UNIDO) International Centre] in [City].

2. You ask for advice regarding an expert opinion commissioned from two professors of law at [City] University, dated [date] (the “opinion”), an English version of which was copied to this Office. The opinion concludes that [UNIDO International Centre] has no legal status other than that of UNIDO and that it enjoys the privileges and immunities

of a specialized agency in [State] but is not exempt from social security contributions in respect of its employees, who have a constitutional right to social security under [State] law.

3. According to the opinion and the information provided by [UNIDO International Centre], [State] legislation requires residents of the country to pay social security contributions for medical and pension rights, although certain exemptions exist for foreigners who are insured abroad. The legislation in question is the Social Insurance and Universal Health Insurance Law No. [number], which gives effect to the right to social security contained in article 60 of the [State] Constitution. [Name] explains that [UNIDO International Centre] personnel are employed under individual service agreements (formerly known as special service agreements) and either have medical and pension insurance in their home countries or, in the case of [State] nationals, contribute to the [State acronym] on their own, apparently stating that they are not employed. Although [UNIDO International Centre] has not received a request to pay [State] social security contributions, the Centre would like to know whether the professors' conclusion could present a problem for UNIDO and hence [UNIDO International Centre], and if so, how best to handle it.

4. This memorandum examines the correctness of the professors' analysis and conclusions, and in particular whether [UNIDO International Centre] is indeed under a legal obligation to contribute to the [State] social security system on behalf of its personnel. While we are not experts in [State] law, the conclusion of this Office is that [UNIDO International Centre] has no such obligation either under international law or [State] law. Before explaining why, I would like to comment on the unannounced visit that social security inspectors paid to [UNIDO International Centre] in [date], during which they requested information on individual employees.

5. Although the circumstances of the visit are not entirely clear, it should be borne in mind that the premises of UNIDO, including those of [UNIDO International Centre], are inviolable. This inviolability derives from the provisions of the Convention on Privileges and Immunities of the Specialized Agencies, 1947 ("the Convention"),<sup>1</sup> which the Government has undertaken to apply to the [UNIDO International Centre] project by virtue of the Declaration of [date] appended to the project document.<sup>2</sup> Article III, section 5, of the Convention stipulates that the premises of the specialized agencies (and hence [UNIDO International Centre]) shall be inviolable and that the property and assets of the specialized agencies (and hence [UNIDO International Centre]), wherever located and by whomsoever held, shall be immune from, *inter alia*, search and any other form of interference, whether by executive, administrative, judicial or legislative action. Thus, while [UNIDO International Centre] would obviously wish to cooperate with the host authorities, inspections of [UNIDO International Centre] offices by state officials require the permission of [UNIDO International Centre], if appropriate following consultation with Headquarters.

6. Turning to the opinion, the crux of the professors' argument is as follows:

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<sup>1</sup> United Nations, *Treaty Series*, vol. 33, p. 261.

<sup>2</sup> In terms of the Declaration, the Government "agrees to apply to the present project, *mutatis mutandis*[,] the provisions of the Revised Standard Agreement concluded between the United Nations and Specialized Agencies and the Government of the [State] on [date], at [City]". Article V of the Revised Standard Agreement provides in turn that the Government shall apply to specialized agencies, their property, funds and assets, and to their officials, including technical assistance experts, the Convention on Privileges and Immunities of the Specialized Agencies.

“Even though exemptions have been granted with clear provisions with regard to tax, the relevant conventions do not contain any provisions regarding exemption from social security obligations [emphasis added]. Therefore, the social security laws and rules, to which those working in [State] are subject, shall apply within the scope of the UNIDO—[UNIDO International Centre] project.

[...]

However, since there are the above explained privileges and immunities about UNIDO—[UNIDO International Centre] in the relevant international conventions, it is not possible to impose any sanctions if the requirements of the social security laws and rules are not fulfilled.”

7. I do not share this line of reasoning for two main reasons. First, the professors draw an unwarranted distinction between income tax on the one hand and social security deductions on the other. The professors correctly point out that UNIDO and its assets, income and property are exempt from “all sorts of direct taxes” in [State] pursuant to the Convention. They also conclude that the fees and salaries received by [UNIDO International Centre] personnel, including technical assistance experts, are exempt from income tax. However, it is unclear from the opinion why social security contributions are not a tax from which [UNIDO International Centre] and its personnel are exempt. The United Nations, for example, has consistently taken the position that mandatory contributions for social security schemes under national legislation are a form of direct taxation on the United Nations and therefore contrary to the Convention on Privileges and Immunities of the United Nations, 1946.<sup>3,4</sup> This Office shares this view. By contrast, the professors assume—I would submit incorrectly—that social security payments are somehow distinguishable from taxes and that immunity has only been granted in respect of the latter.

8. My second reservation regarding the professors’ opinion is that they overlook an important provision of the Trust Fund Agreement between UNIDO and the Government of the [State] of [date], which governs the funding and institutional arrangements of the [UNIDO International Centre] project and which remains in force. Article I, paragraph 4, of the Trust Fund Agreement stipulates that:

“4. The trust fund and the activities financed therefrom shall be administered by UNIDO in accordance with its applicable regulations, rules and administrative instructions or directives. Accordingly, personnel *shall be engaged and administered*; equipment, supplies and services purchased; *and contracts entered into in accordance with the provisions of such regulations, rules and directives* [...] [Emphasis added]”

9. As a matter of international law, therefore, [UNIDO International Centre] personnel must be engaged and administered in accordance with the regulations, rules and directives of UNIDO. This means that the conditions of service of [UNIDO International Centre] personnel, including the conditions relating to social security, should be determined with reference to rules of the Organization. In accordance with those rules, [UNIDO International Centre] personnel sign service agreements that confer on the subscriber the status of an individual contractor *vis-à-vis* UNIDO. As individual contractors [UNIDO International Centre] personnel are not considered to be staff members or employees of

<sup>3</sup> United Nations, *Treaty Series*, vol. 1, p 15 and vol. 99, p. 327 (corrigendum to vol. 1).

<sup>4</sup> See for example, *United Nations Juridical Yearbook, 2005* (United Nations publication, Sales No. E.08.V) p. 439 and *ibid.*, 1998, (United Nations publication, Sales No. E.03.V.5) p. 479.

UNIDO and are responsible for making their own insurance arrangements, such as those mandated by national law.

10. The professors indicate that the Trust Fund Agreement has been approved by the Grand National Assembly of the [State] and that it is directly executable in [State] and equivalent to a national law. If the Trust Fund Agreement has been incorporated into [State] law, then [State] law arguably recognizes that [UNIDO International Centre] personnel must be engaged and administered in accordance with the regulations, rules and directives of UNIDO. The question that arises, then, is whether the Trust Fund Agreement or the rules of UNIDO conflict with the general law of [State], including the constitutional right to social security, and if so, how that conflict may be resolved.

11. The opinion discusses the possibility of a conflict between an international convention or treaty and [State] law. According to [State] judicial precedent, generally recognized canons of interpretation are available to assist [State] courts in determining whether or not a convention will take precedence over national law. Citing the principle *lex specialis derogat legi generali*, the professors explain that “[t]he provisions that introduce privileges and immunities for [UNIDO International Centre] are primarily in the nature of special provisions and will apply in priority against general laws”. A similar argument could be made with respect to article I, paragraph 4, of the Trust Fund Agreement, which is cited above: if there were a conflict between the special provisions in article I, paragraph 4, and the law of [State], then the same canon of interpretation might allow the special provisions to prevail. The professors do not, however, consider this possibility and only cite article I, paragraph 4, in passing.

12. The professors’ opinion notwithstanding, we are not persuaded that there is any conflict between the Trust Fund Agreement or the rules of UNIDO and [State] law. Assuming that the information in the [acronym]’s PowerPoint presentation is correct, [State] law allows self-employed individuals to contribute to the social security system and exempts foreigners working in [State] who are adequately covered in their home countries. Broadly speaking, [State] law appears to accommodate the current set-up whereby [UNIDO International Centre] personnel are responsible, as independent contractors, for their own social security arrangements. If [UNIDO International Centre] personnel can contribute to the [State] social security system on their own and are paid fees that enable them to do so, then it is unclear how their constitutional right to social security would be infringed. The opinion does not answer this question but instead assumes that [UNIDO International Centre] personnel fall into the category of employees, a status they do not hold under the rules of UNIDO.

13. Furthermore, in terms of article 27 of the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations of 1986,<sup>\*</sup> “[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty”. Although the Convention has yet to enter into force, article 27 reflects an identical provision of customary international law, which governs treaty relations between UNIDO and the Government of [State]. Even if the provisions of article I, paragraph 4, of the Trust Fund Agreement were to conflict with a [State] norm

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<sup>\*</sup> See *Official Records of the United Nations Conference on the Law of Treaties between States and International Organizations or between International Organizations*, vol. II (United Nations publication, Sales No. E.94.V.5) (Not yet in force).

(which, as I have indicated, is uncertain), the Government would remain bound by the Trust Fund Agreement on the international plane.

14. For these reasons, we conclude that [UNIDO International Centre] is not legally required to pay [State] social security contributions on behalf of its personnel. At any rate, if [UNIDO International Centre] were to make such contributions, any additional costs to the project would be borne by the donor (the Government) in terms of article III of the Trust Fund Agreement, which obligates the donor to meet the actual costs of the services specified in the project document.

