Extract from:

UNITED NATIONS JURIDICAL YEARBOOK

2013

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

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

Chapter VI

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

A. Legal opinions of the Secretariat of the United Nations

(Issued or prepared by the Office of Legal Affairs)

1. Privileges and immunities

(*a*) Note to the Ministry of Foreign Affairs of [State], concerning privileges and immunities extended to locally-recruited staff who are nationals of [State]

Article 105 of the Charter of the United Nations—Article V of the Convention on Privileges and Immunities of the United Nations, 1946—No differentiation between internationally and nationally recruited staff, with exception of those who are recruited locally and assigned to hourly rates—Distinct regime of the Vienna Convention on Diplomatic Relations, 1961, which applies to states and their diplomatic personnel—International treaty obligations may not be diminished on basis of national legislation

The Legal Counsel of the United Nations presents her compliments to the Minister for Foreign Affairs of [State] and has the honour to refer to the ongoing negotiations between the [United Nations entity] and [State] for the establishment of a [United Nations entity] office in [State].

In this regard, the Legal Counsel understands that several meetings have taken place between officials of [United Nations entity] and the authorities of [State] to discuss the establishment of the [United Nations entity] office, including informal discussions with [Name], the Permanent Representative of [State] to the United Nations in [City] on [date], as well as meetings on [dates] with various individuals in the Ministry of Foreign Affairs in [City], including (i) [Name] and [Name] from [Office], (ii) [Name], the [Title] of [Office], (iii) [Name], [Title] of [Office], (iv) [Name] from [Office] and (v) [Name], the [Title] of [Office].

The Legal Counsel further understands, based on these meetings, that the Government of [State] has taken the position that privileges and immunities may not be extended to members of the [United Nations entity] office who are nationals of [State]. The Legal Counsel wishes to note that the Government's position is in direct contradiction

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

to its obligations to the United Nations under international law and the Legal Counsel respectfully requests that the Government of [State] reconsider its position.

The Legal Counsel wishes to point out that as a member of the United Nations, [State] is bound by the Charter of the United Nations. The status of the United Nations and its staff members in [State] is governed by Article 105 of the United Nations Charter. Pursuant to paragraph 1 of Article 105 of the Charter of the United Nations, "[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." Paragraph 2 of Article 105 of the United Nations Charter provides that "[r]epresentatives of the Members of the United Nations and officials of the Organization shall similarly enjoy such privileges and immunities as are necessary for the independent exercise of their functions in connection with the Organization". Finally, paragraph 3 of Article 105 stipulates that "[t]he General Assembly may make recommendations with a view to determining the details of the application of paragraph 1 … of this Article or may propose conventions to the Members of the United Nations for this purpose."

In order to give effect to Article 105 of the United Nations Charter, the General Assembly of the United Nations adopted the Convention on the Privileges and Immunities of the United Nations, 1946 ("the General Convention"),[*] which was acceded to by [State] on [date], without reservation. As an integral part of the United Nations, [United Nations entity] is entitled to the privileges and immunities provided for in the General Convention.

The Legal Counsel wishes to note that the legal regime governing the privileges and immunities of the United Nations and its officials is separate and distinct from the regime governing the privileges and immunities enjoyed by States and their diplomatic personnel as codified in the Vienna Convention on Diplomatic Relations.[**] Accordingly, when considering the status of United Nations officials who are national staff, reference must be made to the provisions of the General Convention and relevant General Assembly resolutions and not to practice under the Vienna Convention on Diplomatic Relations.

Pursuant to article V, section 18, subparagraph (*b*) of the General Convention, officials of the United Nations are entitled to a various range of privileges and immunities, including immunity from legal process in respect of words spoken or written and all acts performed by them in their official capacity as well as immunity from national service obligations. In setting forth these privileges and immunities, the General Assembly did not differentiate between internationally recruited staff and nationally recruited staff. It should be noted in this regard that General Assembly resolution 76 (I) specifically provides for "the granting of privileges and immunities referred to in Article V ... to all members of the staff of the United Nations, with the exception of those who are recruited locally and are assigned to hourly rates". Therefore, locally-recruited staff members from [State] who are not assigned to hourly rates also enjoy the privileges and immunities of article V of the General Convention.

The Legal Counsel wishes to point out that it is a fundamental principle of international law that international treaty obligations may not be diminished on the basis of the national legislation of [State]. According to article 27 of the Vienna Convention on the Law

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

[**] *Ibid*., vol. 500, p. 95.

of Treaties, 1969,* which codifies customary international law applicable to international treaties, "[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty." This principle is also reflected in section 34 of the General Convention, according to which the Government of [State] undertook an obligation to be "in a position under its own law to give effect to the terms" of the General Convention. Accordingly, the provisions of national legislation in [State] cannot be a basis for [State] to fail to fulfil its obligations which were committed to by the Government when [State] acceded to the General Convention.

If [State] could invoke its national legislation as a basis for not adhering to the terms of the General Convention, this would not only place [State] in an unfair position *vis-à-vis* other Member States party to the General Convention, but would be an interpretation of the General Convention that would not be within the spirit of the underlying provisions of the Charter of the United Nations, and in particular, paragraph 2 of Article 2 and paragraphs 1 and 2 of Article 105 thereof. Moreover, if the 193 Member States of the United Nations could generally invoke provisions of their national legislations as a basis for failing to fulfil their obligations pursuant to the Charter of the United Nations or other international treaties, this would undermine the very essence of the principle of *pacta sunt servanda* set forth in article 26 of the Vienna Convention on the Law of Treaties, namely that "every treaty in force is binding upon the parties to it and must be performed by them in good faith".

The Legal Counsel therefore respectfully requests the Government of [State] to ensure that the [United Nations entity] Office Agreement guarantees the privileges and immunities provided for under the General Convention to officials who are nationals of [State]. In light of the importance of this matter, the Legal Counsel would be grateful if the relevant representatives of the Government of [State] would attend a meeting with members of the Office of Legal Affairs, at a mutually convenient time, to discuss this matter further.

…

17 January 2013

(*b*) Note to the Ministry of Foreign Affairs of [State], concerning privileges and immunities enjoyed by certain categories of United Nations personnel in [State]

Article 105 of the Charter of the United Nations—Article V of the Convention on the Privileges and Immunities of the United Nations—General Assembly resolution 76 (I) sets out the privileges applicable to all United Nations staff except those recruited locally and assigned to hourly rates—General Assembly resolution 239 (III)—Staff Assessment Plan designed to impose a direct assessment on United Nations staff members comparable to national income taxes—Value Added Tax deemed to be indirect taxes within meaning of section 8 of the General Convention—Responsibility of States for the safety and protection of Unit-

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

ED NATIONS PERSONNEL—RESPONSIBILITY OF GOVERNMENT TO MAKE MONETARY AND IN-KIND CONTRIBUTIONS TOWARD THE COST OF UNITED NATIONS OPERATIONS IN THE COUNTRY

The Legal Counsel of the United Nations presents her compliments to the Minister for Foreign Affairs of [State] and has the honour to bring to the Minister's attention a number of problems that the United Nations, including the [United Nations entity 1], the [United Nations entity 2] and the [United Nations entity 3], have experienced in [State] with respect to the implementation of the privileges, immunities and facilities provided for the United Nations and its officials in accordance with applicable international legal instruments. The Legal Counsel has the further honour to refer to note verbale No. [number] of the Permanent Mission of [State] to the United Nations dated [date] seeking "clarification on the privileges and immunities for certain categories of the United Nations personnel (categories P1–P5)".*

In this regard, the Legal Counsel wishes to address the following issues: (1) privileges and immunities enjoyed by United Nations officials, including the exemption from taxation of United Nations officials, who are nationals of [State]; (2) exemption of the United Nations, its funds and programmes from Value Added Tax (VAT); (3) safety and security of United Nations personnel in the country; and (4) the obligation of the Government of [State] to provide the United Nations, its funds and programmes, with premises and to make other kinds of contributions towards the United Nations operations in the country.

The legal status, privileges and immunities of the United Nations, including [United Nations entity 1], [United Nations entity 2] and [United Nations entity 3], which are integral parts of the Organization, and their personnel in [State], are governed by Article 105 of the Charter of the United Nations.

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…", and according to paragraph 2 of the same Article, "...officials of the Organization shall similarly enjoy such privileges and immunities as are necessary for the independent exercise of their functions in connexion with the Organization". Paragraph 3 of this Article empowered the General Assembly to detail the application of paragraphs 1 and 2 of this Article and "propose conventions to the Members of the United Nations for this purpose". Following this provision, the Convention on the Privileges and Immunities of the United Nations, 1946 (hereinafter, the "General Convention") was adopted by the General Assembly. [State] is a party to the General Convention without any reservation.

Privileges and immunities of United Nations officials

Privileges and immunities of United Nations officials are outlined in article V of the General Convention. Section 17 of article V of the General Convention provides as follows:

> "The Secretary-General will specify the categories of officials to which the provisions of this article and article VII shall apply. He shall submit these categories to the General Assembly. Thereafter these categories shall be communicated to the Governments of all Members. The names of the officials included in these categories shall from time to time be made known to the Governments of Members."

* Not reproduced herein.

Further to this provision, on the basis of a proposal made by the Secretary-General, the General Assembly adopted resolution 76 (I) of 7 December 1946, whereby it approved "the granting of privileges and immunities referred to in Article V ... to all members of the staff of the United Nations, with the exception of those who are recruited locally *and* are assigned to hourly rate" (emphasis added). 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. This exception, therefore, only applies to individuals who meet *both* criteria. Thus, all locally-recruited staff members who are not assigned to hourly rates are fully entitled to all privileges and immunities enjoyed by United Nations officials under the United Nations Charter, the General Convention and applicable bilateral agreements.

In particular, in accordance with section 18 of article V of the General Convention and the established practice of the Organization, United Nations officials enjoy the following privileges and immunities:

- Immunity from legal process in respect of words spoken or written and all acts performed by them in their official capacity. In accordance with the established practice and jurisprudence, it is the Secretary-General's prerogative to establish what constitutes "official capacity". Many bilateral agreements also provide for the immunity from the inspection and seizure of the baggage of officials and/or arrest and detention of officials.
- Exemption from taxation on United Nations salaries and emoluments. This exemption is addressed below in more detail.
- Immunity from national service obligations, including military service.
- United Nations officials, together with their spouses and relatives dependant on them, are immune from immigration restrictions and alien registration. According to this provision, officials who need to travel on official business of the Organization, including for taking up their post, must be issued, together with their family members, entry visas and any other necessary documents as speedily as possible.
- Officials have the right to import free of duty their furniture and effects at the time of first taking up their post in the host country. According to bilateral agreements and/or national legislation of Member States, United Nations officials are often allowed to also import free of duty articles and vehicles for personal use.
- United Nations officials are entitled to exchange facilities offered to diplomats, as well as to repatriation facilities in time of international crises, together with their spouses and relatives dependant on them.

According to section 19 of the General Convention, "[i]n addition to the immunities and privileges specified in section 18, the Secretary-General and all Assistant Secretaries-General shall be accorded in respect of themselves, their spouses and minor children, the privileges and immunities, exemptions and facilities accorded to diplomatic envoys, in accordance with international law." Following the United Nations reform that took place in the 1950s, diplomatic privileges and immunities were also extended to

United Nations officials at the level of Under-Secretary-General and, subsequently, to the Deputy-Secretary-General.

In addition, Member States, as a rule, extend diplomatic privileges and immunities to heads of United Nations country offices and missions and other senior United Nations officials at the P4/P5 levels and above.

The General Convention does not outline the exact scope of diplomatic privileges and immunities enjoyed by such officials. However, according to the established practice, the Vienna Convention on Diplomatic Relations, 1961 (hereinafter, the "VCDR")*, codifying such privileges and immunities, is used for these purposes. In particular, senior United Nations officials are entitled to enjoy immunity from criminal, civil and administrative jurisdiction of the host country, although that immunity is subject to certain exceptions as set out in the VCDR. They cannot be obliged to give evidence as a witness and shall not be subject to any form of arrest and detention. With some exceptions, they are also exempt from all dues and taxes whether personal or real, national, regional, or municipal.

Exemption from taxation of United Nations officials

With respect to the exemption from taxation enjoyed by United Nations officials on their United Nations-sourced income, the Legal Counsel has the honour to refer to her note verbale dated [date] and to that of her predecessor dated [date] (both attached), as well as to numerous communications of the Resident Coordinator of the United Nations in [State].** The Legal Counsel also wishes to summarize the legal position of the Organization in this regard as follows.

Under article II, section 7 (*a*) of the General Convention, "[t]he United Nations, its assets, income and other property shall be exempt from all direct taxes." Furthermore, pursuant to article V, section 18 (1) (*b*) of the General Convention, "officials of the United Nations shall be exempt from taxation on salaries and emoluments paid to them by the United Nations." The same provision is also included, *inter alia*, in article X (2) (*e*) of the Cooperation Agreement between the United Nations [United Nations entity 2] and [State], 1994 (hereinafter, the "[United Nations entity 2] Agreement"); and article XIII (1) (b) of the Standard Basic Cooperation Agreement between the United Nations [United Nations entity 3] and [State], 1993 (hereinafter, the "[United Nations entity 3] Agreement"). In addition, article IX (1) of the Assistance Agreement between the United Nations [United Nations entity 1] and [State], 1995 (hereinafter, the "[United Nations entity 1] Agreement") confirms the applicability of the General Convention, *inter alia*, to [United Nations entity 1] officials.

The Legal Counsel wishes to point out that, as stated above, all locally-recruited staff members who are not assigned to hourly rates are fully entitled to exemption from taxation on their United Nations-sourced income.

As a party to the General Convention, [State] cannot make use of United Nations salaries and emoluments for any tax purposes. In place of national taxation, and to avoid the double taxation of United Nations officials, the General Assembly, in 1948, adopted a Staff Assessment Plan designed "to impose a direct assessment on United Nations staff members which is comparable to national income taxes (General Assembly resolution 239 (III) A of

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

** Not reproduced herein.

18 November 1948). The total funds collected from this assessment are distributed among Member States, including [State], in proportion to their contributions to the assessed budget of the United Nations. National taxation would, therefore, impose a double taxation burden on officials of the United Nations and would increase the financial burden of the Organization and its Member States.

Another rationale of the immunity from taxation of salaries and emoluments paid by the United Nations is to achieve equality of treatment for all officials of the Organization, and that no Member State should derive any national financial advantage from the presence on its territory of staff of international organizations who receive salaries and emoluments from the funds of these organizations. These principles were clearly enunciated by the General Assembly in resolution 78 (I) of 7 December 1946 as follows: "[i]n order to achieve full application of the principles of equality among Members and equality among personnel of the United Nations, Members which have not yet completely exempted from taxation, salaries and allowances paid out of the budget of the Organization are requested to take early action in that matter."

