Extract from:

UNITED NATIONS JURIDICAL YEARBOOK

2016

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

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

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CHAPTER VI. SELECTED LEGAL OPINIONS OF THE SECRETARIATS OF THE UNITED NATIONS AND RELATED INTERGOVERNMENTAL ORGANIZATIONS

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Chapter VI

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

A. Legal opinions of the Secretariat of the United Nations

(Issued or prepared by the Office of Legal Affairs)

1. Privileges and immunities

(*a*) Note to [State] concerning privileges and immunities of United Nations staff members regarding the recruitment of nationals of [State] by the United Nations, its Funds and Programmes and other subsidiary bodies in [State]

Privileges and immunities of United Nations officials under Article 105 of the Charter of the United Nations and article V, section 18 of the Convention on the Privileges and Immunities of the United Nations—Independence of the United Nations Secretary-General and staff members pursuant to Article 100 of the Charter—Appointment of United Nations officials in line with Articles 97 and 101 of the Charter—United Nations Staff Regulations and Rules are a complete employment code for the staff of the Organization

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 Note Verbale from the Diplomatic Service Corps Department of 1 June 2015 regarding the recruitment of [State] nationals by the United Nations, its Funds and Programmes and other subsidiary bodies (UN Offices) in [State], attached here for ease of reference.

The Office of Legal Affairs understands that the Government of [State] has issued Decree […] on [date] (the "Decree") regarding the recruitment and management of [State] nationals working for international organizations and Circular […] on [date] (the "Circular") regarding the implementation of the Decree. The Office of Legal Affairs notes that pursuant to the Decree and Circular, UN Offices in [State] wishing to recruit nationals of [State] must do so through recruitment agencies which have been appointed or authorized by the Ministry of Foreign Affairs. Such recruitment agencies will be responsible for selecting and introducing candidates to the UN Offices, and the UN Offices will be required to appoint one of the pre-selected candidates. The Office of Legal Affairs understands that UN Offices may recruit [State] nationals directly only if the recruitment agency is unable to select and introduce a candidate within a stipulated time period. The Office of

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

Legal Affairs also understands that pursuant to the Decree and Circular, UN Offices and [State] nationals are required to comply with [State] labour laws. [State] nationals recruited through this procedure will also, in addition, be required to comply with the regulations of the recruitment agency.

The Office of Legal Affairs wishes to express its concern that the above legislation is not in accordance with the obligations of [State] to the United Nations and is incompatible with the status of the United Nations and its staff members established under the Charter of the United Nations (the "UN Charter").

At the outset, the Office of Legal Affairs notes that the legal framework applicable to the United Nations differs from the legal framework applicable to foreign missions accredited to [State]. Any requirements or restrictions under the 1961 Vienna Convention on Diplomatic Relations regarding the appointment of persons having the nationality of a receiving state as members of the diplomatic staff of a mission in the receiving state does not apply to United Nations officials. United Nations officials are not appointed and accredited to Member States in the same way that is analogous to the bilateral exchange and accreditation of diplomatic staff on the part of two states.

As an international organization, the United Nations and its officials have been accorded certain privileges and immunities under the UN Charter. Pursuant to Article 105, paragraph 1 of the UN 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 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". In order to give effect to Article 105 of the UN Charter, the General Assembly of the United Nations adopted the Convention on the Privileges and Immunities of the United Nations on 13 February 1946 (the "General Convention") to which [State] acceded on […]. In accordance with article V, section 18 of the General Convention, officials of the United Nations are accorded certain privileges and immunities. In particular, United Nations officials shall "be immune in respect of words spoken or written and all acts performed by them in their official capacity" and "from national service obligations". It should be noted in this regard that General Assembly resolution 76 (I) provides "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 assigned to hourly rates". Therefore, all staff members of the United Nations, irrespective of nationality, are considered officials, with the sole exception of those who are recruited locally and assigned to hourly rates.

The Office of Legal Affairs recalls that the independence of the United Nations Secretary-General and staff members is protected under the UN Charter. Article 100 of the UN Charter states that "[i]n the performance of their duties, the Secretary-General and the staff shall not seek or receive instructions from any Government or from any other authority external to the Organization" and "[e]ach Member of the United Nations undertakes to respect the exclusively international character of the responsibilities of the Secretary-General and the staff and not to seek to influence them in the discharge of their responsibilities". Pursuant to Article 101 of the UN Charter, "[t]he staff shall be appointed by the Secretary-General under regulations established by the General Assembly" and "[t]he paramount consideration in the employment of the staff and in the determination

of the conditions of service shall be the necessity of securing the highest standards of efficiency, competence and integrity."