**(d) Inter-office memorandum regarding a claim by [a staff member] for retroactive dependency allowances in respect of his children**

STAFF RULE 106.10(A) RELATES TO A STAFF MEMBER WHO HAS NOT BEEN RECEIVING AN ALLOWANCE, GRANT OR OTHER PAYMENT TO WHICH HE OR SHE IS ENTITLED—DISCRETIONARY DECISIONS ARE SUBJECT TO LIMITED REVIEW IN ACCORDANCE WITH THE ABUSE-OF-DISCRETION STANDARD—STAFF RULE 106.10(A) DOES NOT PREVENT RETROACTIVE PAYMENT OF THE ALLOWANCES CLAIM—COMPELLING CIRCUMSTANCES WARRANT MAKING AN EXCEPTION

1. Reference is made to your inter-office memorandum (IOM) of [date] regarding the claim by [Name] for retroactive dependency allowances in respect of his dependent children. The staff member, who is a national of the [State A], submitted the claim to Human Resources Management (HRM) following a decision by the [State B] fiscal authorities to recover government grants mistakenly paid to his spouse. You ask for my opinion on whether the Organization is liable to pay the allowances claimed, taking into account that the United Nations Office in Vienna (UNOV) reimburses similar claims without any limitation on the number of years covered by the retroactive payments.

2. In his memorandum to HRM, dated [ . . . ], [the Staff Member] explains that his spouse drew [State B] family benefits in respect of both their children between [date] and [date], their second child having been born in [date]. Earlier this year, the [fiscal authority] demanded reimbursement of the benefits paid after [date], totalling [amount], “because, according to the Headquarters Agreement, employees of UNIDO and their family members are excluded from receiving social benefits from the equalization fund for family benefits” (second paragraph of [the Staff Member]’s memorandum). An appeal against that decision succeeded in part: the fiscal authorities issued a new decision on [date], requiring repayment of the sum of [amount], this being the amount in [State B] family benefits mistakenly paid out after [the Staff Member] joined UNIDO on [date]. [ . . . ]

3. The latest decision of the fiscal authorities appears to be well founded. In accordance with [State B] law, officials of UNIDO are not entitled to receive [State B] family benefits unless they are nationals of [State B] or other European states, or are stateless persons resident in [State B] [ . . . ] The legal situation in [State B] derives, *inter alia*, from section 39(b) of the Headquarters Agreement of UNIDO, which stipulates that:

“Officials of the UNIDO and the members of their families living in the same household to whom this Agreement *applies shall not be entitled to payments out of the Family Burden Equalization Fund* or an instrument with equivalent objectives,<sup>\*</sup> unless such persons are [State B] nationals or stateless persons resident in [State B]. [Emphasis added]”

\* The Family Burden Equalization Fund is a national fund from which [State B] family benefits are paid.

4. In view of the fiscal authorities' final decision, [the Staff Member] requests that he be granted dependency allowances in respect of his children retroactively from [the time he joined UNIDO]. Concerning the merits of his claim, it is undisputed that the staff member has a right to receive such allowances in future in accordance with staff rule 106.15. The only issue at stake is whether his entitlement should be recognized retroactively and if so, from what date.

5. On the question of retroactiveness of payments, staff rule 106.10(a) provides that:

“(a) A staff member who has not been receiving an allowance, *grant or other payment to which he or she is entitled* shall not receive retroactively such allowance, grant or payment unless the staff member has made written claim:

- (i) In the case of the cancellation or modification of the staff rule governing eligibility, within three months following the date of such cancellation or modification;
- (ii) In every other case, *within one year following the date on which the staff member would have been entitled to the initial payment.* [Emphasis added]”

6. The purpose of staff rule 106.10(a) is to set a reasonable limit on the Organization's obligation to reimburse allowances and entitlements that are claimed late. If it is assumed that [the Staff Member] was entitled to claim dependency allowances as [of the time he joined UNIDO] in respect of his first child [ . . . ], and as of [date] in respect of his second child (i.e. when she was born), staff rule 106.10(a) would preclude retroactively backdating the allowances to those two dates. Instead, we understand that the usual practice in applying the rule would be to backdate the allowances by one year only, calculated from the date of the staff member's claim.

7. Although a strict application of staff rule 106.10(a) might lead to the partial rejection of [the Staff Member]'s claim, such a course of action would not be advisable. The International Labour Organization (ILO) Administrative Tribunal tends to treat decisions on retroactiveness of payments as discretionary decisions, which, like other discretionary decisions, are subject to limited review in accordance with the abuse-of-discretion standard. In Judgment No. 2411<sup>1</sup> the Tribunal had the following to say regarding decisions of this kind:

Even when the Tribunal has dealt with express time-bar limitations it has nonetheless adopted a flexible attitude, saying that and that, *in certain circumstances, “justice requires that an exception should be made”* (see Judgment 451).

In Judgment 53 the Tribunal found, as in other cases since, that “*all the circumstances of the case*” should be taken into account, for instance to determine whether a reasonable time has elapsed, “*including inter alia the bona or mala fides of the official, the nature of the error, the degree of negligence and [ . . . ] the hardship caused*”.

It has also been stated that, even in discretionary matters, “essential facts” should be taken into consideration and that “mistaken conclusions” cannot be drawn “from the facts” (see in particular Judgments 972, 1262 and 1384). These are basic legal principles. [Judgment No. 2411 at consideration 7, emphasis added]

<sup>1</sup> See ILO Administrative Tribunal, *In re Mr E.K. L. v. the European Patent Organisation (EPO)*, Judgment No. 2411 (2 February 2005).



8. The circumstances of [the Staff Member]’s case would justify making an exception to staff rule 106.10(a) and granting him dependency allowances retroactively to 2008 and 2010, respectively. In particular:

- the staff member’s late claim for dependency allowances results from a series of administrative errors on the part of the [State B] authorities and from their subsequent decision to seek recovery of the overpayments;
- responsibility for the situation cannot be attributed to the staff member or his spouse: they are not expected to be familiar with provisions of the Headquarters Agreement and acted diligently and in good faith throughout;
- backdating the dependency allowances by one year only would unduly benefit the Organization at the expense of the staff member: through no fault of his own, he would be out of pocket by a considerable sum and would receive less favourably treatment than other staff members with dependent children;
- backdating the dependency allowances by one year only would also have the effect of unfairly penalizing the staff member for the fact that his spouse exercised her right of appeal under [State B] law: had the fiscal authorities’ initial decision been left unchallenged, the staff member would have been able to submit his claim for dependency allowances several months earlier, but would simultaneously have been out of pocket by an additional [amount], which was wrongly claimed back in the initial decision.

9. In addition to this, it is arguable that the rule limiting retroactiveness of payments is not applicable in the present case. It is recalled that staff rule 106.10(a) relates to “[a] staff member who has not been receiving an allowance, grant or other *payment to which he or she is entitled*” (emphasis added). The rule thus governs situations in which the staff member is actually *entitled* to the allowance, grant or other payment but for some reason submits a late claim. It is doubtful that this precondition is satisfied here. In accordance with the Staff Regulations and Rules, [the Staff Member] was not entitled to full dependency allowances in respect of his children as long as his spouse was being paid the government grants (*see* staff regulation 6.9(c) and paragraph C of Annex I to the staff regulations, which aim to avoid duplication of benefits and to achieve equality between staff).<sup>2</sup> His entitlement only arose when the [State B] benefits were withdrawn. The assumption that he could claim dependency allowances as of [date] in respect of his first child, and as of [date] in respect of his second, is therefore incorrect. In fact, he could only reasonably claim the allowances, whether on a prospective or retroactive basis, after his legal representative had received the fiscal authorities’ final decision on [date]. This is what he duly did.

10. In light of the above, we conclude that staff rule 106.10(a) does not prevent the retroactive payment of the allowances claimed by [the Staff Member] and, even if it did, that compelling circumstances warrant making an exception to the rule. [ . . . ]

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<sup>2</sup> While in receipt of government grants the staff member could only claim the difference, if any, between the government grant and the UNIDO dependency allowance (*see* staff rule 106.16(d)).



### 3. Comprehensive Nuclear-Test Ban Treaty Organization

#### (a) Inter-office memorandum to the Chief of Procurement regarding the interpretation of the Rule of Origin for Services of the Preparatory Commission for the Comprehensive Nuclear-Test-Ban Treaty Organization (Commission)

FACTORS FOR ASSESSMENT AND EVIDENCE OF COMPLIANCE WITH RULE OF ORIGIN WHEN PORTION OF SERVICES MAY BE PERFORMED BY A NON-SIGNATORY STATE—DEFINITION OF “ORIGIN”—PHYSICAL PLACE OF ORIGIN—LEGAL PLACE OF ORIGIN—PROVISION OF GOODS/SERVICES ALLOWED FROM A NON-SIGNATORY STATE UNDER CERTAIN CIRCUMSTANCES—RISK ANALYSIS EVALUATION

##### THE REQUEST FOR LEGAL ADVICE

1. The Procurement Section has requested legal advice from the Legal Services Section concerning the interpretation of the Commission’s Rule of Origin for Goods/Services (Memorandum No. [ . . . ], REF: Purchase Order No. [ . . . ], dated [ . . . ]).