In this regard, the Legal Counsel expresses her serious concern with the imposition of tax on the United Nations-sourced income of the officials of the United Nations, who are nationals of [State], since such practice is not consistent with the legal obligations of the Government as outlined above.

Exemption from Value Added Tax

Turning to the question of exemption of the United Nations, its funds and programmes, from VAT, the Legal Counsel wishes to highlight the following points.

Article II, section 7 (*a*) of General Convention provides for a general exemption of the Organization from taxation, and in particular it states that "[t]he United Nations, its assets, income and other property shall be exempt from all direct taxes." Section 8 of the General Convention further provides that "while the United Nations will not, as a general rule, claim exemption from excise duties and from taxes on the sale of movable and immovable property which form part of the price to be paid, nevertheless when the United Nations is making important purchases for official use of property on which such duties and taxes have been charged or are chargeable, Members will, whenever possible, make appropriate administrative arrangements for the remission or return of the amount of duty or tax". In United Nations practice, value added taxes are, as a rule, deemed to be indirect taxes within the meaning of section 8 of the General Convention.

Thus, following section 8 and the established practice of the Organization in its implementation, Member States are obliged to remit or return the amount of duty or tax which has been charged or is chargeable on important purchases of goods and services. The question of whether particular purchases are "important" within the meaning of section 8 of the General Convention has been determined by reference either to purchases made on a recurring basis, or which involve considerable quantities of goods, commodities or materials. The phrase "official use" in United Nations practice is interpreted as any use in furtherance of United Nations objectives, purposes, programmes and mandates.

Section 8 of the General Convention is designed to protect the assets of the Organization from such taxes, the imposition of which would be especially heavy, and would constitute an undue burden upon it. The principle of remission or return, reflected

in the General Convention, has become a regular element in the customary practice of States parties to the General Convention. The United Nations attaches special importance to this principle because it is designed to equalize the procurement costs of the Organization throughout the world and the consequent charges upon Member States.

Another important principle applicable to this issue was formulated by the United Nations Conference on International Organization at San Francisco in 1945, in recommending that Article 105 be included in the Charter:

> "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).

In light of this principle, it is important that the exemption of the United Nations, its funds and programmes, from taxation, be implemented in the most efficient way, using whatever process is the least cumbersome for the Organization.

In this regard, the Legal Counsel wishes to express her concern with the situation where the United Nations experiences a less preferential treatment than that offered to a number of international organizations present in the territory of [State], including the [United Nations entity 1], the [United Nations entity 2], the [United Nations entity 3], and [another United Nations entity] in [State], in terms of exemption from VAT. The Legal Counsel understands that the United Nations has so far not been allowed to use the scheme of "Advance VAT Exemption" and, therefore, incurs additional burdens associated with the process of VAT remission.

Safety and security of United Nations personnel in [State]

The Legal Counsel also wishes to address the issue of safety and security of the United Nations personnel based in [State]. The Legal Counsel understands that several heads of United Nations offices and other United Nations personnel have suffered burglaries.

In this regard, the Legal Counsel recalls that the Government of [State] bears primary responsibility under international law for the safety and security of United Nations personnel. Therefore, the Government is under a legal obligation to take effective and adequate actions as may be required to ensure the appropriate security, safety and protection of United Nations personnel in the territory of [State].

Moreover, since the heads of the United Nations offices as well as other senior United Nations officials in [State], as a rule, are to enjoy diplomatic status, the Government incurs an additional obligation under international law to "treat [them] with due respect and ... take all appropriate steps to prevent any attack on [their] person, freedom or dignity".

Contribution of the Government

In conclusion, the Legal Counsel would like to draw the Minister's attention to the obligation of the Government to make monetary and in-kind contributions toward the costs of United Nations operations in the country.

In particular, in accordance with articles V and VI of the [United Nations entity 1] Agreement, the Government "undertakes to furnish ... the necessary office space and other premises", as well as make a number of other monetary and in-kind contributions. In accordance with article VI of the [United Nations entity 3] Agreement, the Government "provide[s] to the [United Nations entity 3] as mutually agreed upon and to the extent possible ... appropriate office premises for the [United Nations entity 3] office", as well as makes other kinds of contributions. Following article VI of the [United Nations entity 2] Agreement, the Government agreed to "assist the [United Nations entity 2] officials in finding appropriate office premises" and "to provide funds up to a mutually agreed amount to cover the cost of local services and facilities for the [United Nations entity 2] office, such as establishment, equipment, maintenance and rent, if any, of the office".

In this regard, the Legal Counsel urges the Government to consider providing premises at no cost to the United Nations in the country, as well as to provide financial support in accordance with the above-mentioned obligations.

The Legal Counsel wishes to point out that the privileges and immunities enjoyed by the United Nations and other legal obligations assumed by the Government with respect to the United Nations, its funds and programmes, in accordance with the aforementioned international legal instruments may not be diminished on the basis of the national legislation of [State]. According to article 27 of the Vienna Convention on the Law of Treaties, 1969, which codifies customary international law applicable to international treaties, "[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty". This principle is also reflected in section 34 of the General Convention, which provides that Member States have an obligation to be "in a position under [their] own law to give effect to the terms of this Convention".

In summary, the Legal Counsel kindly requests the Government to take all necessary measures to ensure respect for the privileges, immunities and other obligations toward the United Nations, its funds and programmes. In particular, the Legal Counsel requests the Government to exempt all United Nations officials, including those who are nationals of [State], from any taxation on their United Nations-sourced income; to allow the United Nations, its funds and programmes, to use the "Advance VAT Exemption" scheme as the most efficient way of VAT exemption available in [State]; to take all necessary measures to ensure the safety and security of United Nations personnel present in the country, and to provide at no cost adequate office space for the United Nations.

...

22 February 2013

(*c*) Note to the Ministry of Foreign Affairs of [State], concerning the privileges and immunities of a [United Nations entity] and its officials from legal process initiated against it by a former service contractor

Article 105 of the Charter of the United Nations—Convention on the Privileges and Immunities of the United Nations, 1946—As per Article 27 of the Vienna Convention on the Law of Treaties, 1969, a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty—United Nations immunity from legal process differs in scope and nature as com-

PARED TO THE JURISDICTIONAL IMMUNITIES OF STATES—IMMUNITY OF THE UNITED NATIONS AND ITS OFFICIALS FROM JURISDICTION OF MEMBER STATES—SERVICE CONTRACTORS CAN AVAIL THEMSELVES OF THE DISPUTE RESOLUTION MECHANISMS SET OUT IN THEIR CONTRACTS

The Office of Legal Affairs of the United Nations presents its compliments to the Ministry of Foreign Affairs of [State] and has the honour to refer to the legal proceedings instituted by a former service contractor of [a United Nations entity], [Name], against [United Nations entity]. The Office of Legal Affairs has the further honour to refer to the most recent decision of the [domestic court] of [date] requesting [United Nations entity] to appear before the Court to be formally notified of the legal complaint filed by [Name] (attached).*

In this regard, the Office wishes to confirm the position outlined in the Notes Verbales of [United Nations entity] addressed to the Ministry dated [date] and [date] (attached), and to reiterate the following legal principles relating to the privileges and immunities of the United Nations.*

The activities of [United Nations entity], as a joint subsidiary organ of the United Nations and [United Nations entity 2], are governed in [State] by the Charter of the United Nations and the Convention on the Privileges and Immunities of the United Nations, 1946 (hereinafter the "General Convention"), to which [State] is a party, without reservation. The privileges and immunities of [United Nations entity] and its personnel were further confirmed in the [date] Basic Agreement between [United Nations entity] and [State].

Pursuant to paragraph 1 of Article 105 of the Charter of the United Nations, "[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...", and according to paragraph 2 of the same Article "... officials of the Organization shall similarly enjoy such privileges and immunities as are necessary for the independent exercise of their functions in connection with the Organization". Paragraph 3 of this Article empowered the General Assembly to detail the application of paragraphs 1 and 2 of this Article and "propose conventions to the Members of the United Nations for this purpose". Following this provision, the General Convention was adopted by the General Assembly.

Pursuant to article II, section 2 of the General Convention, "[t]he 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". 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".

The Office wishes to point out that the privileges and immunities enjoyed by [United Nations entity] in accordance with the aforementioned international legal instruments may not be diminished on the basis of the national legislation of [State]. According to article 27 of the Vienna Convention on the Law of Treaties, 1969, which codifies customary international law applicable to international treaties, "[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty".

* Not reproduced herein.

This principle is also reflected in section 34 of the General Convention, according to which the Government of [State] undertook an obligation to be "in a position under its own law to give effect to the terms" of the General Convention. Moreover, any interpretation of the provisions of the General Convention must be carried out within the spirit of the underlying provisions of the Charter of the United Nations, and in particular, paragraphs 1 and 2 of Article 105 thereof.

The Office also wishes to recall that the United Nations operations, including those of [United Nations entity], are not governed by the Vienna Convention on Diplomatic Relations, 1961*, or Vienna Convention on Consular Relations, 1963.** Moreover, the absolute immunity of the United Nations, including [United Nations entity], from every form of legal process, including that related to labour matters, is different in scope and nature as compared to the jurisdictional immunities of States.

International intergovernmental organizations, including the United Nations, have a character completely different from that of States, and the requirements for and the legal basis of their immunity is consequently entirely different from that of States.

The International Court of Justice (ICJ), has held that, while the United Nations was an "international person ... that is not the same thing as saying that it is a State, which it certainly is not, or that its legal personality and rights and duties are the same as those of a State .... Whereas a State possesses the totality of international rights and duties recognized by international law, the rights and duties of an entity such as the Organization must depend upon its purposes and functions as specified or implied in its constituent documents and developed in practice." (Advisory Opinion on Reparations for Injuries Suffered in the Service of the United Nations (1949)).

While the immunity of States derives from their respective sovereignty and depends on the nature of the activity in question (commercial or in exercise of governmental functions) as well as the possibility of invoking reciprocity, the immunity of intergovernmental organizations is designed to protect their ability to function independently of any government. This distinction is well established in international law. Thus changes in the laws and principles governing the sovereign immunity of States are not relevant to the differently based immunity of intergovernmental organizations as set out above.

Moreover, the United Nations, as well as its programmes and funds, carry out their functions not only in their headquarters State but in the territories of all their Members. Therefore, in order to deal equitably with all their Members, they must be able to operate on the basis of uniform application of their constituent instruments, rather than on the basis of the diverse laws of particular Member States as well as international treaties to which these States may be parties. If any State could, through its courts, bend the operations of an international organization to the laws of that State, all other States could do likewise with respect to their laws, thus possibly paralysing or fragmenting the Organization.

The Office also wishes to draw the attention of the Ministry to the established practice of the United Nations, based on the provisions of the General Convention, not to appear in local courts of Member States, as well as other bodies authorized to conduct legal proceedings in order to assert its privileges and immunities. This long standing position is

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

** *Ibid*., vol. 596, p. 261.

reflected in the Study of the practice of the United Nations, the specialized agencies and the International Atomic Energy Agency concerning their status, privileges and immunities that was prepared by the Secretariat of the United Nations for the International Law Commission in 1967 (see the *Yearbook of the International Law Commission*, 1967, vol. II p. 223). The assertion of the immunity of the United Nations is done in a written communication to the Ministry of Foreign Affairs of the State concerned, requesting it to take the necessary steps to inform the appropriate office of government (usually the Ministry of Justice or the Attorney-General's Office) to appear or otherwise move the court to dismiss the suit on the grounds of the Organization's immunity.

Subsequently, such practice was supported, *inter alia*, by the ICJ in the … *Cumaraswamy* case. The Court in particular stated:

> "[T]he Government of [State] had an obligation, under Article 105 of the Charter and under the General Convention, to inform its courts of the position taken by the Secretary-General. According to a well-established rule of international law, the conduct of any organ of a State must be regarded as an act of that State. Because the Government did not transmit the Secretary-General's finding to the competent courts, and the Minister for Foreign Affairs did not refer to it in his own certificate, [Member State] did not comply with the above-mentioned obligation."

The Court continued by stating:

> "When national courts are seized of a case in which the immunity of a United Nations agent is in issue, they should immediately be notified of any finding by the Secretary-General concerning that immunity ... . The governmental authorities of a party to the General Convention are therefore under an obligation to convey such information to the national courts concerned, since a proper application of the Convention by them is dependent on such information. Failure to comply with this obligation, among others, could give rise to the institution of proceedings under Article VIII, Section 30, of the General Convention."

Indeed, the Organization's immunity from legal process can only be fully protected if the Organization and its personnel do not bear the burden of asserting the immunity themselves. The Organization would face an onerous burden, both in terms of financial and personnel resources, if it had to appear in court to assert its immunity in the jurisdictions of its 193 Member States.

In light of the above, the Office reiterates that the United Nations is expressly maintaining its immunity, including that of [United Nations entity], and the immunity of its officials from legal process with respect to the proceedings instituted by [Name] against [United Nations entity] in [State].

Therefore, [United Nations entity] and its officials are not in a position to appear before the [domestic court]. The Office respectfully requests the Ministry to inform the relevant authorities of the position of the United Nations in this matter and to promptly take all necessary steps to ensure full respect for the privileges and immunities of the United Nations, including [United Nations entity] and its officials.

In particular, the Office respectfully requests the competent authorities of [State] to seek dismissal of the case in accordance with the Government's obligations under international law.

Finally, the Office has the honour to assure the Ministry that, notwithstanding the immunity of the Organization and its officials from legal process under the applicable provisions of the General Convention and the Charter of the United Nations, [Name] is not without a remedy to address her complaint. Consistent with the provisions of the General Convention, service contractors, including [Name], can avail themselves of the dispute resolution mechanism set out in their contracts.