On this basis, the Secretary-General, as the Chief Administrative Officer of the Organization pursuant to Article 97 of the UN Charter, is to be accorded the independence to appoint personnel based on the considerations set out under the UN Charter, irrespective of their nationality. With respect to United Nations Funds and Programmes, the head of the respective organization is responsible for the engagement and appointment of its personnel. In this regard, the Office of Legal Affairs notes that the Government has an obligation under the UN Charter not to restrict the ability of the United Nations to engage and appoint its personnel in [State] or to impose any conditions regarding their engagement.

The Office of Legal Affairs also wishes to note that the conditions of service of staff members are established exclusively by the Staff Regulations established by the General Assembly and the Staff Rules promulgated by the Secretary-General. The Staff Regulations and Rules establish a complete employment code for the staff of the Organization and include detailed provisions with regard to matters which are usually covered by national labour laws. In this regard, the Office of Legal Affairs notes that the requirement under the Decree and Circular for [State] nationals to comply with the labour laws of [State] and regulations of the recruitment agency are not in accordance with the international character of their responsibilities which is emphasised in the Staff Regulations and Rules, and the UN Charter.

In light of the above, the Office of Legal Affairs requests that the Government of [State] confirm that the Decree, Circular, and any other relevant domestic laws on the recruitment of nationals and permanent residents of [State] will not be applied to the United Nations, its Funds and Programmes and other subsidiary bodies in [State].

25 January 2016

(*b*) Note to [State] concerning privileges and immunities of United Nations staff members regarding the request by [State] of information on criminal records and annual wages of United Nations personnel in [State] and the names, identity numbers and social security insurance numbers of personnel who are nationals and permanent residents of [State]

Privileges and immunities of United Nations officials under Article 105 of the Charter of the United Nations and article V, section 18 of the Convention on the Privileges and Immunities of the United Nations—Names of United Nations officials may only within the limits of article V, section 17 of the Convention—Duty to cooperate with Member States in the proper administration of justice under Article V, section 21 of the General Convention—Employment and conditions of service under Article 101, paragraph 3 of the United Nations Charter—Comprehensive social security scheme pursuant to Staff Regulation 6.2—Availability of information on the United Nations Common System of Salaries, Allowances and Benefits to all Member States

The Office of Legal Affairs of the United Nations presents its compliments to the Ministry of Foreign Affairs of the [State] and has the honour to refer to the Notes Verbales of the Ministry of Foreign Affairs dated 7 December 2011 […], 27 October 2015 […] and 19 November 2015 […] addressed to foreign missions and international organisations

in [State]. The Office of Legal Affairs understands that the Ministry of Foreign Affairs is requesting information regarding criminal records and annual wages of United Nations personnel in [State] and the names, identity numbers and [social security] insurance registry numbers of personnel who are nationals and permanent residents of [State].

In this regard, the Office of Legal Affairs wishes to provide the following information on the applicable legal framework.

At the outset, the Office of Legal Affairs notes that the legal framework applicable to the United Nations differs from the legal framework applicable to foreign missions accredited to [State]. Any requirements or restrictions under the 1961 Vienna Convention on Diplomatic Relations regarding the appointment of persons having the nationality of a receiving state as members of the diplomatic staff of a mission in the receiving state do not apply to United Nations officials. United Nations officials are not appointed and accredited to Member States in a way that is analogous to the bilateral exchange and accreditation of diplomatic recognition on the part of two states.

As an international organisation, the United Nations and its officials have been accorded certain privileges and immunities under the United Nations Charter (the "UN Charter") which are necessary for the fulfilment of the purposes of the Organization. Pursuant to Article 105 of the UN 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 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". In order to give effect to Article 105 of the UN Charter, the General Assembly of the United Nations adopted the Convention on the Privileges and Immunities of the United Nations on 13 February 1946 (the "General Convention"), to which the [State] acceded on […].