2. The request for legal advice relates to the renewal of Purchase Order [ . . . ], under which [Company X] in [Signatory State XYZ], as a sole source supplier, provided support for Company X licenses. The Purchase Order was awarded to [Company X] in [Signatory State XYZ], and the invoice was received from and paid to [Company X] in [Signatory State XYZ]. In the course of the renewal of the Purchase Order it came to the attention of the Procurement Section that the representative of [Company X] in [Signatory State XYZ] for this Purchase Order communicated with the Commission with contact details in a State which has not signed the Comprehensive Nuclear-Test-Ban Treaty\* (“Non-Signatory State”).

3. The Procurement Section sought clarifications with [Company X] in [Signatory State XYZ]. According to [Company X], [Company X] has a global support organization, with engineers located in many countries (including the Non-Signatory State) who work with a multi-shift model in providing a 24/7 support to its customers. Whereas generally contracts for the provision of services are concluded by the [Company X] subsidiary which is located in the country of the domicile of the customer, in this case [Company X] in [Signatory State XYZ], the provision of some products or services may be supported by resources from other [Company X] subsidiaries, including [Company X] in the Non-Signatory State.

4. In the Memorandum, the Procurement Section notes that the Commission’s standard Instructions to Bidders, attached to Requests for Quotations (RFQ), contain a paragraph which provides that:

“The goods and services (if any) to be rendered under the Purchase Order shall have their origin in the States Signatories of the Comprehensive Nuclear-Test-Ban Treaty (CTBT), the list of which is attached to this RFQ. For purposes of this paragraph, “the origin” means the place from where the materials, goods and/or from which the services are supplied.”

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\* A/50/1027. Not yet in force.

5. The Procurement Section therefore seeks legal advice regarding the decisive factors for assessment and acceptable proof/evidence of compliance with the Commission's Rule of Origin, particularly where, as here, software maintenance/support services have to be provided on a 24/7 basis through a global support network, while the Contractor ([Company X] in [Signatory State XYZ]), at the time of contracting, cannot confirm or deny whether a portion of the services may be performed by another Company X subsidiary in a Non-Signatory State.

#### THE STATUS OF THE RULE OF ORIGIN

6. The above-mentioned paragraph in the Instructions to Bidders regarding the country of origin of goods and services does not appear in the CTBT, or the Resolution establishing the Commission, or the Commission's Financial Regulations and Rules, nor is it spelled out or even mentioned in the Commission's reports or other official documents. Therefore, strictly speaking, the rule embodied in this paragraph is not a rule in a statutory sense, but a rule evolved in practice through consistent adherence by the Commission in its procurement of goods and services.

7. The only place where the issue (but not the rule) was referred to is an Information Paper prepared by the Commission's Provisional Technical Secretariat (PTS) (The 1999 Procurement Expenditure Country-by-country Report, CTBT/PTS/INF.177, dated 25 June 1999). During the twelfth session of Working Group A, the PTS was requested to provide a report for delegations on the countries of origin of the vendors which were awarded contracts or purchase orders from the PTS. The PTS prepared a spreadsheet displaying the requested information for the period 1 January through 16 June 1999 for contracts or purchase orders above USD 10,000. The following 14 countries were listed:

[Signatory States]

However, the report of Working Group A for its twelfth session did not mention its request for information or the above PTS Information Paper. Nor was this ever referred to in any other official documents of the Commission. It is not clear for what reason Working Group A requested the information, or whether it discussed the Information Paper at all, or why it did not take up the matter anymore. Given the fact that all the above 14 countries had signed the CTBT in 1996 and were therefore all States Signatories during the period covered by the Information Paper, it is impossible to know how Working Group A or the Commission would have reacted if one of the countries had been a Non-Signatory State. In other words, current evidence is *inconclusive* of the Commission's attitude towards the Rule of Origin.

8. Nevertheless, the Rule of Origin, as applied in practice, is in the Commission's best interest, for three main reasons. First, it has been the Commission's standard and consistent policy that certain benefits, such as access to, and civil and scientific application of, verification data and analyses, are available only to States Signatories. Secondly, the CTBT, the Resolution and the Commission's Staff Regulations and Rules all provide that only nationals of the States Signatories can be appointed as staff members of the Commission. Thirdly, only in the States Signatories can the Commission's international personality, legal status, and privileges and immunities be best recognised and protected.

9. It should then be assumed that the Rule of Origin as it currently stands is, both in form and in substance, what the Commission (albeit tacitly) approves and can therefore only be interpreted and applied, but not changed, by the PTS.

## TWO VALID INTERPRETATIONS OF THE RULE OF ORIGIN

10. In view of the above, we find that the current Rule of Origin is open to two equally possible and equally valid legal interpretations. These two interpretations are, for the sake of convenience, termed here as Interpretation A and Interpretation B. Interpretation A would prohibit any services from being supplied from a Non-Signatory State, whereas Interpretation B would allow services to be supplied from a Non-Signatory State if certain conditions are fulfilled. The crux of the matter is how one should understand the definition of “Origin” in the last part of the Rule, namely, that “the origin” means the place from where the materials, goods and/or from which the services are supplied’.

*10.1 Alternative Interpretation A: no provision of goods/services allowed from a Non-Signatory State*

The definition of “Origin” can be understood as meaning ‘the place from where the materials, goods and/or from which the services are physically supplied’. On this understanding, whatever the legal arrangement, goods/services must be physically supplied from a State Signatory. That is to say, the goods/services contracted by the Commission must be supplied through equipment and by personnel located only in a State Signatory. Thus, even if the contractor may be an entity incorporated and domiciled in a State Signatory, but if such an entity, or its parent entity, has a composite global corporate structure under which goods/services, or portions of goods/services, may be supplied by or through a subsidiary/subsidiaries incorporated and/or domiciled in a Non-Signatory State, the Commission can receive supply of goods/services only from those subsidiaries located in a State Signatory, otherwise the contractual relationship must be terminated.

*10.2 Alternative Interpretation B: provision of goods/services allowed from a Non-Signatory State under certain circumstances*

In contrast, the definition of “Origin” can also be understood as meaning “the place from where the materials, goods and/or from which the services are legally supplied”. In this case the focus will no longer be whether the relevant goods/services are physically supplied from a State Signatory, and the corporate structure of the contractor or that of its parent will become irrelevant. What is decisive will be whether the goods/services are supplied as a matter of *law*, not whether such goods/services are supplied as a matter of *fact*. For this purpose, goods/services are legally supplied from a State Signatory if the following three conditions are satisfied:

- (1) The contract/purchase order for goods/services is awarded only to an entity which is incorporated and domiciled in a State Signatory;
- (2) The invoice(s) for payment for the goods/services under the contract is/are received only from and paid only to this entity, and no other entity; and
- (3) Under the contract, it is only this entity, and no other entity, which is the contractual counterpart of the Commission and which assumes sole responsibility and liability towards the Commission with regard to the goods/services; and, should any dispute arise under the contract, again it is only this entity that will settle the dispute with the Commission.

In other words, the legal relationship for the procurement and supply of goods/services takes place entirely between the Commission and an entity in a State Signatory, which, legally, will be the *supplier* of goods/services under the contract. As the Commission receives, and pays for, goods/services solely from an entity in a State Signatory; as this entity assumes sole legal accountability for such goods/services; and as no other entity, wherever located, can be held accountable for the goods/services in question, then it must be concluded that the goods/services are *legally* supplied from a State Signatory. The fact that the goods/services may actually and physically be supplied from an entity located in a Non-Signatory State becomes irrelevant. The reason is simple: since this entity is not the *supplier* of goods/services under the contract and thus in law, then the goods/services cannot be legally *supplied* by it.

11. As far as the current case of [Company X] in [Signatory State XYZ]/[Company X] in a Non-Signatory State is concerned, under Interpretation A, the Commission *cannot* receive services from [Company X] in the Non-Signatory State; but under Interpretation B, the Commission *can* receive services from [Company X] in the Non-Signatory State so long as [Company X] in the Signatory State remains the contractual partner of the Commission.

#### CONCLUSION

12. The two above interpretations are equally valid under the Commission's Rule of Origin as it is currently phrased. However, given the current high degree of globalisation, together with pressing economic considerations, it is becoming increasingly common for businesses to develop diversified and flexible corporate structures. This is especially true of the IT industry, for which national boundaries do not exist and whose standard mode of operation is working remotely. It should also be noted that the Commission's Rule of Origin contains no restriction to the effect that the supply of services must be performed actually by individuals who are *nationals* of States Signatories, which in any event would be an essentially unimplementable and unenforceable restriction. Therefore, it is recommended that Interpretation B be followed, within certain constraints discussed below.

13. The application of Interpretation B cannot be blindly followed in the abstract: it must be evaluated in the light of technical and security considerations so as not to expose the Commission's IT system to the risk of being compromised by services supplied in bad faith in/from a Non-Signatory State. Such an evaluation should consist of a risk analysis covering at least the following components:

(1) The services provided by an entity or subsidiary in/from a Non-Signatory State are only of a supportive and auxiliary nature, and in any case should not be more than only a minor portion of the total services supplied by the entity with which the Commission enters into the contract. In other words, the entity or subsidiary in/from the Non-Signatory State shall not provide services so essential and extensive, or otherwise play such a dominant role, as to render the entity which enters into contract with the Commission a mere 'front';

(2) An entity or subsidiary in/from a Non-Signatory State shall not have physical access to the Commission's IT system; and

(3) Further security elements as may be determined by the Commission's IT personnel.