…

24 June 2013

(*d*) Note to the Secretary for Foreign Affairs of [State], concerning the taxation of nationals employed by the United Nations

Article 105 of the Charter of the United Nations—Article V of the Convention on the Privileges and Immunities of the United Nations, 1946—Officials of the United Nations exempt from taxation on the salaries and emoluments paid to them by the United Nations—General Assembly resolution 76 (I)—All staff members of the United Nations except those recruited locally and assigned to hourly rates are considered officials for the purposes of the General Convention—General Assembly resolution 239 (III) A—Staff Assessment Plan designed to impose a direct assessment on United Nations staff members comparable to national income taxes—Staff of the funds and programmes subject to staff assessment—Article 27 of the Vienna Convention on the Law of Treaties, 1969—Privileges and immunities enjoyed by the United Nations may not be diminished on the basis of national legislation

The Legal Counsel presents her compliments to the Secretary for Foreign Affairs of [State] and has the honour to refer to the [document 1] and [document 2].*

The Legal Counsel hereby requests the Government of [State] to promptly take all necessary steps to ensure unequivocal respect for the privileges and immunities of the United Nations, including ensuring that no officials of the United Nations in [State] are taxed on their United Nations income. In this regard, the Legal Counsel wishes to reiterate the applicable legal instruments as follows:

As an international organization, the United Nations and its officials have been accorded certain privileges and immunities which are necessary for the fulfilment of the purposes of the Organization. Article 105 of the Charter of the United Nations provides the general basis for the privileges and immunities of both the United Nations and its officials. In order to give effect to Article 105 of the Charter of the United Nations, the General Assembly of the United Nations adopted the Convention on the Privileges and Immunities of the United Nations (the "General Convention") on 13 February 1946, to which [State] acceded … without reservation.

Pursuant to article V, section 18, subparagraph (*b*) of the General Convention, "officials of the United Nations shall be exempt from taxation on the salaries and emoluments paid to them by the United Nations". In this regard, it should be noted that General Assembly resolution 76 (I) provides that "the granting of privileges and immunities referred to in article V ... to all members of the staff of the United Nations, with the exception

* Not reproduced herein.

of those who are recruited locally and are assigned to hourly rates". Therefore, all staff members of the United Nations 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, and are entitled to exemption from such taxation irrespective of their nationality, residence, place of recruitment or rank. Thus, locally-recruited staff members who are not assigned to hourly rates also enjoy the privileges and immunities of article V of the General Convention, including immunity from taxation on the salaries and emoluments paid to them.

The immunity from taxation of salaries and emoluments paid by the United Nations was established to achieve the equality of treatment for all officials of the Organization and in order to ensure that no Member States should derive any national financial advantage from the presence of staff of international organizations who receive salaries and emoluments from the funds of these organizations on their territory. These principles were clearly enunciated by the General Assembly in resolution 239 (III) C of 18 November 1948 in which the Assembly requested Members which had not acceded to the General Convention or had acceded to it with reservations as to section 18 (*b*), to "take the necessary action, legislative or other, to exempt their nationals, employed by the United Nations from national income taxation with respect to their salaries and emoluments paid to them by the United Nations, or in any other manner to grant relief from double taxation to such nationals".

The Legal Counsel recalls that no Member State of the Organization is expected to make use of United Nations salaries and emoluments for any tax purposes. It will be recalled that in place of national taxation and to avoid the double taxation of United Nations officials, the General Assembly, in 1948, adopted a Staff Assessment Plan designed "to impose a direct assessment on United Nations staff members which is comparable to national income taxes" (General Assembly resolution 239 (III) A of 18 November 1948). The total funds collected from this staff assessment are distributed as an offset among Member States who do not impose taxes on United Nations income, including [State], in proportion to their contributions to the assessed budget of the United Nations. National taxation would, therefore, impose a double taxation burden on officials of the United Nations and would increase the financial burden of the Organization and its Member States.

The Legal Counsel wishes to confirm that the staff of the funds and programmes are subject to such staff assessment. As a result, any taxes that might be applied to the income derived from the United Nations would result in double taxation on those staff members. Moreover, the Legal Counsel notes that the Staff Rules and Regulations of the United Nations imposes an obligation on the Organization to reimburse any taxes that might be assessed by national authorities on the salaries of United Nations staff. In cases where the Organization has to make such reimbursement to staff, the Organization seeks equal reimbursement from the relevant national authorities. Therefore, if United Nations national staff members should be required to pay taxes on their United Nations income in [State], the Organization would be required to reimburse them and would then seek equal reimbursement from [State].

The Legal Counsel notes that [document 1] correctly states that based on article V, section 18 of the General Convention, "officials of the United Nations shall be exempt from [State] income tax, regardless of their nationality or place of residence". The [document 1],

however, goes on to state that only those officials whose names have been communicated to the Government (through the Department of Foreign Affairs) shall be covered by the tax exemption. Article V, section 17 of the General Convention states that "[t]he Secretary-General will specify the categories of officials to which the provisions of this article and article VII shall apply... The names of the officials included in these categories shall from time to time be made known to the Governments of Members". Accordingly, while the Organization has an obligation to identify officials to the Government of [State], it must only do so from time to time. It follows from the above provisions that an official is exempt from taxation in [State] even if the United Nations has not yet identified that individual as an official to the Government.

The Legal Counsel would like to note that [document 1] incorrectly identifies the United Nations Children's Fund (UNICEF), the United Nations Development Programme (UNDP), the United Nations High Commissioner for Refugees (UNHCR), and the United Nations Population Fund (UNFPA) as specialized agencies of the United Nations. UNICEF, UNDP, UNHCR and UNFPA are all integral parts of the United Nations and are to be accorded the privileges and immunities provided for under the General Convention, including exemption from taxation for [State] nationals and permanent residents. Accordingly, per the terms of [document 1], there is no need to consider any separate host agreements for these entities since they are not Specialized Agencies.

Under section 34 of the [General] Convention, [State] has an obligation to be "in a position under its own law to give effect to the terms of this convention". Moreover, any interpretation of the provisions of the Convention must be carried out within the spirit of the underlying principles of the Charter of the United Nations, and in particular, paragraph 1, Article 105 thereof, which provides that the Organization shall enjoy such privileges and immunities as are necessary for the fulfilment of its purposes. Measures which might, *inter alia*, increase the financial or other burdens of the Organization have to be viewed as being inconsistent with this provision.

Additionally, the privileges and immunities enjoyed by the United Nations in accordance with the aforementioned international legal instruments may not be diminished on the basis of the national legislation of [State]. According to article 27 of the Vienna Convention on the Law of Treaties, 1969, which codifies customary international law applicable to international treaties, "[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty".

The Legal Counsel therefore respectfully requests the Government of [State] to take the appropriate steps to ensure that all officials of the United Nations, including officials of its funds and programmes, are not taxed on their United Nations income. In this regard, members of the Office of Legal Affairs remain available to discuss this matter further with the relevant authorities of [State].

…

28 June 2013

(*e*) Note to the Secretary-General from the Legal Counsel, concerning the extension of the privileges and immunities of the officials of the Special Court for Sierra Leone and the Residual Special Court for Sierra Leone

CONVENTION ON THE PRIVILEGES AND IMMUNITIES OF THE UNITED NATIONS, 1946—RECOGNITION OF SPECIAL COURT FOR SIERRA LEONE (SCSL) AND RESIDUAL SPECIAL COURT FOR SIERRA LEONE (RSCSL) OFFICIALS AS EXPERTS ON MISSION WHEN OUT OF THE HOST COUNTRIES OF THE COURTS—ABSENCE OF FUNCTIONAL IMMUNITY AFFECTING INDEPENDENT EXERCISE OF OFFICIALS—CONSIDERING ACTIVITIES OF THE SCSL AND RSCSL AS ACTIVITIES OF THE UNITED NATIONS RESULTING FROM A MANDATE OF THE SECURITY COUNCIL

1. In the … letter dated [date], the President and the Registrar of the Special Court for Sierra Leone (SCSL) request that the United Nations consider extending the scope of application of the privileges and immunities of the SCSL and the Residual Special Court for Sierra Leone (RSCSL) and their officials.* Specifically, they suggest that the privileges and immunities should be applicable universally and not only in the host countries of the Courts (Sierra Leone and the Netherlands) and that former officials should continue to enjoy immunity in respect of words spoken and acts done by them in their official capacity.

2. For the reasons set out below, I believe that the officials of the SCSL and the RSCSL could be recognized as experts on mission under the Convention on the Privileges and Immunities of the United Nations (hereinafter the "General Convention") when they are out of the host countries of the Courts.

3. By way of background, the SCSL was established by an agreement between the United Nations and the Government of Sierra Leone. The seat of the SCSL is in Sierra Leone but, for security reasons, its proceedings against the former President of Liberia, Mr. Charles Taylor, are taking place in The Hague. The SCSL expects to deliver the appeal judgment in that case by 30 September 2013 and to close by the end of this year. The RSCSL was also established by agreement between the United Nations and the Government of Sierra Leone, to carry out the residual functions of the SCSL upon its closure. Its permanent seat is in Sierra Leone, but it will perform its functions temporarily at an interim seat in The Hague.

4. The SCSL and RSCSL are treaty-based bodies that are not part of the United Nations. The officials of the SCSL and the RSCSL are not officials of the United Nations. As such, they do not enjoy the privileges and immunities granted to United Nations officials under the General Convention. Instead, they are accorded privileges and immunities under the SCSL and RSCSL Agreements as well as under headquarters agreements with Sierra Leone and the Netherlands. The officials do not enjoy privileges and immunities in any other States.

5. The President and Registrar are concerned that after the completion of their work, former SCSL officials will not enjoy immunity for the actions performed by them in their capacity as Court officials in the countries to which they will relocate. Further, they note that pursuant to the RSCSL Statute, the officials of the RSCSL will be expected to perform most of their functions remotely, in countries in which they do not enjoy immunity. The absence of functional immunity in those countries could affect the independent exercise of

* Not reproduced herein.

their functions. The Office of Legal Affairs has discussed these concerns with the President and Registrar.

6. This problem could be resolved by treating the officials of the SCSL and the RSCSL as experts on mission for the United Nations in countries other than Sierra Leone and the Netherlands and according to them the privileges and immunities under articles VI and VII of the General Convention. The President and Registrar have informally agreed that this solution would be suitable.

7. There is no definition of "experts on mission" in the General Convention. The established principle and consistent practice of the Organization is to consider as "experts on mission" persons who are performing missions for the United Nations provided they are serving in an individual capacity and are neither officials of the Organization nor representatives of Member States.

8. The practice also shows that the United Nations has recognized the status of experts on mission of the members of human rights treaty bodies which have a separate legal status from the United Nations. The recognition was based on the fact that the human rights treaty bodies are closely linked to the United Nations.

9. In this regard, it should be noted that there is a special relationship between the United Nations and the SCSL and the RSCSL. While the United Nations is, strictly speaking, not a parent organ of the SCSL and the RSCSL, it is a founding party. The SCSL was established pursuant to Security Council resolution 1315 (2000) which mandated the creation of the Court, instructed the Secretary-General to enter into negotiations with the Government of Sierra Leone to that end, and defined the subject matter jurisdiction of the Court. The RSCSL was established with the approval of the Security Council, which was expressed by letter dated 15 July 2010 from the President of the Security Council to the Secretary-General (S/2010/385).

10. Moreover, the Security Council has supported the SCSL in a number of ways, including by: instructing the United Nations Mission in Sierra Leone (UNAMSIL) to provide administrative and related support to the SCSL (resolution 1400 (2002)); authorizing the deployment of the military personnel of the United Nations Mission in Liberia (UNMIL) to Sierra Leone to provide security for the SCSL (resolution 1626 (2005)); and authorizing UNMIL to arrest and transfer Charles Taylor to the SCSL (resolution 1638 (2005)). In addition, the Security Council and the General Assembly have approved United Nations' subventions to the SCSL in order to enable it to complete its work and to transition to the RSCSL. The President and Prosecutor of the SCSL also periodically address the Security Council on the work of the Court.

11. It follows from this that the activities of the SCSL and RSCSL may be considered by the United Nations as activities resulting from a mandate of the Security Council. In such a case, officials of the SCSL and the RSCSL may be regarded as performing missions for the United Nations.

12. The fact that the SCSL and RSCSL officials do not have a contract from the United Nations does not prevent them from being considered as experts on mission. The International Court of Justice clarified in its advisory opinion in the *Mazilu* case that "... the experts thus appointed or elected may or may not be remunerated, may or may not have a contract, may be given a task requiring work over a lengthy period of time of a short time. The essence of the matter lies not in their administrative position but in the nature

of their mission." Further, the fact that they are officials of the SCSL and the RSCSL does not prevent them from being considered as experts on mission. It is only officials of the United Nations who may not be considered as experts on mission.

13. In light of the foregoing, I wish to recommend that SCSL and RSCSL officials should be considered as experts on mission for the United Nations when they are outside the countries in which they already enjoy privileges and immunities under the SCSL and RSCSL Agreements or the relevant headquarters agreements.

14. If the Secretary-General agrees, I will address a communication to that affect to the President of the SCSL and will publish this communication in the United Nations Juridical Yearbook for the information of Member States.

23 July 2013

(*f*) Request for review and clearance of draft Memorandum of Understanding between [the Secretariat Office] and United Nations Volunteers

United Nations Volunteers (UNVs) serve under contract with UNV and are not staff members—Convention on the Privileges and Immunities of the United Nations, 1946, does not apply to UNVs—Express agreements with host country are required for privileges and immunities to be granted to UNVs unless existing agreements already provide them under Status-of-Forces Agreements (SOFAs), Status-of-Mission Agreements (SOMAs), or Standard Basic Assistance Agreements (SBAAs) entered into by UNDP

1. This is with reference to your memorandum dated [date] by which you requested this Office to review and clear a draft Memorandum of Understanding between the [Secretariat Office (hereinafter the "Office")] and United Nations Volunteers (UNV). This also refers to the subsequent correspondence and discussions between representatives of our Offices concerning this matter, including a meeting held on [date].

2. As you are aware, individual UNVs serve under contract with UNV and are not United Nations staff members or officials. Accordingly, they do not enjoy privileges and immunities under the Convention on the Privileges and Immunities of the United Nations (the "General Convention"). Therefore, in each country in which they are deployed, separate negotiations with the host country are required in order for relevant privileges and immunities to be granted to UNVs, unless existing arrangements between the United Nations and host Governments provide for privileges and immunities for UNVs. In this respect, currently, agreements that provide for privileges and immunities for UNVs are the Status-of-Forces Agreements (SOFAs) and Status-of-Mission Agreements (SOMAs) entered into by peacekeeping and political missions as well as Standard Basic Assistance Agreements (SBAA) entered into by UNDP. Thus, unless UNVs serve in countries where SOFAs or SOMAs are in force or where SBAAs have been concluded and they are performing work for UNDP, or a host country has expressly agreed to provide privileges and immunities for UNVs under a separate agreement, UNVs do not enjoy relevant privileges and immunities.