The Office of Legal Affairs notes that the Government of [State] has also confirmed the applicability of the General Convention to the United Nations, including its Funds and Programmes and other subsidiary bodies of the United Nations, pursuant to article V, paragraph 1 (*a*) of the Revised Standard Agreement between the United Nations, the International Labour Organisation, the Food and Agriculture Organization of the United Nations, the United Nations Educational, Scientific and Cultural Organization, the International Civil Aviation Organization, the World Health Organization, the International Telecommunication Union, the World Meteorological Organization, the International Atomic Energy Agency, the Universal Postal Union and the Inter-Governmental Maritime Consultative Organization and the Government of [State] Concerning Technical Assistance of […] (the "Standard Agreement"). Pursuant to article V, paragraph 1 (*b*) of the Standard Agreement, the Government of [State] has also agreed to apply, in respect of the Specialized Agencies in [State], the provisions of the Convention on the Privileges and Immunities of the Specialized Agencies which was approved by the General Assembly on 21 November 1947.

The Office of Legal Affairs wishes to note that in accordance with article V, section 18 of the General Convention, officials of the United Nations are accorded certain privileges and immunities. It should be noted in this regard that General Assembly resolution 76(I) provides "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, all staff members of the United Nations, irrespective of nationality, 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 privileges and immunities under the General Convention.

The Office of Legal Affairs notes that the only requirement under the General Convention regarding the provision of information concerning United Nations personnel to Member States is pursuant to article V, section 17 which states that "[t]he names of the officials … shall from time to time be made known to the Governments of Members." In this connection, the Office of Legal Affairs understands that the Office of the United Nations Resident Coordinator in [State] periodically provides the Government with a list of [State] staff members working for the United Nations, its Funds and Programmes in [State]. The Office of Legal Affairs understands that in addition to their names, this list also includes the office to which they are assigned, their post, as well as their date of appointment.

With respect to the information requested beyond what is provided pursuant to section 17 of the General Convention, the Office of Legal Affairs notes that the Organization is not in a position to provide such information. In relation to the criminal records of personnel, the Office of Legal Affairs notes that the Organization does not routinely collect this information and has no authority to obtain such information from national authorities. The Office of Legal Affairs wishes to reassure the Government that, in accordance with Article 101, paragraph 3 of the UN Charter, "[t]he paramount consideration in the employment of the staff and in the determination of the conditions of service shall be the necessity of securing the highest standards of efficiency, competence, and integrity." However, pursuant to article V, section 21 of the General Convention, "[t]he United Nations shall co-operate at all times with the appropriate authorities of Members to facilitate the proper administration of justice". Accordingly, if the Government has any specific issues concerning individual United Nations personnel, the United Nations is willing to cooperate with the Government to resolve the matter in a manner consistent with the UN Charter and the General Convention.

With respect to identity numbers and insurance registry numbers of nationals and permanent residents of [State], the Office of Legal Affairs understands that this request is in connection with the requirement under the laws of [State] for local personnel to be insured under the national insurance scheme. The Office of Legal Affairs notes that United Nations staff members are insured under the Organization's own comprehensive social security scheme. Pursuant to the Staff Regulations established by the General Assembly, Regulation 6.2 provides that "[the Secretary-General shall establish a scheme of social security for the staff, including provisions for health protection … and reasonable compensation in the event of illness, accident or death attributable to the performance of official duties on behalf of the United Nations". Accordingly, it would be inconsistent with Staff Regulation 6.2 that a staff member is also required to participate in the national insurance scheme. In this regard, the Office of Legal Affairs also notes that United Nations staff members are not prohibited from voluntarily participating in their national insurance schemes as they see fit at their own expense. Where staff members voluntarily participate in their national insurance schemes, they do so in their personal capacity and the United Nations does not collect or have the relevant information requested.

With respect to annual wages, the Office of Legal Affairs notes that this information is requested on a voluntary basis in relation to a statistical study to be conducted in [State]. In this regard, the Office of Legal Affairs notes that the salaries received by United Nations staff members are in accordance with the United Nations Common System of Salaries, Allowances and Benefits, the details of which are available to all Member States, including [State]. The Office of Legal Affairs also wishes to note that staff members, who wish to participate in this study, are not prohibited from voluntarily providing this information as they see fit.

In light of the foregoing, the Office of Legal Affairs therefore respectfully requests that the Government of [State] takes appropriate steps to ensure that United Nations offices and its personnel in [State] are not compelled to provide information additional to that which is being provided by those offices pursuant to the applicable provisions of the General Convention and the Standard Agreement referred to above.