23 November 2012

**(b) Legal opinion on the status of the resolution establishing  
the Preparatory Commission for the Comprehensive  
Nuclear-Test-Ban Treaty Organization (CTBTO)\***

HISTORICAL BACKGROUND, PURPOSE AND FUNCTIONS OF THE PREPARATORY COMMISSION—NATURE AND STATUS OF THE GENERAL ASSEMBLY RESOLUTION ESTABLISHING THE PREPARATORY COMMISSION—INTERPRETATION OF THE RESOLUTION UNDER ARTICLE 31 OF THE VIENNA CONVENTION ON THE LAW OF TREATIES, 1969—DEFINITION OF TREATY—DESIGNATION AS A “RESOLUTION” IS IRRELEVANT TO THE DETERMINATION OF ITS NATURE—PRACTICE BY THE PREPARATORY COMMISSION’S 183 MEMBER STATES REFLECTS ADHERENCE TO THE TERMS OF THE RESOLUTION—ORDINARY MEANING OF THE EXPRESS TERMS OF THE RESOLUTION IN RESPECT OF RIGHTS AND OBLIGATIONS (“SHALL”) DESIGNATES OBLIGATORY CONDUCT—FAILURE TO REGISTER A TREATY UNDER ARTICLE 102 OF THE CHARTER DOES NOT IMPLY THAT THE INSTRUMENT IS NOT A TREATY, BUT THAT IT CANNOT BE INVOKED BEFORE A UNITED NATIONS ORGAN—PREPARATORY COMMISSION MEETS CRITERIA OF THE THREE STREAMS OF DOCTRINAL DEBATE CONCERNING THE LEGAL BASIS FOR INTERNATIONAL LEGAL PERSONALITY OF INTERNATIONAL ORGANIZATIONS—INTERNATIONAL COURT OF JUSTICE HAS HELD PARTIES TO THE EXPRESS TERMS OF AN INSTRUMENT, IRRESPECTIVE OF ASSERTIONS THAT THE INSTRUMENT WAS NOT BINDING—SIGNIFICANCE OF THE OBJECT AND PURPOSE OF THE RESOLUTION AND ACHIEVEMENT OF THE PREPARATORY COMMISSION’S MANDATE—OBLIGATION OF STATES SIGNATORIES PURSUANT TO ARTICLE 18 OF THE VIENNA CONVENTION NOT TO DEFEAT THE OBJECT AND PURPOSE OF A TREATY PENDING ITS ENTRY INTO FORCE INCLUDES THEIR DUTY TO COMPLY WITH THE RESOLUTION TO ENABLE THE PREPARATORY COMMISSION TO FULFIL ITS MANDATE—THE RESOLUTION CONSTITUTES AN INTERNATIONAL AGREEMENT, LEGALLY BINDING UPON STATES SIGNATORIES OF THE COMPREHENSIVE NUCLEAR-TEST-BAN TREATY

1. INTRODUCTION

In 1996, shortly after signing the Comprehensive Nuclear-Test-Ban Treaty\*\* (CTBT or Treaty), States Signatories “decided to take all necessary measures to ensure the rapid and effective establishment of the future Comprehensive Nuclear-Test-Ban Treaty Organization” (CTBTO) and adopted a resolution establishing the Preparatory Commission (CTBTO Preparatory Commission or Commission) for the CTBTO. The mandate of the Commission is to carry out preparations for the effective implementation of the CTBT at its entry into force and the first session of the Conference of the States Parties; the procedure and numerous tasks to be completed are stipulated or indicated in the resolution’s annex.

The following opinion has been prepared to respond to a query as to the status of the resolution as a legally-binding instrument, endowing the Commission with international legal personality and the power to adopt decisions binding upon its member States.

\* CTBTO, document CTBT/MSS/RES/1 of 17 October 1996. Available from: <http://www.ctbto.org>.

\*\* A/50/1027. Not yet in force.

## 2. HISTORICAL BACKGROUND

Upon the adoption of the text of the CTBT by the United Nations General Assembly on 10 September 1996,<sup>1</sup> two parallel processes were set in motion: the first was the opening for signature of the Treaty by the United Nations Secretary-General as its Depositary on 24 September 1996; and as a consequence the second process was the establishment of the Preparatory Commission referred to in the Treaty. At a meeting on 19 November 1996, States Signatories to the CTBT adopted the resolution establishing the Preparatory Commission for the CTBTO (Resolution) and its annex, the text on the establishment of a Preparatory Commission for the CTBTO (Resolution Annex).<sup>2</sup>

The status of the Commission as an organization distinct from the CTBTO itself is stipulated in the Resolution Annex, the founding document and constituent instrument of the Commission. Paragraph 7 provides that the Commission “shall have standing as an international organization, authority to negotiate and enter into agreements and such other legal capacity as necessary for the exercise of its functions and fulfillment of its purposes”. Paragraph 22 of the Resolution Annex further provides that the “host country” shall accord the Commission “as an international organization” such legal status and privileges and immunities as are necessary for the fulfillment of its object and purpose.

The following day, 20 November 1996, the United Nations Secretary-General convened the first session of the Commission and the Commission commenced its work. As of 2013, the Commission continues the stipulated activities while the CTBT lacks just eight more specific ratifications<sup>3</sup> for it to enter into force. In the normal course of its activities the Commission meets in regular sessions, attended by Representatives duly accredited by its 183 member States, to: adopt its decisions (including the annual budget and scale of assessments); authorise the conclusion of international agreements with third parties (including States and other international organisations); and review the cumulative expenditure of over USD one billion on constructing, maintaining and provisionally operating the International Monitoring System (IMS) and International Data Center (IDC) and preparing for on-site inspections as elements of the regime to verify compliance with the CTBT at its entry into force.

## 3. THE ISSUE

The establishment of the CTBTO Preparatory Commission followed a format and process similar to those of previous preparatory commissions established in the past by States,<sup>4</sup> in particular those for the United Nations 1945–1946,<sup>5</sup> the International Atomic

<sup>1</sup> General Assembly resolution 50/245 of 10 September 1996.

<sup>2</sup> CTBTO, document CTBT/MSS/RES/1 of 19 November 1996, and annex.

<sup>3</sup> By China, Democratic People’s Republic of Korea, Egypt, India, Islamic Republic of Iran, Israel, Pakistan and the United States of America. See article XIV(1) of the CTBT.

<sup>4</sup> Henry G. Schermers and Niels M. Blokker, *International Institutional Law*, 5th ed. (Martinus Nijhoff Publishers, 2011), sections 1618–1620.

<sup>5</sup> See, *Report of the Preparatory Commission of the United Nations*, document PC/20 dated 23 December 1945 and *Documents of the United Nations Conference on International Organization (UNCIO)*, vol. 15 (1945), pp. 512–513.

Energy Agency (IAEA) 1956–1957<sup>6</sup> and the Organisation for the Prohibition of Chemical Weapons (OPCW) 1993–1997.<sup>7</sup> In fact, the Resolution establishing the 1996 CTBTO Preparatory Commission is nearly identical in terms of format, process and institutional tasks with that which established the 1993 OPCW Preparatory Commission,<sup>\*</sup> as they were both drafted nearly contemporaneously by many of the same delegates in the Conference on Disarmament in Geneva. However, the technical tasks assigned to the CTBTO Preparatory Commission are substantively very different, encompassing significant global activities and involving expenditure far beyond those of any of its predecessors.

A very unique purpose of the CTBTO Preparatory Commission is the technical task of fulfilling the CTBT requirements by constructing (or otherwise establishing) and provisionally operating (in test mode) the 337 monitoring facilities comprising the IMS in the Treaty-stipulated locations in 89 countries (plus one to be determined)<sup>8</sup> and the IDC in Vienna.

Pursuant to the Resolution Annex<sup>9</sup> and Commission decisions,<sup>10</sup> the modalities for the cooperation between the PTS and States hosting IMS facilities (“Host States”) are set out in a “facility agreement or arrangement” to be concluded with each of the 89 Host States, based on a model agreement/arrangement which *inter alia* accords privileges and immunities to the Commission. In addition, the Commission organizes technical assistance, capacity-building and other events in all its member States. For those purposes, agreements providing for the recognition of privileges and immunities of the Commission are concluded with the host countries. In both cases, reference is made to the *mutatis mutandis* application to the Commission of the Convention on Privileges and Immunities of the United Nations, 1946.\*\*

Over the course of time the Commission’s conduct of extensive and global activities in dozens of countries has brought to the fore a legal issue related to the recognition of its status and the enjoyment of privileges and immunities. Such an issue may have existed in respect of previous preparatory commissions but was never apparent during their relatively short lifetime and amidst their more limited, less operational activities (primarily drafting

<sup>6</sup> International Atomic Energy Agency (IAEA), Statute of the IAEA, 1956, annex 1, available from <http://www.iaea.org/About/statute.pdf> (accessed on 31 December 2012); and Paul C. Szasz, *The Law and Practices of the International Atomic Energy Agency*, Legal Series No. 7 (Vienna, IAEA, 1970, STI/PUB/250), pp. 47–59.

<sup>7</sup> Lisa W. Tabassi, *OPCW: The Legal Texts* (The Hague, T.M.C. Asser press, 1999), pp. 523–530; and Johan Rautenbach and Lisa W. Tabassi, “Legal Aspects of the Preparatory Commission for the OPCW as an International Organisation,” in Ian Kenyon and Daniel Feakes (eds.), *The Creation of the Organisation for the Prohibition of Chemical Weapons: A Case Study in the Birth of an Intergovernmental Organisation* (The Hague, Cambridge University Press, 2007), pp. 69–82.