3. We understand that one of the main purposes for this MOU is for UNV to obtain agreement from [the Office] that individual UNVs will enjoy the same privileges and immunities enjoyed by United Nations officials under the General Convention. We note our serious concerns about the ability of [the Office] to enter into an MOU with UNV which

requires [the Office] to make the aforementioned arrangement for UNVs in light of our understanding that, with the exception of one Member State, [the Office] does not have its own agreements with host Governments whereby it could extend privileges and immunities to UNVs through such agreements. Even within the one host country agreement concluded by the United Nations/[the Office] with the Government of [State], UNVs do not enjoy the same privileges and immunities enjoyed by United Nations officials under the General Convention. This is because contrary to the provisions of the SOFA, SOMA or SBAA, the Agreement between the United Nations/[the Office] and the Government of [State] dated [date] does not provide for the privileges and immunities of UNVs.

4. In light of the above, we would strongly caution against [the Office] entering into this framework MOU as [the Office] cannot guarantee the necessary privileges and immunities for UNVs without concluding individual agreements with each host country in which such UNVs would be deployed. From a legal perspective, we note that deploying UNVs without the necessary privileges and immunities carries a high risk that the Organization may not be able to properly protect such UNVs in cases of arrest or detention or other forms of legal process.

5. We remain available to discuss further at your convenience.

30 July 2013

2. Procedural and institutional issues

(*a*) Inter-office memorandum to the Assistant Secretary-General and Deputy Executive Director of the United Nations Environment Programme, concerning the rules of procedure and participation issues of the first universal session of the Governing Council

General Assembly resolution 67/213—"Universal membership" of the Governing Council is limited to the 193 Members States of the United Nations—Non-Member States of the United Nations who are Member States of Specialized Agencies can participate as observers in accordance with its rules of procedure—Rules of procedure of the Governing Council's first universal session should be proposed by the President and decided by the Council—Governing Council should decide on a case by case basis which rules or practices of the General Assembly shall be applicable to its proceedings—New rules of procedure should be adopted at UNEP's first universal session rather than amending existing rules

1. I wish to refer to your letter dated [date] in which you sought our views on how the rules of procedure of the Governing Council and the rules and practices of the General Assembly will apply to the first universal session of the Governing Council to be held from 18 to 22 February in Nairobi, Kenya. We provided you with our initial response in our memorandum of [date].

2. You will find attached to this Note a comprehensive comparison between the rules of procedure of the Governing Council and the rules and practices of the General Assembly as well as an analysis of the term "universal membership" used in paragraph 4(*b*) of General Assembly resolution 67/213.* In summary our advice is as follows:

* Not reproduced herein.

3. Under resolution 67/213 universal membership of the Governing Council appears to be limited to the 193 Member States of the United Nations. This is based on our reading of the resolution and the general practice of the General Assembly. However, we are unaware of the specific drafting history of the resolution. For the reasons explained in our Note, non-Member States of the United Nations, who are Member States of Specialized Agencies can participate as observers, on the same basis as they have participated previously in the activities of the Governing Council, in accordance with its rules of procedure. The European Union should also be able to participate as an observer given the enhanced observer status it enjoys within the General Assembly.

4. In order for the President as well as all Member States to have clarity over what rules of procedure are applicable at any given time, we would suggest that, at the beginning of the Governing Council, the President proposes and the Council decides that the rules of procedure of the Governing Council shall apply to its first universal session and that the Governing Council shall decide on a case by case basis which rules or practices of the General Assembly shall be applicable to its proceedings.

5. In taking these decisions the Governing Council may wish to consider applying those rules of the General Assembly which are more advantageous to use in light of its universal membership, such as the rule on quorums or where the Governing Council's rules have no applicable rule such as the General Assembly rule on summary records or electronic voting. The Governing Council could also take a decision to apply both the rules of procedure of the Governing Council and the rules of procedure and the practice of the General Assembly simultaneously, where the specific rule or practice could be viewed as complementary, for example on the participation of intergovernmental organizations.

6. United Nations Environment Programme ("UNEP") may wish to appraise the President and the Bureau prior to the first universal session, of this course of action. They should be briefed in advance on all decisions that will be proposed to the Governing Council by the President. In addition, UNEP may wish to consult informally with the Committee of Permanent Representatives.

7. Given that resolution 67/213 has tasked the development and adoption of the Governing Council's new rules of procedure to the Council itself, the Council will probably not seek to amend its rules of procedure which would be through a decision of the Council itself, but rather to adopt new rules which will supersede those currently applicable to its proceedings. It is important that this process begin at UNEP's first universal session. We will be available to assist UNEP and the Council in this process.

8. Finally, as far as seating is concerned, there is a practice in the General Assembly of deciding by the drawing of lots which Member State shall be seated first. For the sixty-seventh session, Jamaica's name was picked and accordingly, they are seated first in all the meetings of the General Assembly and its Main Committees with other Member States following in alphabetical order.

9. However, we would recommend seating from A–Z in alphabetical order for the first universal session which is the case for most subsidiary organs of the General Assembly, with Observer States seated alphabetically after Member States followed by the European Union.

10. Should you have any questions please do not hesitate to contact us.

11 February 2013

(*b*) Inter-office memorandum to the Executive Secretary of the United Nations Economic and Social Commission for Western Asia (ESCWA), concerning proposal to change the name of the Commission

ECONOMIC AND SOCIAL COMMISSION FOR WESTERN ASIA (ESCWA) RESOLUTION 302 (XXVII)—CHANGE OF THE NAME OF THE COMMISSION TO THE UNITED NATIONS ECONOMIC AND SOCIAL COMMISSION FOR THE ARAB REGION, UPDATE OF ITS TERMS OF REFERENCE, AND REQUEST THAT THE SECRETARIAT INVITE ALL ARAB COUNTRIES TO BECOME MEMBERS OF ESCWA—ABSENCE OF A DEFINITION OF "ARAB COUNTRIES" ADOPTED BY THE INTERGOVERNMENTAL ORGANS OF THE UNITED NATIONS—COMMISSION SHOULD PREPARE AND ADOPT A DRAFT RESOLUTION TO EXPRESSLY REQUEST APPROVAL

1. This memorandum is in response to your memorandum of [date] requesting advice on the "next steps" in terms of finalizing the change of the name from the Economic and Social Commission for Western Asia ("ESCWA" or the "Commission") to the United Nations Economic and Social Commission for the Arab Region, and updating its terms of reference, in line with resolution 302 (XXVII) of 10 May 2012 adopted at the ESCWA Ministerial Session which was endorsed by ECOSOC in its resolution 2012/1.

2. We would like to recall that ESCWA was established by ECOSOC resolution 1818 (LV) of 9 August 1973. The original membership was limited to "the States Members of the United Nations situated in Western Asia which at present call on the services of the United Nations Economic and Social Office in Beirut" in accordance with paragraph 2 of the terms of reference of ESCWA contained in resolution 1818 (LV). These States were, at the time, Bahrain, Iraq, Jordan, Kuwait, Lebanon, Oman, Qatar, Saudi Arabia, Syrian Arab Republic, the United Arab Emirates, Yemen and Democratic Yemen (the last two States later formed a single State in 1990).

3. Subsequently, ECOSOC approved the admission of Egypt, Libya, Morocco, the Sudan, Tunisia and the Palestine Liberation Organization as full members.

4. By ECOSOC resolution 1985/69 of 26 July 1985, the name "Economic Commission for Western Asia" was changed to the "Economic and Social Commission for Western Asia" and the terms of reference were amended accordingly.

5. In this regard, ESCWA resolution 133 (XII) recommended ECOSOC to "[d]esignate the Economic Commission for Western Asia as the Economic and Social Commission for Western Asia ...[and] [a]mend the terms of reference of the Commission ... to conform to the new designation." Thereafter, ECOSOC adopted resolution 1985/69 which decided "to change the name of the Economic Commission for Western Asia to 'Economic and Social Commission for Western Asia'" and "to amend the terms of reference of the Commission ... to reflect the new name." Copies of these resolutions are attached for your ease of reference*.

6. Furthermore, we note that operative paragraph 3 of ESCWA resolution 302 (XXVII) adopted at the Ministerial Session in 2012, "requests the secretariat to invite all Arab countries to become members of ESCWA and to coordinate with relevant United Nations entities and the League of Arab States the re-designation of ESCWA to become the United Nations Economic and Social Commission for the Arab Region."

* Not reproduced herein.

7. With respect to the request to "invite all Arab countries to become members of ESCWA", we are not aware of any definition of "Arab countries" adopted by the intergovernmental organs of the United Nations. In light of this, the ESCWA Executive Secretary should not be seen to as selecting the States who fall into this category, and thus the States who should receive an invitation for membership. One option would be for the ESCWA Executive Secretary to seek further guidance from ESCWA Ministerial Session on the Member States that should receive invitations for membership in accordance with the resolution. The ESCWA Ministerial Session could then adopt a separate decision or resolution which clarifies which States should be invited under resolution 302 (XXVI). Alternatively, the Commission, if there will not be a Ministerial Session in the near future, could adopt such a decision or resolution.

8. As far as next steps in terms of finalizing the name change is concerned, the ESCWA secretariat could provide assistance to the relevant bodies of ESCWA so that the name change and the amendments to the terms of reference can be effected properly and in accordance with prior practice as outlined below.

9. As was done in ESCWA resolution 133 (XII), the Commission could adopt a resolution expressly requesting ECOSOC to approve the change in the name of ESCWA and amendments to the terms of reference, in particular paragraphs 1 and 2. The amendments to be made to the terms of reference could also be specified in that resolution. The practice suggests that ESCWA would prepare and adopt a draft resolution to be submitted to ECOSOC for its final adoption.

10. Once ESCWA adopts the necessary resolution, the issue would be ripe for action by ECOSOC. Proposals to change the name and to amend the terms of reference fall under the regular agenda item "Regional cooperation" which would be taken up at the ECOSOC substantive session normally held in July.

11. Under this agenda item, a report of the Secretary-General entitled "Regional cooperation in the economic, social and related fields" is submitted annually (see e.g. E/2012/15 of 16 April 2012). "Matters calling for action by the Council" submitted by the regional economic commissions are normally included in an addendum to this report (see e.g. E/2012/15/Add.2 of 4 June 2012). The draft resolution for adoption by ECOSOC and any relevant ESCWA resolutions should be included in that addendum.

12. Based on the recommendations from ESCWA, ECOSOC would consider a resolution to change the name of ESCWA and to amend the terms of reference of ESCWA. If such a resolution is adopted, the name change can be reflected.

13. My Office remains available should you have further questions on the matter.

14 February 2013

(*c*) Inter-office memorandum to [a Secretariat Office], concerning the terms of reference for the Scientific Advisory Board to the Secretary-General

Members of Advisory Board may be accorded the status of "experts on mission"—ST/SGB/177, the services of outside experts as participants in advisory meetings shall be obtained under a letter of invitation—Status of members as experts should be included in the Secre-

TARY-GENERAL'S INVITATION LETTER TO THE PROSPECTIVE MEMBERS—TERMS OF REFERENCE SHOULD ALSO SPECIFY THAT PARTICIPANTS SERVE IN THEIR PERSONAL CAPACITY

1. I refer to your e-mail messages of [date] and [date], seeking the Office of Legal Affairs' (OLA) feedback on a revised version of the draft Terms of Reference (TOR) for the establishment of a proposed […] Advisory Board to the Secretary-General (hereinafter, the "Advisory Board"). We had exchanged e-mail messages on this matter at [date] when you had sought OLA's review of a draft version of the TOR that had been prepared by [a specialized agency], which had consulted in the preparation of that draft with various United Nations System organizations. At that time, I had advised that the essential legal issue concerned the terms relating to the appointment and conditions of service of the members of the Advisory Board, which had yet to be elaborated. I had suggested that [the specialized agency] elaborate such terms of appointment of the members of the Advisory Board and provide them to both OLA and the [specialized agency's] legal office, with whom OLA could liaise, in order to finalize such terms.

2. Your e-mail messages of [date] informed OLA that [the specialized agency] had revised the draft TOR to further elaborate on the appointment and status of the members of the Advisory Board, and that the TOR would be the subject of discussions between the Deputy Secretary-General and the [executive head of the specialized agency], which are scheduled to take place tomorrow. Accordingly, for purposes of reviewing and providing feedback on the revised draft TOR for the Advisory Board in advance of that meeting, we set out below our comments on the revised TOR. In order to facilitate the finalization of the TOR, we have inserted our comments in redline in the attached draft TOR.*

3. Insofar as members of the Advisory Board are expected to provide advice to the Secretary-General, it is useful to recall the policies for obtaining the services of individuals on behalf of the Organization. The Secretary-General's bulletin, ST/SGB/177, of 19 November 1982, entitled, "Policies for Obtaining the Services of Individuals on Behalf of the Organization," sets forth, *inter alia*, the basis for the participation of experts in official meetings or other official activities of the Organization. Paragraph 9 of the Bulletin provides that the "temporary services of individuals who provide outside expertise ... as participants in advisory meetings, such as *ad hoc* expert groups, workshops and seminars, shall be obtained under a letter of invitation." It further provides that "participants in such meetings serve in their personal capacity and do not represent any Governments or institution," and that such participants "shall receive no fee or other remuneration for their participation in such meetings but they may be paid travel expenses, including a travel subsistence allowance."

4. Most of these points are already reflected in the draft TOR for the Advisory Board, including, in particular, that the members serve in their personal capacities and do not represent other Government or institutions. Consistent with the Secretary-General's bulletin, we would also recommend that the TOR specify whether the members of the Advisory Board will receive travel expenses, including subsistence allowance. We have added a provision to this effect in the enclosed revision of the draft TOR. We have added the provision within square brackets, should it be decided that the members will receive travel expenses and subsistence allowance. If not so decided, the provision may be omitted.

* Not reproduced herein.

If so decided, mention of this should also be made in the letters of invitation sent to prospective members of the Advisory Board.

5. In addition to the foregoing, it should also be recalled that paragraph 7 of Administrative Instruction ST/AI/296, of 19 November 1982, entitled "Consultants and Participants in Advisory Meetings"[1] provides, in pertinent part, as follows:

> "Individuals whose services are required as participants in advisory meetings such as *ad hoc* expert groups ... will be invited to participate in the meeting by means of a letter which will give details of the meeting, the legal status and obligation of the participants and the Organization's arrangements for their travel, compensation for service-incurred death, injury, illness and their own responsibility for insurance … ."

6. With respect to the legal status of participants in advisory meetings, paragraph 9 of the Administrative Instruction provides as follows:

> "Individuals ... invited to participate in advisory meetings serve in their personal capacity and not as representatives of a Government or of any other authority external to the United Nations. They are neither 'staff members' under the Staff Regulations of the United Nations nor 'officials' for the purpose of the Convention of 13 February 1946 on the Privileges and Immunities of the United Nations. They may, however, be given the status of 'experts on mission' in the sense of Section 22 of Article VI of the Convention. If they are required to travel on behalf of the United Nations, they may be given a United Nations certificate in accordance with Section 26 of Article VII of the Convention."