8 February 2016

(*c*) Note to [State] concerning privileges and immunities of United Nations staff members regarding interrogations in relation to an official United Nations publication

Questioning of selected United Nations personnel in connection with an official United Nations publication is contrary to the status, privileges and immunities of the Organization—Privileges and immunities of United Nations officials under Article 105 of the Charter of the United Nations and article V, section 18 of the Convention on the Privileges and Immunities of the United Nations—Independence of the United Nations Secretary-General and staff members pursuant to Article 100 of the Charter—Staff members preparing an official United Nations publication acted in their official capacity

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 Note Verbale dated 4 February 2016 from the United Nations Office in [State] to the Ministry of Foreign Affairs, a copy of which is attached hereto for ease of reference. The Office of Legal Affairs has the further honour to refer to the Aide-Memoire received by the United Nations on 15 February 2016 regarding the privileges and immunities of United Nations staff members.

The Office of Legal Affairs understands that the authorities are conducting an investigation into the publication "Guidebook on Debates" (the "Guidebook"), produced jointly by the United Nations Development Programme ("UNDP") and United Nations Volunteers ("UNV"). In connection with this investigation, the Office of Legal Affairs understands that several United Nations personnel, including [Name], [Name] and [Name], United Nations staff members; [Name], a United Nations volunteer; and [Name] and [Name], UNDP service contract holders, have been requested to present themselves to the [City name] City Department of the Ministry of Interior. The Office of Legal Affairs also understands that several former United Nations personnel who had been involved in the preparation of the Guidebook have also been requested to present themselves to the authorities, including [Name], former UNDP service contract holder; and [Name] and [Name], former UNDP consultants.

The Office of Legal Affairs wishes to inform the Government that the questioning of selected United Nations personnel in connection with an official United Nations publication is contrary to the status, privileges and immunities of the Organization established under the Charter of the United Nations (the "UN Charter") and other applicable legal instruments.

In this regard, the Office of Legal Affairs wishes to set out the applicable legal principles.

The Office of Legal Affairs notes that as an international organisation, the United Nations and its officials have been accorded certain privileges and immunities under the UN Charter which are necessary for the fulfilment of the purposes of the Organization. Pursuant to Article 105 of the UN 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 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". These privileges and immunities are specified in the Convention on the Privileges and Immunities of the United Nations, adopted by the General Assembly on 13 February 1946 (the "General Convention").

While [State] is not directly a party to the General Convention, it has accepted the applicability of the General Convention to the United Nations, its property, funds and assets, officials and experts on mission in [State] when it entered into the Agreement relating to the establishment of a United Nations Interim Office in [State] of [year] (the "Interim Office Agreement") with the United Nations, which provides in its article IV that the General Convention shall apply. In addition, pursuant to article IX, paragraph 1 of the Agreement between the United Nations Development Programme and the Government of [year] (the "UNDP Agreement"), the Government agreed to "apply to the United Nations and its organs, including the UNDP and UN subsidiary organs acting as UNDP Executing Agencies, their property, funds and assets, and to their officials, including the resident representative and other members of the UNDP mission in the country, the provisions of the Convention on Privileges and Immunities of the United Nations."

In accordance with article V, section 18 of the General Convention, officials of the United Nations are accorded certain privileges and immunities. In particular, officials of the United Nations shall "be immune from legal process in respect of words spoken or written and all acts performed by them in their official capacity." The Office of Legal Affairs notes that the immunity from legal process is accorded to all United Nations officials, irrespective of nationality. The General Assembly, in resolution 76 (I), 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 rates" (emphasis added). The Office of Legal Affairs further notes that such immunity shall continue to be in force after termination of employment with the United Nations.

The Office of Legal Affairs notes that the Government had also confirmed that privileges and immunities of officials under article V of the General Convention would be applicable to all United Nations staff members, without distinction as to nationality. Pursuant to article I, paragraph (*g*) of the Interim Office Agreement, "officials" are defined as "all members of […] staff, *irrespective of nationality*, employed under the Staff Rules and Regulations of the United Nations with the exception of persons who are recruited locally *and* assigned to hourly rates as provided for in General Assembly Resolution 76(I) of 7 December 1946"

(emphasis added). Accordingly, all staff members of the United Nations in [State], irrespective of nationality, 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. The Office of Legal Affairs notes that the staff members involved in the publication of the Guidebook are not locally recruited and assigned to hourly rates and accordingly, they enjoy privileges and immunities as officials of the United Nations and continue to do so after termination of their employment with the Organization.