<sup>\*</sup> For the text of the resolution establishing the OPCW Preparatory Commission (generally referred to as, the “Paris Resolution”) see, *OPCW Legal Series*, (PC-OPCW 1), 1994.

<sup>8</sup> Annex 1 to the CTBT Protocol, tables 1-A, 1-B, 2-A, 2-B, 3 and 4.

<sup>9</sup> Resolution Annex, paras. 12(b), 14 and 22; and appendix, tasks related to paragraph 14.

<sup>10</sup> CTBTO, documents CTBT/PC/I/22 dated 13 March 1997; CTBT/PC/II/1 dated 15 May 1997; CTBT/PC-5/1/Rev.1 dated 16 April 1998; CTBT/PC-6/1/Rev.1 dated 19 August 1998; CTBT/PC-12/1 dated 28 August 2000; CTBT/PC-14/1 dated 30 April 2001; CTBT/PC-19/1 dated 19 November 2002 and annex II, paragraph 13.

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



various institutional documents and recommendations) carried out in the territory of the host State under a headquarters agreement.

The Commission has occasionally faced a view that the Resolution is not legally binding, but only politically binding,<sup>11</sup> and that consequently the Commission cannot be recognised as a legal entity in a national jurisdiction or treated accordingly.

#### 4. THE QUESTION

Is the Resolution a legally binding instrument? Its terms are silent on this point. The Resolution does not provide any requirements for entry into force or means of dispute settlement, is not signed and was never registered as an international agreement under Article 102 of the Charter of the United Nations. On the other hand, the Resolution Annex does stipulate membership of the Commission (“all States which sign the Treaty”).<sup>12</sup> It also specifies the duration of the Commission (“The Commission shall remain in existence until the conclusion of the first session of the Conference of the States Parties”).<sup>13</sup> This, combined with the provisions of articles II(13) and XIV(1) of the CTBT, entails that the Commission must exist and exercise its functions for *at least* two years from 24 September 1996. Currently it has been in existence for 16 years.

The nature and status of the Resolution, which has been considered by one commentator as a supplementary treaty to the CTBT,<sup>14</sup> will be fully discussed in the following sections, which will compare the definition of “treaty” under the 1969 Vienna Convention of the Law of Treaties with the Resolution, apply the canons of interpretation codified in the Vienna Convention, and examine the relevant jurisprudence of the International Court of Justice. It will be concluded that the Resolution is indeed a legally-binding instrument.

#### 5. APPLICATION OF THE 1969 VIENNA CONVENTION ON THE LAW OF TREATIES

##### 5.1 Definition of “Treaty”

Article 2 of the Vienna Convention on the Law of Treaties, 1969\* (generally accepted as constituting a codification of customary international law) defines “treaty,” in the generic sense, as follows:

##### *Article 2. Use of terms*

1. For the purposes of the present Convention: (a) “treaty” means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation;

<sup>11</sup> See for instance Masahiko Asada, “CTBT: Legal Questions Arising from its Non-Entry-into-Force”, *Journal of Conflict & Security Law*, vol. 1, No. 7 (2002), pp. 93–122 at 106, fn. 73. In his article Asada considers the Resolution as a political document not subject to parliamentary review.

<sup>12</sup> Resolution Annex, para. 4.

<sup>13</sup> *Ibid.*, para. 21.

<sup>14</sup> Anthony Aust, *Modern Treaty Law and Practice*, 2nd ed. (Cambridge, Cambridge University Press, 2007), p. 176.

\* United Nations, *Treaty Series*, vol. 1155, p. 331.

Taking that into consideration, to start with, the Resolution satisfies all the criteria contained in the definition. The Resolution:

(a) constitutes an agreement by its terms (*inter alia*, employing throughout the imperative form “shall”; establishing obligations; establishing a sanction (loss of voting rights for late payment of assessed contributions));

(b) was adopted by States;

(c) is in written form; and

(d) is governed by international law (as it was adopted by States as sovereign entities on the international plane).

Its designation as a “Resolution”, in and of itself, has no bearing on the determination of its nature, as provided by the above definition in the Vienna Convention, which reflects universally accepted practice and has been confirmed by the jurisprudence of the International Court of Justice. As one commentator finds, “every international organization is established on the basis of a treaty. In exceptional cases, resolutions adopted by an international conference have sufficed for the setting up of an organization. In law, this may be deemed an agreement in simplified form, possessing the force of a treaty”.<sup>15</sup>

Critical to the differentiation of treaties from non-binding instruments is the intention of the States concerned.<sup>16</sup> To identify the intention of the parties, it will be necessary to have recourse to “the drafting history, the language of the agreement and the circumstances of its conclusion as well as the subsequent practice (e.g., documents submitted for registration under Article 102 of the United Nations Charter). In contrast, the designation and the form of the act as well as the failure to register [is] considered irrelevant. The same holds true for the presence of signatures since it does not necessarily denote a legally binding consent [ . . . ]”.<sup>17</sup> Other commentary has indicated that, “If the parties have not made their intention to enter into legal relations—or the lack of such intention—explicit (e.g., with a ratification clause), the determination of the legally binding character of the respective instrument has to be based on indications”. Commentary on the Vienna Convention records that the drafters, to distinguish international agreements from political instruments, contemplated adding to the definition of “treaty” the element “intended to create

<sup>15</sup> Michel Virally, “Definition and Classification of International Organizations: A Legal Approach,” in Georges Abi-Saab (ed.), *The Concept of International Organization* (1981) p. 52, cited in Masahiko Asada, CTBT: Legal Questions Arising from its Non-Entry-into-Force”, p. 109. For a discussion and listing of such organisations see, Henry G. Schermers and Niels M. Blokker, *International Institutional Law*, sections 34–35 and 1620.

<sup>16</sup> See for example, Oliver Dörr and Kirsten Schmalenbach (eds.), *Vienna Convention on the Law of Treaties: A Commentary* (Heidelberg, Springer, 2012), pp. 39–40; Christine Chinkin, “A Mirage in the Sand? Distinguishing Binding and Non-Binding Relations between States”, *Leiden Journal of International Law*, vol. 10, No. 2 (June 1997), pp. 223 and 241; and Anthony Aust, “The Theory and Practice of Informal International Instruments”, *International and Comparative Law Quarterly*, vol. 35, No. 4 (October 1986), pp. 787 and 800–806.

<sup>17</sup> Jan Klabbers, *The Concept of Treaty in International Law* (The Hague, Kluwer Law International, 1996), p. 75.

rights and obligations”. Such words were not included as the Drafting Committee concluded that the words, “governed by international law”, embraced the element of intent.<sup>18</sup>

## 5.2 Interpretation of the Resolution

The rights and obligations created by the Resolution as evidence of intent can be addressed through applying the canons of interpretation codified in the Vienna Convention:

### *Section 3. Interpretation of treaties*

#### *Article 31. General rule of interpretation*

1. A treaty shall be interpreted in good faith in accordance with the *ordinary meaning* to be given to the terms of the treaty *in their context* and *in the light of its object and purpose*.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(a) *any agreement relating to the treaty* which was made between all the parties in connection with the conclusion of the treaty;

(b) *any instrument* which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:

(a) *any subsequent agreement* between the parties regarding the interpretation of the treaty or the application of its provisions;

(b) *any subsequent practice* in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended. [emphasis added]

### 5.2.1 “Ordinary meaning”

In terms of ordinary meaning, the striking feature of the text of the Resolution is that it employs throughout the imperative form “shall” (rather than “will” or “may”) without any qualification or conditions. The provisions of the Resolution are not phrased in hortatory or discretionary terms and are not statements of facts or policy which one would ordinarily find in a non-binding instrument.

The Resolution stipulates:

“There is hereby established the Preparatory Commission . . .”;<sup>19</sup>

“The seat of the Commission shall be . . .”;<sup>20</sup>

<sup>18</sup> Oliver Dörr and Kirsten Schmalenbach (eds.), *Vienna Convention on the Law of Treaties: A Commentary*, pp. 39–40.

<sup>19</sup> Resolution Annex, para. 1

<sup>20</sup> *Ibid.*, para. 3.

“The Commission shall be composed of all States which sign the Treaty . . .”;<sup>21</sup>

“The costs of the Commission and its activities [ . . . ] shall be met annually by all States Signatories, in accordance with the United Nations scale of assessment . . .”;<sup>22</sup>

“A State Signatory which has not discharged in full its financial obligations to the Commission within 365 days of receipt of the request for payment shall have no vote in the Commission, until such payment is received . . .”;<sup>23</sup>

“All decisions of the Commission should be taken by consensus” [or failing that voting . . .];<sup>24</sup>

“The Commission shall have standing as an international organization . . .”;<sup>25</sup>

“The Commission shall: (a) Elect its Chairman and other officers, adopt its rules of procedure, [ . . . ]; (b) Appoint its Executive Secretary; (c) Establish a provisional Technical Secretariat [ . . . ]; (d) Establish administrative and financial regulations in respect of its own expenditure and accounts . . .”;<sup>26</sup>

“The Commission shall undertake, inter alia, the following tasks [ . . . ] requiring immediate attention after entry into force of the Treaty . . .”;<sup>27</sup>

“The Commission shall undertake all necessary preparations to ensure the operationalization of the Treaty’s verification regime at entry into force, pursuant to article IV, paragraph 1, and shall develop appropriate procedures for its operation . . .”;<sup>28</sup>

“The Commission shall supervise and coordinate, in fulfilling the requirements of the Treaty and its Protocol, the development, preparation, technical testing and, pending their formal commissioning, provisional operation as necessary of the [IDC and IMS] . . .”;<sup>29</sup>

“The Commission shall make all necessary preparations, in fulfilling the requirements of the Treaty and its Protocol, for the support of on-site inspections from the entry into force of the Treaty . . .”;<sup>30</sup>

“Rights and assets, financial and other obligations and functions of the Commission shall be transferred to the [CTBTO] at the first session of the Conference of the States Parties . . .”;<sup>31</sup>

“The Commission shall remain in existence until the conclusion of the first session . . .”;<sup>32</sup>

“The Commission as an international organization, its staff, as well as the delegates of the States Signatories shall be accorded by the Host Country such legal status, privi-

<sup>21</sup> *Ibid.*, para. 4.