Consistent with the Administrative Instruction, the fact that members of the Advisory Board may be accorded the status of "experts on mission" should, therefore, be added to section IV of the draft TOR, and we have done so in the enclosed revised version of the draft TOR. We also recommend that this be included in the Secretary-General's invitation letter to the prospective members of the Advisory Board.

7. In addition to information regarding the legal status of the prospective members of the Advisory Board, the invitation letter should inform them of: (i) their entitlements in case of death, injury or illness attributable to service with the United Nations (as set forth in paragraph 25 of the Administrative Instruction), (ii) their obligations not to seek or accept instructions from Governments or other external authorities (as per paragraph 10 of the AI), (iii) the limitations on the duration of their service (as per paragraph 13 of the AI); (iv) the Organization's arrangements for and conditions for their travel (as per paragraph 23 of the AI); and (v) the fact that they are responsible for their own insurance (as per paragraph 28 of the AI). These requirements are addressed in section III of the enclosed revised draft of the TOR.

8. […]

11 June 2013

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[1] ST/AI/296 was amended by ST/AI/296/Amend.1 of 5 July 1995. However, the amendment only concerns paragraph 26 of the Administrative Instruction regarding the medical clearance of consultants. Given that, as we understand, the members of the Advisory Board are not being retained as consultants, the amendment does not apply in this case.

(*d*) Inter-office memorandum to the Legal Adviser of [a Secretariat Office], concerning partnership arrangements with entities that would engage in cause-related marketing campaigns using a logo of the [Secretariat Office's Campaign]

USE OF SPECIFIC UNITED NATIONS LOGO BY OUTSIDE ENTITIES—ARTICLE 6 *TER* OF THE PARIS CONVENTION—PROHIBITION OF THE USE OF TRADEMARKS, OTHER EMBLEMS, ABBREVIATIONS, AND NAMES OF INTERNATIONAL ORGANIZATIONS WITHOUT AUTHORIZATION BY THE COMPETENT AUTHORITIES—SUCH PROTECTION EXTENDS TO THE DISTINCT SUBSIDIARY BODIES OF THESE ORGANIZATIONS THAT HAVE A PERMANENT CHARACTER—LICENSING OF LOGO FOR GARNERING PRIVATE VOLUNTARY CONTRIBUTIONS

1. This refers to your request for the Office of Legal Affairs' (OLA) advice regarding the use of the "[…] Logo," which is the distinctive visual symbol of the [Secretariat Office's Campaign] (the "Campaign"), in connection with the sale of products and services in return for a share of proceeds of such sales benefitting the Campaign. I refer also to many subsequent communications between representatives of our Offices on this matter.

ISSUES RAISED

2. OLA understands that for several years, [the Secretariat Office (the "Office")] has been carrying out the Campaign in order to raise awareness about and to combat human trafficking. The Campaign has employed the […] Logo as a symbol of that fight against human trafficking. OLA also understands that the […] Logo is also used in connection with the United Nations Voluntary Trust Fund for […] (the "Trust Fund"), which was established by the General Assembly and is administered by [the Office] upon the advice of a Board of Trustees appointed by the Secretary-General. The Campaign calls for contributions to the Trust Fund to enable [the Office] to further the aims and activities of the Campaign.

3. [The Office] now seeks OLA's advice on whether [it] may license the […] Logo for use by private sector entities in connection with the sales of their products or services. A certain portion of the proceeds from such sales would be donated by such entities to the Trust Fund to benefit the Campaign. [The Office]'s proposal for such a cause-related marketing approach raises the following questions:

(*a*) What are the legal or policy implications of engaging in a cause-related marketing campaign?

(*b*) On what basis can [the Office] claim to have intellectual property rights over the […] Logo so as to be able to license its use by third parties?

(*c*) Are there any legal impediments to [the Office]'s seeking contributions to the Trust Fund from third party entities where such contributions are derived from the proceeds of sales of products or services using the […] Logo?

CAUSE-RELATED MARKETING GENERALLY

4. [The Office]'s proposal to raise money for the Campaign through contributions of a portion of proceedings from the sale by third party entities of products or services bearing the […] Logo is an example of cause-related marketing. […]

5. […]

6. The long-standing policy of the Organization is that outside fundraisers should not be used to generate voluntary contributions to the Organization. This is because such fundraisers could expose the Organization to oversight by regulatory bodies of Member States, which would be inconsistent with the status and the privileges and immunities of the United Nations. Moreover, the activities of outside fundraisers could expose the Organization to reputational risk, whether as a result of their messaging or their other fundraising activities, particularly if alleged to be fraudulent or otherwise of a political nature inconsistent with the aims and activities of the Organization. The only exception has been the use of not-for-profit organizations having a specific relationship agreement with the Organization to generate contributions, including the National Committees of UNICEF, the United Nations Associations in Member States, the United Nations Foundation, and similar organizations. The United Nations has never entered into such arrangements, however, with for-profit entities.

7. In this case, as OLA understands, [the Office] proposes to manage the proposed […] Logo cause-related marketing campaign itself. The Organization would not use an outside entity to manage and conduct the proposed […] cause-related marketing campaign […]. Thus, as OLA understands, [the Office] proposes that the United Nations itself would enter into licensing arrangements with partner companies authorizing them to use the […] Logo in connection with the sale of their products or services, and in return such partner companies would contribute a portion of their proceeds from such sales to the Trust Fund. In principle, the Organization itself could enter into such arrangements, as it has the legal capacity to do so. The questions that arise are both of a policy nature, concerning the implications of entering into such arrangements, as well as of a legal nature concerning the basis for and the requirements for such licensing, marketing and contribution arrangements.

Policy implications of conducting cause-related marketing campaigns

8. Cause-related marketing campaigns have been subjected to serious criticism, and such criticism should be considered by [the Office] when deciding whether or not to engage in the proposed […] Logo cause-related marketing campaign. Thus, some critics have suggested that cause-related marketing invites corporations, and their self-interested incentives, to wield considerable influence in the pursuit of a particular cause, thus permitting corporations to manipulate the conversation surrounding the cause to serve their own interests.[1]

9. […]

10. […]

11. The implications of such types of criticism are many for the proposed […] Logo cause-related marketing campaign. Thus, [the Office] may wish to consider how it would screen partner companies to ensure that their business practices and corporate interests are in keeping the objectives of the […] Campaign generally, as well as the aims, activities and purposes of the Organization. For example, if a partnering company's labour practices used in the creation of products that bore the […] Logo were alleged to involve

[1] *See* Berglind & Nakata, "Cause-Related Marketing: More Buck than Bang?", 48 Bus. Horizons 443, 449 (2005).

so-called sweatshop practices, the Campaign and the reputation of the Organization and of [the Office] could suffer substantial set-backs. In particular, [the Office] should assess whether it has the resources to conduct the necessary due diligence not only to initially screen would-be partner companies but also to monitor them after entering into the […] cause-related marketing campaign arrangement. Likewise, [the Office] may wish to consider whether the products and services on which the […] Logo would appear might end up trivializing the serious nature of the campaign to raise awareness for and to combat human trafficking. In this regard, consideration might be given to the perceptions of victims of human trafficking on the product or service related endorsements using the […] Logo.

12. The foregoing concerns, of course, are of a policy nature and not necessarily of a legal nature. Thus, of course, it is for [the Office], and not for OLA, to consider such concerns and to determine whether and how [the Office] should proceed with the proposed cause-related marketing approach. If [the Office] decides to undertake such an approach, then the following legal concerns should be addressed.

Protection and licensing of the […] Logo

13. OLA is not aware that the […] Logo itself is the subject of any intellectual property protection. In order to license its use to third parties and to prevent other persons or entities from appropriating its use, the Organization will have to assert some form of intellectual property protection over the […] Logo.

14. OLA understands that [the Office] asked WIPO whether protection for the […] Campaign could be obtained under article 6 *ter* of the Paris Convention for the Protection of Industrial Property. Under that provision, the Members of the Convention have agreed to prohibit by appropriate measures the use, without authorization by the competent authorities, either as trademarks or as elements of trademarks, armorial bearings, flags, other emblems, abbreviations, and names, of international intergovernmental organizations. Under guidelines established by the Members of the Paris Convention, such protection is also accorded to the names and emblems of distinct subsidiary bodies of international intergovernmental organizations having a permanent character (e.g., the name and emblem of UNICEF). In the case of the […] Logo, however, such protection is not available because [the Office] is not separate from the Secretariat, and the […] Logo is designed to promote the Campaign as opposed to a distinct subsidiary body of the United Nations.

15. OLA does not consider that the […] Logo should be registered as a trademark or service mark under national law. Doing so would subject the Organization to the regulatory authorities of the Member States concerning trademark registration and enforcement, and could require the Organization to appear before administrative or judicial forums of Member States in order to prosecute or defend the trademark. All of this would be inconsistent with the privileges and immunities of the Organization. That said, [the Office] should consider undertaking, or hiring a company or consultant to undertake, a worldwide trademark and copyright search to ensure that the design elements of the […] Logo have not been claimed as intellectual property by another person or entity.

16. While OLA does not recommend seeking trademark protection for it, the […] Logo itself is a distinctive design and might be copyrightable. The Organization copyrights many publications and other works and possibly even designs. International treaties and national treatment of copyright under the Universal Copyright Convention accord

automatic protection to works published by the United Nations. [The Office] may wish to liaise with the DPI to determine how copyright protection might be available for the design and related public relations materials for the […] Logo. Obtaining such copyright protection would be a prerequisite to licensing the […] Logo, as partner companies would require a representation that the Organization had the exclusive ownership of the […] Logo and the right to license it to them.

17. […]

18. […]

19. Once intellectual property rights for the […] Logo have been established, appropriate licensing arrangements will have to be prepared for the use of the […] Logo by partnering companies. Such licensing agreements will have to address how the logo will be licensed and can be used, its placement on products or use in connection with services, the duration of such use, the messaging of any advertising or marketing of such products or services in connection with such use, the determination of what amount of proceeds from sales will be contributed to the Trust Fund, termination of the arrangement, settlement of disputes, and other general aspects of any agreement between the Organization and an outside entity. All such proposed licensing agreements with partnering companies would have to include, in particular, various protections, so that other than the licensing of the […] Logo, the United Nations would not bear responsibility for the products or services being sold (products liability disclaimers) and so that the partnering companies would not be seen to be agents of the Organization in any respect. If [the Office] decides to proceed with the proposed cause-related marketing campaign approach using the […] Logo, then OLA will be prepared to collaborate with [the Office] to develop an appropriate form of such a licensing agreement.

Receipt of contributions from partnering companies

20. Finally, the question arises as to whether [the Office] would face any legal impediments to receiving contributions from partnering companies from proceeds of the sale or products using the […] Logo. In this regard, paragraph 18 of the Terms of Reference of the Trust Fund (the "TOR") provides that, "Acceptance of funds from the private sector will be guided by criteria stipulated in the United Nations Secretary-General's guidelines on cooperation between the United Nations and Business Community (http://www.un.org/partners/business/otherpages/guide.htm)" (the "Business Guidelines"). Therefore, the TOR for the Trust Fund appear to envisage collaboration between the United Nations and the business sector to raise funds for the Trust Fund.

21. Section VI of the "Guidelines on Cooperation between the United Nations and the Business Sector", revised in 2009 (the "Business Guidelines"), and noted by the General Assembly in its resolution 66/223 of 28 March 2012, set out, *inter alia*, the modalities of cooperation between the United Nations and the business community. That section provides, in relevant part, as follows: "Partnership projects: This modality, would involve … partnerships arrangements requiring an agreement between the United Nations and the Business Sector." Further, section IV of the Business Guidelines establishes the general principles of cooperation with the private sector, including the requirement that partnership arrangements maintain the principles of *Integrity, Independence, No Unfair Advantage*, and *Transparency*. In particular, paragraph 12 (*c*) of section IV provides that:

> "When, in accordance with the Financial Regulations and Rules of the United Nations, a partnership arrangement with the Business Sector will have financial implications for the United Nations, such arrangement should be implemented only pursuant to a formal written agreement between the private entity and the United Nations, in accordance with the applicable United Nations regulations and rules, delineating the respective responsibilities and roles of each parties."

Thus, all partnership arrangements for the proposed cause-related marketing campaign would require the conclusion of written agreements (*i.e.*, the licensing arrangements mentioned above).

22. In addition, section III of the Business Guidelines establishes the basic criteria for choosing business sector partners, requiring that the partner selection be subject to due diligence processes and appropriate screening. Thus, as discussed above, [the Office] would be responsible for vetting its potential partnering companies for the proposed campaign. With respect to the selection of companies that would be licensed to use the […] Logo, such as is proposed by [the Office] in the case of [two companies], [the Office] may wish to consult with the Procurement Division of the Office of Central Support Services (OCSS), DM, for advice concerning the suitability and capacity of any proposed partnering companies. The Procurement Division may have tools that would assist [the Office] in evaluating the financial and managerial fitness of the companies. Likewise, [the Office] may wish to consult with the Global Compact Office (UNGCO) to determine whether its assistance could be provided in determining the fitness and background of proposed partnering companies.

23. Article 1 ("Introduction") of the TOR states that the Trust Fund "shall be administered in accordance with the Financial Regulations and Rules of the United Nations", while article 20 of the TOR expressly establishes that "[c]ontributions to the Fund may be accepted from governments, intergovernmental or non-governmental organizations, private-sector organizations and the public at large, in accordance with the Financial Regulations and Rules of the United Nations." The acceptance of funds from the private sector in support of the Trust Fund is then subject to the applicable provisions of the Financial Regulations and Rules of the United Nations, specifically to financial regulation 3.11 which provides that "voluntary contributions, whether or not in cash, may be accepted by the Secretary-General provided that the purposes for which the contributions are made are consistent with the policies, aims and activities of the Organization and provided that the acceptance of such contributions that directly or indirectly involve additional financial liability for the Organization shall require the consent of the appropriate authority." According to the Administrative Instruction on the delegations of authority under the Financial Regulations and Rules of the United Nations, ST/AI/2004/1, the acceptance of financial contributions for the Trust Fund would require the Controller's approval. In practice, this means that each licensing agreement with a proposed partnering company should be cleared by and signed by the Controller.