The Office of Legal Affairs notes that pursuant to the 1969 Vienna Convention on the Law of Treaties, which was also referred to by the Government, article 31, paragraph 1 states that "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." In this connection, the Office of Legal Affairs recalls Article 100 of the UN Charter which states that "[i]n the performance of their duties the Secretary-General and the staff shall not seek or receive instructions from any government or from any other authority external to the Organization" and that "[each Member of the United Nations undertakes to respect the exclusively international character of the responsibilities of the Secretary-General and the staff and not to seek to influence them in the discharge of their responsibilities." In this regard, the Office of Legal Affairs notes that the privileges and immunities granted to United Nations personnel are to achieve the objective under the UN Charter that such personnel may exercise their official functions independently and free from undue pressure from any Government.

The Office of Legal Affairs wishes to note that the Guidebook was published under the official mandate of the United Nations. The United Nations personnel who were involved in the publication of the Guidebook should not be subject to interrogation by the authorities of [State] with respect to the acts performed by them in their official capacity in connection with this publication.

In light of the foregoing, the Office of Legal Affairs urges the Government of [State] to take all necessary steps to ensure that the independence of the United Nations and privileges and immunities of United Nations personnel pursuant to the UN Charter and the other applicable legal instruments are respected. The Office of Legal Affairs trusts that no further requests for interviews or information will be made to any United Nations personnel regarding this matter. If the Government has specific issues concerning the publication of the Guidebook or any other materials, the Office of Legal Affairs respectfully requests that such concerns be addressed directly to the UNDP Resident Representative.

18 February 2016

(*d*) Note to [State] concerning privileges and immunities of United Nations staff members regarding the renewal of an exit visa for a United Nations official by the State of nationality

Obligation of Member States that national law not to impede staff from taking up their post of duty with the United Nations or from travelling from country to country on its business—Independence of the United Nations Secretary-General and staff members pursuant to Article 100 of the Charter—Privileges and immunities of the Organization and United Nations officials under Article 105 of the

Charter of the United Nations—Immunity from immigration restrictions and alien registration and travel privileges under of article V, section 18(*d*) and article VII, Section 25 of the Convention on the Privileges and Immunities of the United Nations

The Office of Legal Affairs of the United Nations presents its compliments to the Permanent Mission of [Home State] to the United Nations and has the honour to refer to the matter concerning the issuance of an exit visa to [Name], a United Nations staff member. The Office of Legal Affairs has the further honour to refer to the Note Verbale from the United Nations Office in [Home State] dated 4 February 2016 to the Ministry of Foreign Affairs of [Home State], and the Note Verbale from the United Nations High Commissioner for Refugees ("UNHCR") dated 11 February 2016 to the Permanent Mission of [Home State] to the United Nations Office in Geneva regarding this matter, copies of which are attached herewith for reference.

The Office of Legal Affairs understands that [Name], a citizen of [Home State] who is appointed as an Associate Programme Officer to the UNHCR Regional Office in [City], [Host State], had returned to [Home State] to renew her exit visa. The Office has been advised that upon her arrival in [City] on 29 January 2016, she was detained and that her passport was seized. The Office understands that she was subsequently released but her passport has not been returned. Accordingly, [Name] has been unable to return to her post in [Host State] and perform the functions that have been assigned to her by the Secretary-General.

The Office of Legal Affairs understands that the Government of [Home State] requires United Nations officials of [Home State] nationality to obtain exit visas each time they travel out of [Home State]. In accordance with the UN Charter and the applicable legal instruments set out below, this requirement shall not impede the ability of staff to take up their post of duty with the United Nations or from travelling from country to country on its business. In this regard, the Office wishes to assure the Government that the Organization is respectful of national legal and procedural requirements, including with respect to exit visas, and will endeavour to assist its staff in meeting those requirements where applicable and in a manner consistent with the status of the United Nations and its personnel. In the present case, the Office regrets any delay in [Name]'s return to renew her exit visa from her UNHCR duty station in [City], [Host State] and respectfully requests the Government to issue an exit visa to [Name] at its earliest convenience so that she may resume her work for UNHCR in [Host State] without any further delay.

In this regard, the Office of Legal Affairs has the honour to set out the applicable legal principles.