<sup>22</sup> *Ibid.*, para. 5(a).

<sup>23</sup> *Ibid.*, para. 5(b).

<sup>24</sup> *Ibid.*, para. 6.

<sup>25</sup> *Ibid.*, para. 7.

<sup>26</sup> *Ibid.*, para. 8.

<sup>27</sup> *Ibid.*, paras. 10 and 11.

<sup>28</sup> *Ibid.*, para. 13.

<sup>29</sup> *Ibid.*, para. 14.

<sup>30</sup> *Ibid.*, para. 15.

<sup>31</sup> *Ibid.*, para. 20.

<sup>32</sup> *Ibid.*, para. 21.

leges and immunities as are necessary for the independent exercise of their functions in connection with the Commission and the fulfilment of its object and purpose.”<sup>33</sup>

The ordinary meaning of the terms is clear, unequivocal and stated in the imperative. Particularly notable from those terms are:

- The automaticity of membership in the Commission, which is not discretionary and establishes legal relations between States Signatories and the Commission;
- Payment of assessed contributions must be mandatory as otherwise it would not be possible for a State to fall into “arrears”,<sup>34</sup> and
- The establishment of rights (e.g., participation in the Commission and its activities; voting); and
- The establishment of obligations (e.g., payment of assessed contributions; the tasks to be carried out; the grant of privileges and immunities).

In contrast, a text intended to be discretionary would have been drafted in other terms. The Resolution would have, for example, *called upon* States Signatories, or those in a position to do so, to participate in the preparatory process. This was not the case.

### 5.2.2 “*In their context*”

Article 31(2) of the Vienna Convention provides that:

“The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes: (a) *any agreement relating to the treaty* which was made between all the parties in connection with the conclusion of the treaty”.

In this respect it is noted that the text of the Resolution Annex was drafted contemporaneously with the text of the CTBT in the Conference on Disarmament in Geneva. The CTBT makes reference to the Commission and the Resolution makes reference to tasks to be undertaken “in accordance with the Treaty”. This establishes an inextricable linkage between the two instruments and constitutes the context.

### 5.2.3 “*In the light of its object and purpose*”

The object and purpose of the Resolution, as stated in its preambular recitals, are “to take all necessary measures to ensure the rapid and effective establishment of the future CTBTO” and “to this end to establish a Preparatory Commission”.

The object is further elucidated through the tasks assigned to the Commission, *inter alia*: making arrangements for the first session of the Conference of the States Parties; developing standard models; negotiating agreements, arrangements and guidelines to be approved at the first session; developing the required operational manuals; acquiring and testing the on-site inspection equipment; developing training programmes; and other tasks “requiring immediate attention at entry into force of the Treaty”.

<sup>33</sup> *Ibid.*, para. 22.

<sup>34</sup> The updated list of States which are in arrears and have lost their voting rights is published on the Commission’s website available from: <http://www.ctbto.org> (accessed on 31 December 2012). No State has protested being characterized as such.

#### 5.2.4 “Subsequent agreements” and “subsequent practice” by States

As provided in article 31(3) of the Vienna Convention, interpretation of the Resolution will take into account subsequent agreements or subsequent practice by States.

In that respect, facility agreements/arrangements have been concluded by the Commission with 43 of its member States in accordance with the Resolution and the model adopted by the Commission, taking into account the provisions of the CTBT. Active negotiations are underway with an additional 19 member States to conclude such agreements/arrangements. Of the 89 States explicitly required to host IMS monitoring facilities under the Treaty, only six have communicated that they will be unable to enter into an agreement with the Commission before entry-into-force of the Treaty.

Subsequent practice by States reflects broad adherence to the terms of the Resolution. Assessed contributions are paid at the level of approximately 90 per cent annually; data is being transmitted to the IDC at nearly the target rate decided by the Commission; the IDC is operating following the CTBT terms; establishment of the IMS is nearly completed; and significant appropriations have been allocated to develop the on-site inspection mechanism.

As evidence of *opinio juris*, at least one member State (United Kingdom) published the Resolution in its Treaty Series.<sup>35</sup>

Of the 43 facility agreements/arrangements concluded so far, 17<sup>36</sup> have been registered by the member States with the United Nations as international agreements falling within the scope of Article 102 of the Charter of the United Nations. Some of those member States<sup>37</sup> have adopted, or are in the process of adopting, national legislation or other measures to give effect to the respective facility agreement/arrangement, enabling the Commission to import tax- and duty-free and exempting from customs restrictions the equipment needed for the construction, upgrading or maintenance of the facility. This fact demonstrates that a significant number of the member States regard the Commission as having the necessary legal capacity and status to enter into international agreements and to enjoy privileges and immunities. It further demonstrates that these member States consider the Resolution capable of conferring such legal capacity and status on the Commission and of creating corresponding legal obligations for the member States, and that they are willing to, and actually do, give legal effect to the relevant provisions of the Resolution. In other words, for these member States, the Resolution is a legally binding instrument.

Moreover, all of the States which have expressed the view that the Resolution is only politically binding have nevertheless accredited a Permanent Mission to the Preparatory Commission and duly submitted credentials for their Permanent Representative, regularly participate in the sessions of the Commission and its subsidiary bodies and have never objected to being listed so in the annual reports and other official documents of the Commission. Such could not be the case if the Commission did not have the status of an international organisation, possessing full legal personality and capacity recognised by those States.

<sup>35</sup> See, United Kingdom *Treaty Series*, No. 46 (1999) Cm. 4399.

<sup>36</sup> Australia, Canada, Cook Islands, Finland, Jordan, Kenya, Mongolia, Niger, Norway, Palau, Peru, South Africa, Ukraine, United Kingdom, Zambia.

<sup>37</sup> Australia, Canada, Cook Islands, Denmark, Ireland, Mongolia, New Zealand, Russian Federation, Sweden, United Kingdom.

The Resolution has not been registered in the United Nations under Article 102 of the Charter, which provides:

*Article 102*

1. Every treaty and every international agreement entered into by any Member of the United Nations after the present Charter comes into force shall as soon as possible be registered with the Secretariat and published by it.

2. No party to any such treaty or international agreement which has not been registered in accordance with the provisions of paragraph 1 of this Article may invoke that treaty or agreement before any organ of the United Nations.

Although Article 102 creates the obligation to register international agreements, the failure to do so does not imply that the instrument is not a treaty or international agreement; it simply has the consequence that it cannot be invoked before a United Nations organ.<sup>38</sup> Conversely, registration in and of itself does not qualify an instrument as an “international agreement”. The object and purpose of Article 102 is to prevent the conclusion of secret agreements.<sup>39</sup> In the present case, as the Resolution was published as an official document of the meeting of States signatories and has been distributed widely by the Commission, the same effect has been achieved otherwise.

In terms of practice by the Commission itself, four months after the adoption of the Resolution it commenced operations at its seat in Vienna. It concluded a Headquarters Agreement with Austria,<sup>7</sup> which published it as a treaty in accordance with national requirements. The Commission has pursued its mandate over the course of 16 years, funded by its 183 member States, most of which duly pay their assessed contributions. It adopted its Rules of Procedure, appointed its officers, established its Provisional Technical Secretariat and appointed its first Executive Secretary (and his successors) and delegated due authority to him to perform his functions. It adopted staff and financial regulations and rules and entered into contracts to carry out its work.

Thus the Commission itself has clearly proceeded in practice (consistently with the terms expressed in its constituent instrument) on the basis that it is legally established and in possession of full legal personality and capacity, even to the extent of exercising its treaty-making capacity with States (e.g., the Headquarters Agreement with Austria and the facility agreements) and with international organisations (e.g., the Relationship Agreement with the United Nations)<sup>40</sup> and cooperation agreements with eight others<sup>41</sup> and registering

<sup>38</sup> In contrast see Article 18 of the Covenant of the League of Nations which required registration for an instrument to be binding. See also, Bruno Simma et al. eds., *The Charter of the United Nations: A Commentary*, 2nd ed. (Oxford University Press, 2002), p. 1278.

<sup>39</sup> *Ibid.*

<sup>\*</sup> United Nations, *Treaty Series*, vol. 1998, p. 3.

<sup>40</sup> Agreement to Regulate the Relationship between the United Nations and the Preparatory Commission, approved by the Commission in CTBT/PC-11/Annex XII dated 9 May 2000 and by General Assembly in resolution 54/280 dated 30 June 2000. United Nations, *Treaty Series*, vol. 2110, p. 217.