24. Finally, it is important that agreements with partnering companies for the cause-related marketing arrangements for the […] Campaign be structured to ensure that the companies would be contributing voluntarily to the Organization. This is necessary to prevent the arrangement from being considered to be a "revenue-producing activity" within the meaning of the Financial Regulations and Rules of the United Nations. Under financial rule 103.7, "[p]roceeds from revenue-producing activities … shall be credited as miscellaneous income" and, pursuant to financial regulation 3.13, miscellaneous income

must be credited to the General Fund. Such income would not be available to benefit the Trust Fund. This would undermine the whole purpose of the proposed cause-related marketing effort.

Conclusion

25. OLA will continue to be available to work with [the Office] to further the proposed cause-related marketing approach for the […] Campaign. However, before this can be undertaken, [the Office] should carefully consider the policy related issues raised in this memorandum. In addition, before engaging with any proposed partnering companies, [the Office] should ensure that the […] Logo can be protected and that the […] Logo has an adequate intellectual property basis to be licensed. Finally, [the Office] should determine how it will initially screen and monitor partnering companies on an ongoing basis.

3 July 2013

(*e*) Note to [United Nations Mission] concerning the use of United Nations license plates

Vehicles of contractors used exclusively in the performance of their services for missions are entitled to enjoy full and unrestricted freedom of movement independent of the use of United Nations licence plates under the Status of Forces Agreement (SOFA)—Contractors should be made aware that issuance of United Nations licence plates has no implication with respect to insurance or liability

We note that code cable [number] of [date], states that [United Nations Mission] [Contractor] has been facing challenges in the delivery of food rations to the Mission, and that following the killing of the [Tribe Chief] on [date], the [Tribe] community has refused to allow [United Nations Mission] contractors, including [Contractor], entering from [State] to pass through parts of the [location] Area. The code cable also notes that, to date, the [location] Area does not have a local governmental authority with which [United Nations Mission] contractors could register their vehicles and obtain "neutral" license plates.

The code cable states that in light of these circumstances, [United Nations Mission] has "decided to temporarily allow [Contractor] to utilise [United Nations Mission] licence plates on its delivery trucks pending the establishment of the [location] Area Administration and the establishment of a mechanism for vehicles to be registered inside the [location] Area".

As you know, under the SOFA, vehicles of contractors used exclusively in the performance of their services for [United Nations Mission] are, in principle, entitled to enjoy full and unrestricted freedom of movement. Such right does not depend on the use of United Nations licence plate. The use of [United Nations Mission] licence plates by contractors may, however, give the impression to the local population that this is a United Nations owned vehicle and potential victims of an accident with such vehicles would then feel legitimately entitled to file a claim against the United Nations. It cannot be discarded that the United Nations would have to first cover the costs before eventually reverting to the contractor.

In view of the foregoing, we would be grateful if you could confirm that the temporary use of United Nations licence plate by [Contractor] is actually based on security considerations which triggered the necessity to allow [Contractor] to use such licence plates and that no other efficient measures could be taken in the circumstances to ensure adequate protection of the Contractor's vehicles and drivers. Otherwise, we would strongly advise [United Nations Mission] to consider taking any other measures than United Nations licence plate to ensure the freedom of movement of vehicles operated by [United Nations Mission] contractors—for example, providing them with distinctive marking displayed on the contractors' vehicles (e.g., stickers, papers behind the windshield) clearly identifying them as Contractors performing official business for the United Nations/[United Nations Mission]. [United Nations Mission] would then verify whether such an identification is acceptable to any existing local authorities/communities. Alternatively, the contractor could be requested to ensure that its vehicles carry licence plates from another acceptable source.

In the meantime, we recommend [United Nations Mission] to have a clear understanding with the Contractor in respect of this arrangement, i.e., that the issuance of United Nations licence plates is only for security purposes in order to ensure access of the vehicles to the mission area but that it has no implication in respect of insurance (for which they have to submit valid documentation) or in terms of any liability which may arise from the driving of the vehicles, both of these issues remaining the contractor's responsibility.

6 December 2013

(*f*) Inter-office memorandum to the Executive Office of the Secretary-General, concerning the bestowing of an award to the Secretary-General from the President of a Member State

Acceptance of honours, gifts, or awards from Member States risks negatively reflecting on the Secretary-General's independence and impartiality as well as his ability to maintain relationships with all Member States on an equal basis—Discretionary decision of the Secretary-General to accept or not a gift or award from a Member State—Spirit of Staff Regulations which prohibit staff members from accepting such gifts or awards—Consideration should be given to accepting a gift on behalf of the Organization should the Secretary-General decide to accept a gift or award

Dear [Name],

I refer to the e-mail … , [date], from the [Title] of [State] to you, forwarding [a note] on the "[Award of the President of the State]" (the "Award").* The [note] indicates that the President of [State] has decided to bestow the Award upon the Secretary-General. […] The Award ceremony is to be held on [date] in the capital city of [State] in connection with [the State's National Day] celebrations. The Award consists of a diploma [in subject matter] and a monetary amount of [over USD 50,000].

[...]

As a general matter, OLA has advised in the past that, from a legal perspective, there are certain risks associated with the Secretary-General accepting honours or awards from

* Not reproduced herein.

the Government of a Member State. The nature and responsibilities of the Office of the Secretary-General require him to maintain relationships with all Member States on an equal basis. The acceptance of an award from a Member State might reflect negatively on the Secretary-General's position and duty of independence and impartiality. Moreover, if he accepts honours from one Government, he would subsequently be constrained in exercising his discretion when honours from other Member States are proposed to him. Lastly, while the absolute prohibition in the Staff Regulations regarding the acceptance of gifts and awards from Governments does not apply to the Secretary-General as he is not a staff member, he would wish, as the Chief Administrative Officer of the Organization, to abide by the spirit of those Staff Regulations even though they are not directly binding on him. Ultimately, however, it is for the Secretary-General to decide in each case whether to accept a specific award or not, and OLA has generally advised that he should exercise his discretion conservatively.

Applying the foregoing considerations to the present case, and since the Award is an honour bestowed by the President of a Member State, it cannot be excluded that the Secretary-General's acceptance of the Award may create an unintended perception of favouritism toward that Member State, especially since it is also a significant monetary award. Its acceptance might also put him in a difficult position should he subsequently wish to refuse similar honours from other Member States. It would therefore seem advisable that the Secretary-General exercise his discretion conservatively in this case. Should it be decided that, for specific policy reasons, the Award should be accepted, consideration could be given to the Secretary-General accepting the Award on behalf of the Organization of which he is the Chief Administrative Officer. For example, Mr. Waldheim, in accepting the Ataturk Award from the Turkish Government in 1981, received it on behalf of the Organization. In addition, given that the Award is to be bestowed during the celebrations of the [State's National Day], it seems advisable to obtain more information from the Permanent Mission of the [State] as to how the acceptance of the Award will be made public, in order to avoid publicity that might not be fully aligned with the purposes of the Secretary-General and the United Nations.

November 2013

(*g*) Inter-office memorandum to the Officer-in-Charge of the International Civil Service Commission (ICSC), concerning a request from a Member State to provide information and clarification on a number of issues within the purview of the ICSC

Single audit principle approved by Member States—General Assembly resolution 59/272—Role of the Board of Auditors and the Joint Inspection Unit—Any external review of the Office of Internal Oversight Services (OIOS) can be undertaken only by such bodies or those mandated to do so by the General Assembly—Any external audit or review including by governmental authorities is precluded

1. I refer to your memorandum of [date] indicating that the International Civil Service Commission (ICSC) has been approached by [State] with a request to provide information and clarification on a number of issues within the purview of the ICSC. […]

2. At the outset, as noted in your memorandum, the Organization follows a "single audit" principle approved by the Member States of the Organization and set forth in the Financial Regulations and Rules of the United Nations. Financial regulation 7.6 provides that "the Board of Auditors shall be completely independent and *solely* responsible for the conduct of audit." (Emphasis added in original). Further, and in the context of Office of Internal Oversight Services (OIOS), General Assembly resolution 59/272 of 2 February 2005, in its operative paragraph 11, "*[r]eaffirms* the role of the Board of Auditors and the Joint Inspection Unit as external oversight bodies, and, in this regard, affirms that any external review, audit, inspection, monitoring, evaluation or investigation of [OIOS] can be undertaken *only* by such bodies or those mandated to do so by the General Assembly". (Emphasis added in original).

3. Thus, in view of the legislation cited above, any review by an external authority, including Governmental authorities, in the nature of an "audit" would be precluded. There are no exceptions to the single audit principle and the Secretary-General does not have the authority to make any exceptions to the financial regulation or the General Assembly resolution.

4. ICSC may, however, wish to consider cooperating with the [State's] request to the extent that is possible without contravening the terms of financial regulation 7.6 and General Assembly resolution 59/272. ICSC could respond to the [State] as it would respond to a request by any Member State which might approach it for clarification on an official matter, and access should be granted only to information which the Organization is prepared to share with all Member States. Any such response, however, should make clear that the information is being provided on a voluntary basis, and without prejudice to the Organization's privileges and immunities.

5. Thus, in providing any non-public information and documentation to the [State], it is important to consider whether ICSC is prepared to share such information with all Member States. In this context, you may wish to consider, for example, whether the responses to the [State] queries contain any sensitive information that the Organization would not want shared with all Member States, such as information contained in documents classified as restricted. The ICSC may also wish to consider whether its responses would require it to undertake analyses of the information provided that it would not be prepared to do at the request of all Member States. In this regard, we note that ICSC considers that certain information requested by the [State] is restricted. If the ICSC is not prepared to share restricted information with other Member States or the public, we recommend that the same position be applied to the request of the [State].

6. […]

January 2013

3. Procurement

Inter-office memorandum to the Director, Procurement Division, Office of Central Support Services, concerning effective competition in public procurement

United Nations financial regulation 5.12 requires "effective international competition" in procurement—Absence of international agreement setting rules and principles for international competition law and regulating universal anticompetitive behaviour—General Assembly resolution 35/63—United Nations Set of Principles and Rules for Control of Restrictive Business Practices (the "United Nations Set") to deal with restrictive business practices adversely affecting international trade—Collusive tendering contravenes Financial Regulations and Rules of the United Nations and is illegal in most United Nations Member States

1. This refers to the Procurement Division's (PD) memorandum of 1 March 2013, requesting the Office of Legal Affairs' (OLA) advice with respect to the issue of effective competition in public procurement. In particular, PD seeks advice on whether the principles of fair and open competition allow for subsidiaries of the same parent company, as well as the parent company itself, to bid on one United Nations solicitation. The concern is that such entities could collude in pricing and prevent the United Nations from conducting a procurement exercise in accordance with financial regulation 5.12, which requires "effective international competition" in procurement. PD further requested OLA's guidance on mechanisms to avoid "any potential complaints concerning antitrust issues and/or alleged impediment of a competitive marketplace" in this respect.

2. At the outset, as you may be aware, no single national legislation regulating fair market competition applies to the United Nations. Further, we are unaware of any international agreement or agreements setting rules and principles for international competition law which would regulate anticompetitive behaviour universally on the international level. Indeed, certain international standards on fair market competition have begun to emerge. Such international standards have been set out for example in the United Nations Set of Principles and Rules for the Control of Restrictive Business Practices (the "United Nations Set"), adopted by the General Assembly in its resolution 35/63, of 5 December 1980. The United Nations Set states, in relevant part, that "[a]ppropriate action should be taken in a mutually reinforcing manner at national, regional and international levels to eliminate or effectively deal with, restrictive business practices, including those of transnational corporations, adversely affecting international trade." However, notwithstanding the emergence of such international standards, we are unaware of any legal regime on which the United Nations could rely in preventing collusive practices among affiliated entities involved in United Nations procurement activities.

3. Collusive tendering (i.e., agreement to submit identical bids, agreement as to who shall submit the lowest bid or a voluntary cover bid, agreement on common norms to calculate prices or set other proposal terms) is inherently anti-competitive. It contravenes the very purpose of inviting tenders, which is to procure goods or services on the most favourable prices and conditions. Indeed, such anti-competitive tendering would contravene the requirements of United Nations financial regulation 5.12(*c*), which requires "effective international competition" in United Nations procurement exercises. Moreover, according

to a study conducted by the United Nations Conference on Trade and Development (UNCTAD), collusive tendering is illegal in most of the United Nations Member States (see UNCTAD, Model Law on Competition, Substantive Possible Elements for a Competition Law, Commentaries and Alternative Approaches in Existing Legislation, Part II, pp. 24–25, paras. 36 and 37). UNCTAD concluded that most countries treat collusive tendering more severely than other horizontal agreements, because of its fraudulent aspects and particularly its adverse effects on public spending (see *ibid*.).

4. The likelihood of collusion increases where there is a potential for communication occurring among bidders, particularly in cases of affiliated companies participating in the same solicitation. Allowing subsidiaries of the same company and/or the parent company and its subsidiaries to participate in the same solicitation exercise could increase the opportunity of such bidders to engage in collusive agreements.

5. Because it would be difficult to seek to import any particular legal regime—whether it be antitrust laws, international agreements, or otherwise—into United Nations procurement exercises, we recommend that the terms and conditions for participation in United Nations procurement exercises specifically limit or exclude affiliated entities from participating in any one solicitation. This would effectively remove the risk of collusion.

6. In this regard, PD may wish to consider including in its solicitation documents a limitation on bidding by several subsidiaries of the same parent company and/or by the subsidiaries of a parent company and the parent company itself. In this context, the solicitation document could specify as follows:

(*a*) Bids or proposals submitted by a vendor and its parent entity, or vendors having the same parent entity, shall not be accepted, and if submitted, shall result in their bids or proposals being rejected as non-compliant with the requirements of the ITB or RFP, as the case may be.

(*b*) Only one bid from a vendor and its parent entity, or vendors having the same parent entity, will be accepted in any given procurement exercise; if the services of both or all of such entities are for some reason required, then one must take the lead with the other affiliated entities serving as sub-contractors under the bid or proposal, as the case may be.

(*c*) For purposes of the foregoing, bids or proposals submitted in the same solicitation by the following entities will be rejected:

(i) The parent entity and any entity or entities in which more than 50% of the voting shares or other relevant indicia of ownership or control are owned or controlled, whether directly or indirectly, by such parent entity; or

(ii) Two or more entities having a common related entity which owns or controls, whether directly or indirectly, more than 50% of the voting shares or other relevant indicia of ownership or control of such entities; or

(iii) Entities which would otherwise meet the requirements of subparagraphs (*c*)(i) or (*c*)(ii), above, but for the requirement of 50% voting share or other relevant indicia of ownership or control, where in the sole opinion of the United Nations effective operational control by a parent or other related entity creates a risk of collusion among the entities in the tendering process.