The Office of Legal Affairs notes that Article 100 of the UN Charter provides that "[i]n the performance of their duties, the Secretary-General and the staff shall not seek or receive instructions from any government" and that "[e]ach Member of the United Nations undertakes to respect the exclusively international character of the responsibilities of the Secretary-General and the staff and not to seek to influence them in the discharge of their responsibilities". The Office of Legal Affairs further notes that pursuant to paragraph 1 of Article 105 of the UN 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". In accordance with 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". These privileges

and immunities are specified in the Convention on the Privileges and Immunities of the United Nations, adopted by the General Assembly on 13 February 1946 (hereinafter the "General Convention").

[Home State] has recognized the applicability of the General Convention in, *inter alia,* article IX of the Basic Cooperation Agreement concluded between the United Nations Children's Fund and the Government on [Date] (the "BCA"), article IV of the Agreement between the United Nations and the Government relating to the establishment of a United Nations Interim Office in [Home State] of [Date] (the "1992 Agreement"), and article IX (1) of the Agreement between the United Nations Development Programme and the Government signed on [Date] (the "UNDP SBAA").

The Office of Legal Affairs further wishes to note that in accordance with article V, section 18(*d*) of the General Convention, officials of the United Nations, together with their spouses and dependent relatives, are immune "from immigration restrictions and alien registration". Article VII, section 25 stipulates that "[a]pplications for visas (where required) from the holders of United Nations laissez-passer, when accompanied by a certificate that they are traveling on the business of the United Nations, shall be dealt with as speedily as possible. In addition, such persons shall be granted facilities for speedy travel". Accordingly, the Government of [Home State] has an obligation to grant visas to officials of the United Nations in a timely manner pursuant to the express terms of the General Convention.

The above provisions make clear that once the Secretary-General, as the Chief Administrative Officer of the Organization pursuant to Article 97 of the UN Charter, has appointed officials to a United Nations office, the Office of Legal Affairs notes that the Government has an obligation under the UN Charter to facilitate the travel of those officials into or from the country to enable them to carry out their functions.

In accordance with this obligation, the Government has accepted, in the provisions of the bilateral agreements between the United Nations and the Government, that no impediment to the exit (or entry) of UN officials shall be imposed. Article X, paragraph 1(*b*) of the UNDP SBAA provides that the "Government shall take any measures which may be necessary … to grant them such other facilities as may be necessary for the speedy and efficient execution of UNDP assistance", including the "prompt issuance without cost of necessary visas, licenses or permits". In addition, paragraph 1(*d*) provides that the Government shall grant the "free movement within or *to or from* the country, to the extent necessary for proper execution of UNDP assistance" (emphasis added). Article XII of the 1992 Agreement provides that internationally-recruited officials, experts on mission and persons performing services shall be entitled to "*unimpeded access to or from the country* … to the extent necessary for the implementation of programmes of co-operation" (emphasis added). Article XVI of the BCA provides that UNICEF officials shall be entitled "to prompt clearance and issuance, free of charge, of visas, licenses or permits, where required" and "to *unimpeded access to or from [Home State]* …" (emphasis added).

As noted by the Secretary-General in paragraph 115 of his report to the 7 Session of the General Assembly (A/2364, 30 January 1953), "it is clear that Member States should not, under the provisions of the Charter, seek to interpose their passport or visa requirements in such a manner as to prevent staff from taking up their post of duty with the United Nations or from travelling from country to country on its business". As further stated by the Secretary-General in 1963, "freedom for officials to travel is one of the

most essential privileges which is necessary for the independent exercise of their functions in connection with the Organization, and for the fulfilment of the purposes of the Organization." (International Law Commission, 1967 study on "The practice of the United Nations, the specialized agencies and the International Atomic Energy Agency concerning their status, privileges and immunities", paragraph 366).

The Office of Legal Affairs notes that in connection with her official functions, [Name] is required to undertake urgent missions to assist in delivering aid to persons of concern in various countries, in furtherance of the humanitarian mandate of UNHCR. In light of the above, it is clear that the Government has an obligation under international law to grant permit [Name] to travel. Accordingly, the Office of Legal Affairs urges the Government of [Home State] to take all necessary steps to promptly return the passport of [Name] and issue the necessary exit visa to facilitate her travel.