<sup>41</sup> Association of Caribbean States (ACS), European Centre for Medium-Range Weather Forecast (ECMWF), Agency for the Prohibition of Nuclear Weapons in Latin America and the Caribbean (OPANAL), United Nations Development Programme (UNDP), United Nations Educational, Scientific and Cultural Organization (UNESCO), World Meteorological Organization (WMO), United Nations International Computing Centre (UNICC) and World Food Programme (WFP).



them with the United Nations under Article 102 of the Charter. No member State has ever expressed any objection.

Furthermore, the Resolution as an instrument has a constitutional character in that it established an intergovernmental organisation which has proved to be dynamic. In practice the Commission has duly carried out its explicit mandate and it has also exercised implied powers. Evolving in response to the needs of the international community for IMS data for disaster relief and mitigation purposes, in 2006 the Commission decided it could provide IMS data to UNESCO-recognised tsunami warning centers when the data's utility was recognised during the 2004 Indian Ocean tsunami.<sup>42</sup> Again in 2011, the Commission began sharing IMS data with other relevant international organisations in collaboration with assistance with the response to the radiological disaster in Japan.<sup>43</sup>

Thus the Commission meets the criteria of all three streams of doctrinal debate concerning the legal basis for international legal personality of international organizations: (a) the traditional view that it must be explicitly attributed;<sup>44</sup> (b) the “objective legal personality” school, which maintains that organisations which have an organ with decision-making power distinct from the subjective will of the member states possess international legal personality *ipso facto*, bestowed by international law and not by the intention of the parties (i.e., “original personality, as do states”);<sup>45</sup> and the current “implied powers” school which holds that international organizations entrusted by their member States with carrying out certain functions have a derived legal personality (not *ipso facto* original).<sup>46</sup> In the opinion of the International Court of Justice in respect of the United Nations, “by entrusting certain functions to [the organisation], with the attendant duties and responsibilities, [the Member States] have clothed it with the competence required to enable those functions to be effectively discharged.”<sup>47</sup>

### 5.3 *Travaux préparatoires*

The Vienna Convention provides for a supplementary means of interpretation to confirm or clarify the result obtained by application of article 31:

<sup>42</sup> CTBTO, CTBT/PC-27/2, dated 23 November 2006, paragraphs 18, 29, 30 and annex II, para. 13. See also, Henry G. Schermers and Niels M. Blokker, *International Institutional Law*, section 209A.

<sup>43</sup> Commission press release, “CTBTO to Share Data with IAEA and WHO” of 19 March 2011; Opening Statement of the Executive Secretary, CTBT/WGA-39/CRP.1, dated 23 May 2011; Response of the Verification Regime of the Preparatory Commission to the Nuclear Disaster in Japan, CTBT/PTS/INF.1134 dated 10 June 2011.

<sup>44</sup> See, Henry G. Schermers and Niels M. Blokker, *International Institutional Law*, section 1565 at pp. 988–989, citing as an example Grigorii I. Tunkin, *The Legal Nature of the United Nations*, in *Collected Courses of the Hague Academy of International Law*, vol. 119, 1966-III (Martinus Nijhoff Publishers), pp. 20–25.

<sup>45</sup> *Ibid.*, citing as an example F. Segerstedt, *Common Law of International Organizations* (2008), pp. 43–64.

<sup>46</sup> *Ibid.*, sections 1565–1566, citing the International Court of Justice, *Reparation for Injuries Suffered in the Service of the United Nations*, *Advisory Opinion*, I.C.J. Reports 1949, pp. 178–179.

<sup>47</sup> *Ibid.*

*Article 32. Supplementary means of interpretation*

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

- (a) leaves the meaning ambiguous or obscure; or
- (b) leads to a result which is manifestly absurd or unreasonable.

Two draft versions of the Resolution Annex were published without commentary by the Conference on Disarmament's Ad Hoc Committee on a Nuclear Test Ban.<sup>48</sup> There are no other official records of the negotiations of the text. According to the Chairman of the Ad Hoc Committee on a Nuclear Test Ban, the text was prepared by the Friend of the Chair, Ambassador Wolfgang Hoffman, in Geneva and it was an agreed text.<sup>49</sup> This can be presumed to be true, since the second published version is identical to the Resolution Annex finally adopted by States Signatories in New York.

One commentator has indicated that there was disagreement during the drafting of the Resolution Annex over the use of the imperative form "shall" ("The Commission *shall* have standing as an international organisation . . ."). According to that account, during the drafting at least one State asserted that "shall" was inappropriate since the text was intended to be politically binding. Other States differed and the imperative form "shall" was retained in the final text adopted.<sup>50</sup> In this respect, the comments of the Special Rapporteur of the International Law Commission to the Vienna Convention on what became article 32 are of particular interest:

"Today, it is recognized that some caution is needed in the use of travaux préparatoires as a means of interpretation. They are not [ . . . ] an authentic means of interpretation. They are simply evidence to be weighed against any other relevant evidence of the intentions of the parties, and their cogency depends on the extent to which they furnish proof of the common understanding of the parties as to the meaning attached to the terms of the treaty. Statements of individual parties during the negotiations are therefore of small value in the absence of evidence that they were assented to by the other parties."<sup>51</sup>

The terms of the Resolution are clear and imperative. As one leading commentator put it:

"The parties have to manifest their will by 'expressing' it. Although, as has been suggested in jest, agreements between hidden thoughts and ulterior motives may well be the only genuine treaties, law cannot take into consideration anything that remains buried away in the minds of the parties. In addition to being spelled out, their wills must concur to form the object and purpose of the agreement, both of which play so prominent a part

<sup>48</sup> Conference on Disarmament, document CD/NTB/WP.333 dated 10 June 1996 and Rev.1 dated 28 June 1996.

<sup>49</sup> Jaap Ramaker et al., *The Final Test: A History of the Comprehensive Nuclear-Test-Ban Treaty Negotiations* (CBTO Provisional Secretariat, 2003), pp. 31 and 33.

<sup>50</sup> Masahiko Asada, "CTBT: Legal Questions Arising from its Non-Entry-into-Force" 209A.

<sup>51</sup> International Law Commission, third report on the law of treaties, by Sir Humphrey Waldock, Special Rapporteur contained in document A/CN.4/167 and Add.1-3, *Yearbook of the International Law Commission, 1964*, vol. II, p. 58, paras. 20-21.

in the whole law of treaties. That is why the debates in municipal law between supporters of the ‘declared’ will and ‘real’ will theories can be regarded as largely academic, for the expressed will is the only real will upon which the parties have been able to reach an agreement . . .”<sup>52</sup>

In a number of key cases outlined below, the International Court of Justice has held the parties to the express terms of the instrument, irrespective of assertions that the instrument was not binding.

## 6. JURISPRUDENCE OF THE INTERNATIONAL COURT OF JUSTICE

In a number of cases the International Court of Justice has had to determine whether a certain instrument constituted an agreement binding the parties for the purposes of establishing the Court’s jurisdiction. The International Court of Justice has consistently relied upon an objective interpretation of the text of the instrument, as the expressed will of the parties, overriding subjective indications of intention to the contrary. The following extracts are drawn from the Court’s reasoning in those cases:<sup>53</sup>

– Treaties appear in an “infinite variety.”<sup>54</sup>

– “Interpretation must be based above all upon the text of a treaty.”<sup>55</sup>

– To determine the status of an instrument, the Court must have regard “to its actual terms and to the particular circumstances in which it is drawn up.”<sup>56</sup>

– “It has been argued that the Mandate in question was not registered in accordance with article 18 of the Covenant<sup>[57]</sup> which provided: ‘No such treaty or international engagement shall be binding until so registered.’ . . . Moreover, article 18, designed to secure publicity and avoid secret treaties, could not apply in the same way in respect of treaties to which the League of Nations itself was one of the Parties as in respect of treaties concluded among individual Member States. The Mandate for South West Africa, like all the other Mandates, is an international instrument of an institutional character, to which the League of Nations, represented by the Council, was itself a Party. It is the implementation of an institution in which all the Member States are interested as such. The procedure to give the necessary publicity to the Mandates including the one under consideration was applied in view of their

<sup>52</sup> Paul Reuter, *Introduction to the Law of Treaties*, 2nd ed. (Kegan Paul International, 1995) sections 63–68, pp. 29–30.

<sup>53</sup> For a complete discussion see, Jan Klabbbers, *The Concept of Treaty in International Law* (1996); Malgosia Fitzmaurice, “The Practical Working of Treaties,” in M. Evans (ed.), *International Law* (2006), pp. 187–213; Malgosia Fitzmaurice, “The Identification and Character of Treaties and Treaty Obligations Between States,” in M. Fitzmaurice and O. Elias (eds.), *Contemporary Issues in the Law of Treaties* (2005), pp. 1–48; Anthony Aust, “The Theory and Practice of Informal International Instruments”, pp. 787–812; and C. Chinkin, “A Mirage in the Sand? Distinguishing Binding and Non-Binding Relations Between States”, pp. 223–249.

<sup>54</sup> *Temple of Preah Vihear (Cambodia v. Thailand), Preliminary Objections, Judgment of 26 May 1961: I.C.J. Reports 1967*, p.17 at p. 31.