(*d*) To the extent that it may be difficult to monitor compliance with the above requirement in every solicitation, we further recommend that PD include as part of the requirements of the ITB or RFP, as the case may be, a representation by the vendors that no such entities, as defined above, are participating in the solicitation exercise. Such representation could be made in a separate document to be signed by the participating vendors.

7. Should you have any questions or seek any clarification regarding the foregoing, please do not hesitate to contact us.

30 March 2013

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

United Nations Industrial Development Organization

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

(*a*) Internal e-mail message to a UNIDO Branch, concerning updated requirements for the employment of private household help

UNIDO headquarters Agreement—Employment of foreign household help to staff—Foreign servants of members of the mission are only exempt from taxation on their emoluments—Article 37 of the Vienna Convention On Diplomatic Relations, 1961—A receiving state can exercise jurisdiction over foreign servants only if it does not interfere unduly with the performance of the functions of the mission

1. I refer to your e-mail of [date]. You enclosed a [Circular note] dated [date] from the [State] communicating new legal requirements regarding the conditions of employment of private servants, who are not nationals of or permanently resident in [State], of diplomats and officials of international organizations.

2. You expressed your concerns about the financial implications of a paragraph in the circular which invites the heads of diplomatic missions and international organizations in [State] to assume responsibility for the behaviour of their staff and to make use of all internally available regulations and measures to ensure that the prescriptions of [State] labour law for private household employees are complied with.

3. You added that, while you are sure the information in the circular will be useful for many colleagues, you do not see how and why UNIDO would assume responsibility for enforcing [State] law. You asked: "Is the text suggesting that UNIDO also has a financial liability and would be called to pay penalties if a staff would be found violating the fee levels or any other legal condition?"

4. You also asked me to intervene through the appropriate channels in case I share your concerns.

5. In the meantime, I wish to share a few observations on the matter. As far as I can tell, the formulation used by the [State] is the same as in previous years. The issue of household help, who are members of the household of UNIDO officials, is governed

by UNIDO's Headquarters Agreement,* in particular by article X, section 29(*a*)(iii) and (*c*) and article XII, section 37(i) as well as international law (e.g., the Vienna Convention on Diplomatic Relations, 1961)**. The employment of foreign household help is thus one of the privileges afforded to staff under the said instruments. Under the Headquarters Agreement, the Organization is obliged to ensure that there is no abuse of this or any other privilege (see sections 48 and 49). The only way UNIDO could avoid involvement in the matter is if the right to employ foreign household help were withdrawn.

6. According to two legal opinions by the Office of Legal Affairs of the United Nations dated 14 July 1992*** and 24 January 1994****, private servants of members of the mission, if they are not nationals or permanent residents, are exempt only from taxation on their emoluments. The Vienna Convention on Diplomatic Relations, 1961, provides that private servants may enjoy additional privileges and immunities, to the extent granted by the receiving State. The labour law of the receiving State may be made applicable to private servants in such a manner which would not infringe upon the jurisdictional diplomatic immunities or otherwise. In addition, in the context of the matter under consideration, an important principle, codified in paragraph 4 of article 37 of the Vienna Convention, should be stressed, that in exercising its jurisdiction over foreign servants, the authorities of the receiving State must do this "in such a manner as not to interfere unduly with the performance of the functions of the mission." As a matter of policy and practice, the United Nations does not intervene to prevent disputes between household employees and staff members from being taken up by the local courts of the host country.

7. As I read it, the circular note is mainly a call on [host State-based organizations] to take appropriate measures to ensure that their staff respect [State] law on the subject. Such measures could include promulgating the circular note, intervening in problem cases (e.g. instructing a staff member to meet their private obligations or imposing a disciplinary sanction) and, if necessary, waiving a staff member's immunity before the local courts. How we respond would have to be decided on a case-by-case basis.

18 February 2013

(*b*) External e-mail message to the Permanent Mission of [State], concerning [State]'s [Year] contribution language

UNIDO Constitution and Financial Regulations do not allow Member States to attach unilateral conditions to their assessed contributions—The Director-General is not authorized to accept conditions or to refund contributions

1. I refer to your e-mail of [date], and subsequent phone call in the week of [date] on the above-mentioned subject. You requested me to approve a text that is intended to accompany [State]'s payment of its assessed contributions to UNIDO for [Year], or to refer you to another service if need be.

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* Available from http://www.unido.org/en/overview/legal/basic-legal-documents.html.

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

*** *Juridical Yearbook*, 1992, pp. 492–494

**** *Ibid.*, 1994, pp. 443–444

2. The draft text sets out what appear to be certain conditions that would attach to the payment, including that [State]'s assessed contributions would not be used for "any illegal, corrupt, or unethical practice" or for "direct or indirect support to or funding of resources for organisations and/or individuals associated with terrorism". In the event of proven misappropriation, [State] may "request [UNIDO] to either promptly return any such funds to [State] or credit the funds to another mutually agreed activity".

3. Having consulted the relevant services in the Secretariat, I wish to offer the following brief comments on the draft text.

4. The payment by Member States of their assessed contributions is regulated by the Constitution (e.g. article 15) and the Financial Regulations of UNIDO (e.g. Regulation 3.3). In my view, neither the Constitution nor the Financial Regulations allow Member States to attach unilateral conditions to their assessed contributions to UNIDO. Likewise, neither the Constitution nor the Financial Regulations authorize the Director-General to accept such conditions or to refund assessed contributions in the event that the conditions are not met. To my knowledge, the Policymaking Organs of UNIDO have also taken no decision that could be interpreted as authorizing any conditions with respect to assessed contributions.

5. Thus, while we have taken due note of the sentiments expressed in the draft text, the Secretariat has no mandate to accept or approve conditions for the payment of [State]'s assessed contributions to UNIDO. Nevertheless, I wish to assure you that UNIDO has a range of safeguards in place to prevent direct or indirect support to or funding of organizations and individuals associated with illegal, corrupt or unethical practices.

March 2013

(*c*) Inter-office memorandum to the Secretary of the Joint Appeals Board (JAB), concerning a request for the JAB to recommend suspension of action on an administrative decision

No staff rule indicates how the JAB should decide whether to recommend suspension of action on a decision—The JAB can rely on the criteria set out in the statute of the UNDT—Prima facie unlawfulness of the decision, particular urgency of the matter and irreparable damages are the conditions to be fulfilled to order suspension of action on a decision

1. I refer to your e-mail of [date] regarding a request made by an appellant, pursuant to staff rule 112.02(*d*), for the Joint Appeals Board to submit an urgent recommendation to the Director-General to suspend action on a decision to separate the appellant from service with effect from [date].

2. Staff rule 112.02(*d*) reads as follows:

> (*d*) The filing of an appeal with the Joint Appeals Board shall not have the effect of suspending action on an administrative decision that is the subject of the appeal. However, *upon request of the staff member, the Board may, after a preliminary hearing, recommend to the Director-General the suspension of action on that decision*; the Director-General's decision on such a recommendation is not subject to any appeal. [Emphasis added]

3. Besides providing for a preliminary hearing, staff rule 112.02(*d*) does not indicate how the JAB should decide whether or not to recommend suspension of action on a decision. The rules of procedure of the JAB are likewise silent on this point. In view of the urgency of the appellant's request, the JAB has requested my views on the following two questions:

1. What are the principles of law that guide the JAB in such cases?
2. How should the hearing be conducted?

QUESTION 1: WHAT ARE THE PRINCIPLES OF LAW THAT GUIDE THE JAB IN SUCH CASES?

4. The question here is whether general principles of law reflect any criteria or conditions that should be fulfilled before the JAB recommends suspension of action in a particular case. In my view, the absence of express criteria or conditions in staff rule 112.02(*d*) implies that the JAB is able to take into account all relevant considerations that are brought to its attention and weigh those considerations as it sees fit. In doing so, it would not be inappropriate for the JAB to rely on the criteria or conditions set out in the rules of other United Nations organizations, which in turn borrow from the legal requirements for preliminary measures under national law. In particular, the Statute of the United Nations Dispute Tribunal* empowers the Tribunal to issue judgments and orders suspending the implementation of administrative decisions in the following situations:

Article 2, paragraph 2

> 2. The Dispute Tribunal shall be competent to hear and pass judgement on an application filed by an individual requesting the Dispute Tribunal to suspend, during the pendency of the management evaluation, the implementation of a contested administrative decision that is the subject of an ongoing management evaluation, where the decision appears *prima facie* to be unlawful, in cases of particular urgency, and where its implementation would cause irreparable damage. The decision of the Dispute Tribunal on such an application shall not be subject to appeal.

Article 10, paragraph 2

> 2. At any time during the proceedings, the Dispute Tribunal may order an interim measure, which is without appeal, to provide temporary relief to either party, where *the contested administrative decision appears prima facie to be unlawful, in cases of particular urgency, and where its implementation would cause irreparable damage*. This temporary relief may include an order to suspend the implementation of the contested administrative decision, except in cases of appointment, promotion or termination. [Emphasis added]

5. There are consequently three conditions which have to be fulfilled in order for the UNDT to order suspension of action on an administrative decision: the decision should appear *prima facie* to be unlawful, the case should be urgent, and implementation of the decision would cause the applicant irreparable harm. There is a substantial body of UNDT jurisprudence shedding light on the meaning of these requirements.

* Available from http://www.un.org/en/oaj/dispute/statuterules.shtml.

6. A decision that "appears *prima facie* to be unlawful" would be a decision that, upon initial examination of the rules and available evidence, seems to be unlawful or an abuse of discretion. In *Judgment No. 003 (22 July 2009): Hepworth* v. *UNSG* (*UNJY 2009*, p. 338), the UNDT noted that, since suspension of action is only an interim measure and not the final decision of a case, it may be more appropriate to assume that *prima facie* does not require more than serious and reasonable doubts about the lawfulness of the contested decision. In *Judgment No. 2009/097 (31 December 2009): Lewis* v. *UNSG* (*UNJY 2009*, p. 351), the Tribunal reasoned that on balance the applicant had a reasonably arguable case, and that the prerequisite of *prima facie* unlawfulness therefore was satisfied. In *Judgment No. 2011/126 (12 July 2011): Villamoran* v. *UNSG* (*UNJY 2011*, p. 436), the UNDT recalled that it is enough for an applicant to present a fairly arguable case that the contested decision was influenced by some improper considerations, was procedurally or substantively defective, or was contrary to the Administration's obligations to ensure that its decisions are proper and made in good faith.

7. Whether a case is particularly urgent will depend on the prevailing circumstances, such as the nature of the contested decision, when it will become effective, and when the JAB may be expected to submit its final report on the appeal to the Director-General.

8. Regarding the requirement of "irreparable damage", such damage is normally understood to mean injury or harm that is not merely financial or that cannot be made good through an award of compensation. Irreparable damage might result, for example, from the premature termination of a staff member's career or the loss of rights that are contingent upon retirement from UNIDO, such as the right to reside in the Host State. In *Judgment No. 2012/029 (22 February 2012): Diop* v. *UNSG* the UNDT stated that, whereas mere economic loss deriving from the loss of employment can be compensated in damages, there is more harm caused by the non-renewal of a contract than that, namely loss of career prospects, loss of self-esteem, and unquantifiable potential harm to the applicant's professional reputation. Likewise, the Tribunal held in *Judgment No. 2012/058 (26 April 2012): Khambatta* v. *UNSG* that:

> "Loss of employment is to be seen not merely in terms of financial loss, for which compensation may be awarded, but also in terms of loss of career opportunities. This is particularly the case in employment within the United Nations which is highly valued. Once out of the system the prospect of returning to a comparable post within the United Nations is significantly reduced. The damage to career opportunities and the consequential effect on one's life chances cannot adequately be compensated by money. The Tribunal finds that the requirement of irreparable damage is satisfied." [1]

Question 2: How should the hearing be conducted?

9. The expression "hearing" in staff rule 112.02(*d*) implies an opportunity for both sides to be heard before the JAB decides on the matter. As regards the procedure for the hearing, the JAB must determine its own rules in this regard: the duty to do so flows from paragraph (*d*) of Appendix K to the staff rules, which stipulates that the JAB shall establish its own rules of procedure. To the extent that the staff rules contain procedural rules—for example, on the composition of the JAB—they must naturally be followed as well.

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[1] *Diop* v. *UNSG* and *Khambatta* v. *UNSG* are available at http://www.un.org/en/oaj/dispute/judgments_2012.shtml.

10. In order to implement staff rule 112.02(*d*), the JAB could:

- Notify the parties that the JAB intends to take up the appellant's request for an urgent recommendation on suspension of action at a preliminary hearing to be held on a particular date, which they are invited to attend;
- Inform the parties of the composition of the responsible panel (which need not be the same as that handling the merits of the appeal);
- Inform the parties that, in order to facilitate the hearing, it intends to take into account the requirements for a judgment or order on suspension of action set out in the Statute of the United Nations Dispute Tribunal, i.e. prima *facie* unlawfulness, particular urgency, and irreparable damage;
- Invite the parties to provide advance written representations on the matter, focusing on the elements of *prima facie* unlawfulness, particular urgency, and irreparable damage;
- Advise the parties that if they do not attend the hearing or make any written representations, the JAB will proceed on the basis of the available material;
- Give the parties the opportunity to make oral submissions during the hearing and to respond to possible questions from the panel (the parties should not question each other).

11. Following the hearing, the JAB should decide on the appellant's request right away. If a recommendation is sent to the Director-General, it should explain the reasons why suspension of action would be advisable in the circumstances. The JAB should also include the reasons for issuing (or not issuing) the recommendation in its final report on the appeal. It should be noted that, even if the JAB recommends suspension of action at this stage, it may still conclude subsequently that the appeal should be dismissed.

July 2013

(*d*) Internal e-mail message to a Human Resource Specialist, concerning an offer of settlement to [UNIDO staff]

The administration or the appellant are free to propose that the JAB use other criteria than those set out in the UNDT statute to determine the conditions to be fulfilled to suspend an action—The application of UNDT criteria cannot affect the ILOAT jurisdiction to hear complaints—ILOAT jurisprudence offers no useful guidance to determine in which circumstances an internal appellate body should recommend a suspension of the action—The Director-General's decisions cannot be appealed—Failure to consider the staff member's request could lead to a separate claim for damages

1. I refer to your e-mail of [date] concerning a staff member's request for the [Joint Appeals Board] to recommend suspension of action on a decision under appeal ([Case number]). The JAB will hold a preliminary hearing on the matter on [date] and has indicated that it "intends to take into account the requirements for an order on suspension of action set out in the statute of the United Nations Dispute Tribunal, i.e. *prima facie* unlawfulness of the decision, particular urgency of the matter and irreparable damage."

2. You ask me for my opinion on the JAB's proposal to rely on the requirements set out in the UNDT statute and for my views on the jurisprudence of the ILOAT on suspension of action. As concerns the application of the UNDT criteria, your e-mail notes:

- the jurisdiction of the ILOAT results from a decision of the policy-making organs and is reflected in our staff regulations and rules. The m/s have not recognized the jurisdiction of the UNDT;
- Jurisprudence of ILOAT on applying other tribunals' statute;
- Article 2.2 of the UNDT statute provides a timeframe for the submission of a request for suspension of the decision (i.e., during the request for review process.) Applying bits and pieces of the statute may create problems.

3. In accordance with staff rule 112.02(*d*),

> The filing of an appeal with the Joint Appeals Board shall not have the effect of suspending action on an administrative decision that is the subject of the appeal. However, *upon request of the staff member, the Board may, after a preliminary hearing, recommend to the Director-General the suspension of action on that decision*; the Director-General's decision on such a recommendation is not subject to any appeal. [Emphasis added]

4. Although the JAB is empowered to recommend suspension of action after a preliminary hearing, staff rule 112.02(*d*) provides no guidance on when such a recommendation would be appropriate. Under paragraph (*d*) of Appendix K to the staff rules, the JAB shall establish its own rules of procedure but these are likewise silent on this point. As a practical matter, therefore, the JAB needs to determine what criteria or conditions should be fulfilled if it is to make a recommendation on suspension of action in this case. Given the power of the JAB to establish its own rules of procedure, I see no difficulty with its having recourse to the criteria or conditions set out in article 2(2) of the UNDT statute in order to fill the gap in UNIDO's rules. Several other organizations have similar requirements,[1] though the UNDT criteria are arguably the most stringent and hence the most difficult for the appellant to prove.

5. Should the Administration or the appellant have reservations about the UNDT criteria, they are free to comment on the criteria or to propose that the JAB use other criteria instead. In this regard, and turning to the arguments mentioned in your e-mail, I do not think that the approach of the JAB raises any jurisdictional problem or that it implies recognition of the statute of the UNDT: the mere application of the UNDT criteria cannot give the UNDT jurisdiction over UNIDO or affect the existing jurisdiction of the ILOAT to hear complaints emanating from UNIDO. Nor will reliance on the UNDT criteria mean that the ILOAT would have to apply the statute of another tribunal: the ILOAT remains bound by its own statute and in the event of a complaint would adjudicate the matter in accordance with the powers conferred on it under that statute. At any rate, given that

[1] For example, according to information received in 2009, section 10.32.1 of the *Human Resources Procedures Manual* of IFAD allows for suspension of a decision under appeal when: (*a*) the appellant has made a *prima facie* case for suspension; (*b*) the administrative decision in question has not already been implemented: (*c*) the administrative decision is, in fact, the subject of the appeal; and (*d*) the immediate and irreparable harm would be caused to the appellant's interest.

decisions of the Director-General on recommendations for suspension of action are not subject to appeal, these issues are unlikely to arise.

6. You point out that, in terms of article 2(2) of the UNDT statute, suspension of action can only occur during the request for review process, or during what the statute terms the "management evaluation". However, the process of management evaluation is only partially analogous to the process of request for review at UNIDO. In addition, article 10(2) of the UNDT statute provides that the UNDT can order temporary relief *at any time during the proceedings*, under the same conditions as are set out in article 2(2), i.e. where the contested administrative decision appears *prima facie* to be unlawful, in cases of particular urgency, and where its implementation would cause irreparable damage. According to article 10(2), this temporary relief may include an order to suspend the implementation of the contested administrative decision, except in cases of appointment, promotion or termination.

7. Finally, the jurisprudence of the ILOAT offers no useful guidance on the circumstances in which it would be appropriate for an internal appellate body to recommend suspension of action. What emerges from this lack of jurisprudence and from the odd passing reference to recommendations on suspension of action is that the ensuing decisions of the executive head are generally not subject to appeal, as is the case at UNIDO. On the other hand, even if the Director-General's decision cannot be appealed, failure to consider the staff member's request fairly could potentially lead to a separate claim for damages, in the same way as damages may be claimed for unreasonable delay in the internal appeal.

6 August 2013

(*e*) Internal e-mail message concerning the legal basis for UNIDO tax exemption in [State]

The principle of functional immunity set forth in article 21.1 (UNIDO Constitution) serves as a basic point of reference in all matters pertaining to the privileges and immunity of the country office and its staff—The Government shall apply to UNIDO country offices and its staff the privileges and immunities set out in the UNIDO Constitution and the Specialized Agency Convention

1. I refer to your e-mail of [date] concerning the above-mentioned subject. Attached to your e-mail was an e-mail of the same date from UNIDO's programme coordinator in [State] asking you for a copy of a formal document which regulates UNIDO's tax exempt status in [State].

2. I wish to inform you that the [State], as a Member State of UNIDO, has agreed that UNIDO "shall enjoy in the territory [of State] such legal capacity and such privileges and immunities as are necessary for the exercise of its functions and for the fulfillment of its objectives" (UNIDO Constitution, Art. 21.1). [State] also has agreed that "officials of the Organization shall enjoy such privileges and immunities as are necessary for the independent exercise of their functions in connection with the Organization" (UNIDO Constitution, Art. 21.1). Although generally worded, the principle of functional immunity that is set forth in article 21.1 serves as a basic point of reference in all matters pertaining to the privileges and immunities of the Country Office and its staff in [State].

3. Further, on [date] [State] and UNIDO signed the "[Title of the agreement]" (the "MOU"). In accordance with article II.2 of the MOU,

> "[T]he Government shall apply to UNIDO, including its property, funds, assets and its officials and experts during official missions, the privileges and immunities in accordance with the Convention on the Privileges and Immunities of the Specialized Agencies adopted by the General Assembly of the United Nations in 1947."*

4. Sections 9 and 10 of the 1947 Convention regulate the issue of taxation as follows:

"[S]ection 9:

The specialized agencies, their assets, income and other property shall be:

(*a*) Exempt from all direct taxes; it is understood, however, that the specialized agencies will not claim exemption from taxes which are, in fact, no more than charges for public utility services;

(*b*) Exempt from customs duties and prohibitions and restrictions on imports and exports in respect of articles imported or exported by the specialized agencies for their official use; it is understood, however, that articles imported under such exemption will not be sold in the country into which they were imported except under conditions agreed to with the Government of that country;

(*c*) Exempt from duties and prohibitions and restrictions on imports and exports in respect of their publications.

Section 10:

> While the specialized agencies will not, as a general rule, claim exemption from excise duties and from taxes on the sale of movable and immovable property which forms part of the price to be paid, nevertheless when the specialized agencies are making important purchases for official use of property on which such duties and taxes have been charged or are chargeable, States parties to this Convention will, whenever possible, make appropriate administrative arrangements for the remission or return of the amount of duty or tax."

5. The Constitution, the MOU and Specialized Agencies Convention, to which [State] acceded on [date] without reservations, can be accessed on the Intranet or the public website legal resources pages.[1]

6. From the above, it follows that the privileges and immunities of the UNIDO Country Office in [State] and its staff are those set out in the Constitution of UNIDO and the Specialized Agencies Convention.

9 October 2013

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

[1] For the UNIDO Constitution: http://intranet.unido.org/intra/Legal_Documents/Basic_Legal_Documents or http://www.unido.org/en/overview/legal/basic-legal-documents.html. For the Specialized Agencies Convention: http://intranet.unido.org/intra/Legal_Documents/Treaties_related_to_the_activities_of_UNIDO or http://www.unido.org/en/overview/legal/relevant-treaties.html .

(*f*) Internal e-mail message to a UNIDO Director, concerning the rules for the election of an External Auditor at General Conference (15th session)

LAWFULNESS OF VOTING BY PROXY—A REPRESENTATIVE CANNOT REPRESENT MORE THAN ONE GOVERNMENT AT THE SAME TIME—PARAGRAPH 2 OF RULE 101 GOVERNS THE BALLOTING FOR THE ELECTION OF AN EXTERNAL AUDITOR—NUMBER OF UNSUCCESSFUL CANDIDATES ADMITTED TO SECOND ROUND OF VOTING

1. I refer to your e-mail of [date] concerning voting by proxy for the election of an external auditor for UNIDO and the exact rules that govern the related balloting. Two Member States ([State A and State B]) have inquired whether voting by proxy would be possible. You think that this could become an issue for Member States who will not be able to participate in the General Conference in [City]. To [UNIDO Secretariat Division]'s knowledge, there has not been any precedent of proxy voting at UNIDO. You therefore ask me whether a Member State can authorize another Member State to vote on its behalf. If so, in which format that Member State should inform the Secretariat/President of the General Conference.

2. In this connection, I would like to refer to a legal opinion given by the Office of Legal Affairs of the United Nations in 1965*. After stating that "there is no voting or representation by proxy at meetings or conferences of the United Nations", the opinion went on to say:

> "Although there is no such express prohibition, representation of more than one government by a single representative has never been permitted and interested governments have been so informed. However, representation of a member by a national of another State (or by a member of a different delegation) has been permitted in cases where the representative does not simultaneously serve as a representative of both States."

3. I wish to add that the matter is one on which the Office of Legal Affairs of the United Nations has taken a consistent stand—namely, that a representative cannot represent more than one government at the same time. The Rules of Procedure of UNIDO's Policymaking Organs, like those of the United Nations, are silent on the matter of proxy votes. Nevertheless, it seems that voting by substitute or proxy would be possible provided that the individual concerned is duly accredited and does not represent more than one country. For example, if country A will not send a delegation of its own to the General Conference, it could appoint a delegate from country B as its representative (but not the representative of country B) by issuing that delegate with credentials in the manner prescribed in Rule 27 of the Rules of Procedure of the General Conference. The delegate from country B would then serve as the representative of country A and only of country A.

4. Your second question is whether a candidate for the position of the External Auditor of UNIDO who obtains the fewest votes in the first ballot would automatically be eliminated before the Conference proceeds to the second ballot. [UNIDO Secretariat Division] did not find a legal basis in the rules of procedure for removing from the second ballot the candidate with the fewest votes in the first ballot. However, you found out that [at the 9th session of the General Conference] the candidate with the fewest votes was removed from the second ballot. You therefore asked me whether indeed the candidate obtaining the least number of votes is eliminated before starting the second ballot.

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* Opinion of 22 October 1965, *Juridical Yearbook*, 1965, pp. 223–224.

5. In my view, your question is addressed in paragraph 2 of Rule 101 (Balloting). According to this paragraph, the voting is restricted to the unsuccessful candidates having obtained the largest number of votes in the previous ballot, but not exceeding twice the number of places remaining to be filled. As there is one place to be filled, this means that only the two candidates having obtained the largest number of votes in the first ballot will make it through to the second round. However, in case of a tie between a greater number of unsuccessful candidates in the first ballot, a special ballot shall be held for the purpose of reducing the number of candidates to the required number. The rest of paragraph 2 of Rule 101 regulates the latter situation.

6. Finally, in the course of the informal consultations that took place today, delegates of [State C] and [State B] approached me informally and asked me the above questions ([State B] asked your first question and [State C] your second). I addressed their questions along the above lines.

17 October 2013

(*g*) Internal e-mail message to a UNIDO Head of Operation concerning income tax and pension status of local employees in [State]

Mandatory contributions to social security schemes under national law—UNIDO tax exemption—UNIDO social security scheme for staff members—Locally-recruited staff who are not assigned to hourly rates are exempted from taxation on salaries and emoluments—UNIDO experts on mission are subject to national security taxes

1. Reference is made to your e-mail of [date], which informed us of the request from the [State] Pension Funds Administrator to comply with the tax and pension regulations of the country. You request our advice to prepare UNIDO's reply.

2. In my opinion, the strongest and most effective UNIDO response would be to join and/or coordinate with the United Nations System's response to the Government's démarche. You are kindly requested to speak to the United Nations Resident Coordinator about this issue and to inform us of the UN's actions in this respect. Ideally, a United Nations letter written on behalf of all United Nations agencies in the country would produce a more effective response than a lone letter sent by UNIDO.

3. For your information, and to assist you when discussing the issue with the United Nations colleagues, I would also like to share the following views on the legality of the government's position.

4. [State] is a member state of UNIDO, and in accordance with article 21 of the UNIDO Constitution, it has agreed under international law that UNIDO shall enjoy in its territory the privileges and immunities defined in the Convention on the Privileges and Immunities of the United Nations of which [State] became a party on [date] without reservation.[*]

5. As a Specialized Agency of the United Nations and consistent with the terms of the Convention and United Nations practice, it is my opinion that mandatory contributions

[*] State in question was party to the Convention on the Privileges and Immunities of the United Nations, and not to the Convention on Privileges and Immunities of the Specialized Agencies. Accordingly, article 21 (2)(*b*) of the UNIDO Constitution applied.

to social security schemes under national legislation are considered a form of direct taxation and, therefore, contrary to the Convention.

6. Pursuant to the provisions of article II, section 7, sub-paragraph (*a*) of the Convention, UNIDO, its assets, income and other property shall be exempt from all direct taxes. Furthermore, pursuant to article V, section 18, sub-paragraph (*b*) of the Convention, UNIDO officials "shall be exempt from taxation on the salaries and emoluments paid to them by" UNIDO.

7. It should be noted in this regard that General Assembly resolution 76(1) provides "the granting of the privileges and immunities referred to in Article V ... to all members of the staff of the United Nations, with the exception of those who are recruited locally and are assigned to hourly rates." Thus, consistent with United Nations law and practice, locally-recruited staff of UNIDO who are not assigned to hourly rates are entitled, irrespective of their nationality, to the exemption from such taxation.

8. The exemption from national security schemes is further evidenced by the fact that UNIDO has its own comprehensive social security scheme for its staff members. The establishment of such scheme is required under the Staff Regulations of UNIDO, which are established by the General Conference of UNIDO pursuant to the UNIDO Constitution.

9. Although persons who are not UNIDO officials but who are engaged by UNIDO on special service agreements may be deemed to be experts on mission for UNIDO, they do not enjoy an exemption from taxation and could therefore be subject to national social security taxes. Such persons are personally responsible for the fulfillment of their private legal obligations including reporting taxable income and paying applicable social security taxes.

10. Based on the foregoing, UNIDO may not engage in national social security schemes either on behalf of staff or on behalf of other persons engaged by the Organization.

25 November 2013