<sup>55</sup> *Territorial Dispute (Libyan Arab Jamahiriya v. Chad), Judgment, I.C.J. Reports 1994*, p. 6, para. 41.

<sup>56</sup> *Aegean Sea Continental Shelf, Judgment, I.C.J. Reports 1978*, pp. 41–44, paras. 97 and 101–108.

<sup>57</sup> Covenant of the League of Nations.

special character, and in any event they were published in the *Official Journal* of the League of Nations.”<sup>58</sup>

– “For its confirmation, the Mandate for South West Africa took the form of a resolution of the Council of the League but obviously it was of a different character. It cannot be correctly regarded as embodying only an executive action in pursuance of the Covenant. The Mandate, in fact and in law, is an international agreement having the character of a treaty or convention.”<sup>59</sup>

– “. . . Accordingly, and contrary to the contention of Bahrain, the Minutes are not a simple record of a meeting, similar to those drawn up within the framework of the Tripartite Committee; they do not merely give an account of discussions and summarize points of agreement and disagreement. They enumerate commitments to which Parties have consented. They thus create rights and obligations in international law for the Parties. They constitute an international agreement. [ . . . ] The Court does not find it necessary to consider what might have been the intentions of the Foreign Minister of Bahrain or, for that matter, those of the Foreign Minister of Qatar. The two Ministers signed a text recording commitments accepted by their Governments, some of which were to be given immediate application. Having signed such a text, the Foreign Minister of Bahrain is not in a position to say that he intended to subscribe only to a ‘statement recording a political understanding,’ and not to an international agreement.”<sup>60</sup>

#### 7. SIGNIFICANCE OF THE ACHIEVEMENT OF THE COMMISSION’S MANDATE

Finally, the significance of the object and purpose of the Resolution and achievement of the Commission’s mandate should be factored into the present analysis.

As the Resolution is linked to the CTBT, as a starting point it will be noted that the Preamble of the CTBT provides that:

“Convinced that the most effective way to achieve an end to nuclear testing is through the conclusion of a universal and internationally and *effectively verifiable* comprehensive nuclear test-ban treaty [ . . . ],

Affirming the purpose of attracting the adherence of all States to this Treaty and its objective to contribute effectively to the prevention of the proliferation of nuclear weapons in all its aspects, to the process of nuclear disarmament and therefore to the enhancement of international peace and security.”<sup>61</sup>

From those preambular recitals it can be inferred that part of the object and purpose of the CTBT is to constitute an effectively verifiable test ban treaty which ultimately will contribute to international peace and security.

Accordingly, article IV(1) of the CTBT requires that:

<sup>58</sup> *South West Africa Cases (Ethiopia v. South Africa; Liberia v. South Africa)*, Preliminary Objections, Judgment of 21 December 1962: I.C.J. Reports 1962, p. 332.

<sup>59</sup> *Ibid.*, p. 330.

<sup>60</sup> *Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Jurisdiction and Admissibility, Judgment*, I.C.J. Reports 1994, p. 112, at 120–122, paras. 21–30, 25 and 27.

<sup>61</sup> CTBT, preambular recitals 7 and 10.

*Article IV. 1.*

In order to verify compliance with this Treaty, a verification regime shall be established consisting of the following elements: (a) An International Monitoring System; (b) Consultation and clarification; (c) On-site inspections; and (d) confidence-building measures. *At entry into force of this Treaty, the verification regime shall be capable of meeting the verification requirements of this Treaty.* [emphasis added]<sup>62</sup>

Thus, by signing the CTBT, each State Signatory has accepted that “at entry into force of this Treaty, the verification regime shall be capable of meeting the verification requirements of this Treaty”. [Emphasis added].

Correspondingly, the Resolution Annex paragraph 13, requires that:

“The Commission shall undertake all necessary preparations to ensure the operationalization of the Treaty’s verification regime at entry into force, pursuant to article IV, paragraph 1, and shall develop appropriate procedures for its operation. . . .”

The tasks necessary to ensure that the verification requirements of the CTBT can be met are those which are specified in the Resolution Annex. Denial of the legal existence of the Commission or the failure of member States to meet their obligations under the Resolution or the failure of the Commission to fulfil its mandate could render the CTBT unimplementable or unverifiable, in part or in whole, at entry into force. The significant consequences that such failure would imply leads to the conclusion that the tasks assigned to the Commission cannot be considered as discretionary.

Furthermore, article 18 of the Vienna Convention provides:

*Article 18. Obligation not to defeat the object and purpose of a treaty prior to its entry into force*

A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when:

(a) it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty; or

(b) it has expressed its consent to be bound by the treaty, pending the entry into force of the treaty and provided that such entry into force is not unduly delayed.

Accordingly, as part of the object and purpose of the CTBT is to constitute an effectively verifiable treaty and States Signatories are under the obligation not to defeat the object and purpose of the CTBT pending its entry into force, they must therefore comply with the Resolution to enable the Commission to fulfil its mandate to ensure the operationalization of the CTBT verification regime at entry into force.

## 8. CONCLUSION

In view of the foregoing, it is the considered opinion that the Resolution Establishing the Preparatory Commission for the CTBTO constitutes an international agreement, legally binding upon States Signatories to the CTBT for the following reasons:

<sup>62</sup> One commentator considers that article IV(1) should be taken to have legal effect before entry into force of the Treaty. See, Masahiko Asada, “CTBT: Legal Questions Arising from its Non-Entry-into-Force”, at p. 113.

(a) With reference to the definition of “treaty,” as a generic term, provided in the 1969 Vienna Convention on the Law of Treaties, the Resolution is an instrument employing terms constituting an agreement, adopted by States in written form, and governed by international law. The fact that it was not signed and makes no provision for procedures for consent to be bound or entry into force has no impact on the binding nature of the commitments stated in the Resolution Annex. Its designation as a “resolution” is irrelevant to the determination of its nature. The failure to register it as an international agreement under Article 102 of the United Nations Charter and publish it in the United Nations *Treaty Series* is also not determinative as it was otherwise published and widely distributed, achieving the purpose of Article 102.

(b) Applying the canons of interpretation codified in the Vienna Convention on the Law of Treaties (the ordinary meaning of treaty terms in their context and in the light of the treaty’s object and purpose), one can see that the text of the Resolution Annex is expressed in the imperative form “shall”, which ordinarily means that the conduct is obligatory. The Resolution is the founding document and constituent instrument of a subject of international law, the Commission. The Resolution Annex establishes legal relations between States Signatories and the Commission by stipulating automatic membership and, finally, the Resolution creates rights and obligations for the Commission’s member States. Placed in context, the Resolution is inextricably linked to the CTBT which requires that its verification regime shall be capable of meeting the verification requirements of the Treaty at entry into force. The object and purpose of the Resolution is to “take all necessary measures to ensure the rapid and effective establishment of the CTBTO” and “to this end to establish a Preparatory Commission.” The terms of the Resolution and its Annex are not hortatory or discretionary or statements of fact or policy: rather, specific tasks are assigned to the Commission to be funded by all its member States and completed in a time-bound manner. These tasks are the elucidation of the object of the Resolution.

(c) The significance of the tasks enumerated in the Resolution are such that if the commitment to accomplish them is interpreted to be only politically binding, leaving it up to the discretion or *bona fides* of States Signatories, the result could render the CTBT unimplementable in part and unverifiable at entry into force of the Treaty. The object and purpose of the CTBT is, in part, to constitute an effectively verifiable test-ban and article IV requires that it be so at entry into force of the CTBT. By signing the CTBT States Signatories have accepted this. The corresponding paragraph 13 of the Resolution Annex requires the Commission to ensure the operationalization of the CTBT verification regime at entry into force. As article 18 of the Vienna Convention places States Signatories under the interim obligation not to defeat the object and purpose of a treaty pending its entry into force, States Signatories must comply by completing the Commission’s mandate on time. It would be an unreasonable interpretation to argue that the tasks are discretionary.

(d) The practice by the Commission itself, in particular its exercise of treaty-making capacity, reflects that it possesses international legal personality and full legal capacity as conferred by the Resolution.

(e) The practice by nearly all of the Commission’s 183 member States reflects adherence to the terms of the Resolution, demonstrated throughout the past 16 years by: the accreditation of permanent missions and permanent representatives to the Commission; the exercise of voting rights; payment of over 90 per cent of assessed contributions annu-

ally; conclusion of more than half the required facility agreements/arrangements with the Commission in accordance with the Resolution and Commission decisions; ongoing negotiations of most of the remainder; registration of half of the facility agreements in force as international agreements with the United Nations under Article 102 of the Charter; and establishment and provisional operation of the IDC and 80 per cent of the required IMS facilities.

(f) The challenges faced by some member States in their effort to achieve the recognition of the Commission and its privileges and immunities, on the grounds that the Resolution is politically, not legally, binding, need to be addressed at the national level and cannot constitute a legal bar to the accomplishment of the mandate of the Resolution.

The express terms, the significant body of subsequent practice and functional necessity lead to the conclusion that the Resolution Establishing the Preparatory Commission for the CTBTO is legally-binding upon States Signatories. As the CTBT International Monitoring System draws closer to its completion, and as the Preparatory Commission stands poised to complete its mandate to ensure the operationalization of the Treaty's verification regime at entry into force, it is all the more important that the legal nature of the Resolution be fully realised. To this end, the ordinary meaning of the express terms of the Resolution in respect of rights and obligations ("shall") will prove decisive.