29 February 2016

(*e*) Note to [State] concerning privileges and immunities of United Nations staff members regarding a declaration of a United Nations country representative as *persona non grata*

Privileges and immunities of the Organization and United Nations officials under Article 105 of the Charter of the United Nations and the Convention on the Privileges and Immunities of the United Nations—No right of host States to declare United Nations officials *persona non grata* or to take equivalent action—Appointment of United Nations staff pursuant to Article 101 of the Charter of the United Nations—Member States have an obligation to respect the exclusively international character of the responsibilities of the Secretary-General and the staff pursuant to Article 100, paragraph 2 of the Charter of the United Nations

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 enclosed Note Verbale of 13 June 2016 received by the Office of the Resident Coordinator and United Nations Development Programme (UNDP) Country Representative from the Ministry advising the Resident Coordinator that the representation of [Name], Country Representative, United Nations Entity for Gender Equality and the Empowerment of Women (UN Women) in [State], "has terminated with immediate effect" and requesting the Resident Coordinator "to arrange for [Name] to leave the country immediately". The Ministry also brings to the attention of the Resident Coordinator alleged complaints of employment irregularities concerning four additional United Nations personnel.

The Office of Legal Affairs wishes to convey the Organization's serious concern regarding the matters raised in the Note Verbale from the Ministry. The Office of Legal Affairs also respectfully wishes to recall the applicable legal framework regarding these matters as follows.

Pursuant to Paragraph 1 of Article 105 of the Charter of the United Nations (the 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". Pursuant to paragraph 2 of Article 105, 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".

Such privileges and immunities are specifically provided for in the Convention on the Privileges and Immunities of the United Nations (the "General Convention"), to which [State] is a party. The Office of Legal Affairs wishes to recall that the General Convention is applicable to UN Women, which is an integral part of the Organization, and to its officials, who enjoy the status of United Nations officials.

It should be noted that the General Convention neither provides for nor envisions any right for States hosting United Nations operations to declare United Nations officials *persona non grata* or to take equivalent action. This doctrine, which is detailed in article 9 of the Vienna Convention on Diplomatic Relations, applies only to bilateral relations between States. It is not applicable to officials of the United Nations who are neither representing any particular government nor are accredited to any government.

The Office of Legal Affairs wishes to recall that the Organization enjoys the right that its staff members be permitted to remain in their country of assignment to perform their official functions on behalf of the United Nations as determined by the Secretary-General. Specifically, pursuant to Article 101 of the Charter, the Secretary-General is responsible for the appointment of United Nations staff. Furthermore, pursuant to Article 100, paragraph 2 of the Charter, "each member of the United Nations undertakes to respect the exclusively international character of the responsibilities of the Secretary-General and the staff and not to seek to influence them in the discharge of their responsibilities". In order to fulfil the responsibilities entrusted to him by the Charter, and to protect and ensure the independence of the United Nations, the Secretary-General, in accordance with Article 100, has the right to appoint staff members and determine their length of service in the country of their assignment, as required.

Accordingly, the Office of Legal Affairs wishes to inform the Ministry that its demand that [Name] depart from [State] is at variance with the international legal obligations of [State], including those specified under the General Convention and the Charter.

In this connection, the Office of Legal Affairs wishes to advise that if the Government has any specific issues concerning [Name], the relevant information should be brought to the attention of the United Nations officially to enable the Secretary-General to make a decision as to whether any appropriate action should be taken. With respect to the alleged complaints of employment irregularities regarding the four additional United Nations personnel referenced in the Note Verbale from the Ministry, the Office of Legal Affairs wishes to recall that such issues are solely to be addressed in accordance with the applicable contractual arrangements of the individuals concerned. They are not subject to review by the authorities of Member States.

In light of the above, the Office of Legal Affairs respectfully requests the Ministry to reverse the action it has taken against [Name].

13 June 2016

(*f*) Inter-office memorandum to the Legal Counsel of a United Nations entity concerning the privileges and immunities of a staff member for civil proceedings

Status of a United Nations entity as a joint subsidiary organ of the United Nations and the Food and Agriculture Organization (FAO)—Any decision to waive immunity must be made jointly by the United Nations Secretary-General and the FAO Director-General—A waiver of immunity for civil proceedings relating a private matter which does not affect official functions is without prejudice to the interested of the United Nations

1. This is in response to your email dated 26 August 2016 requesting a waiver of diplomatic immunity in respect of [Name], Logistics Officer, P-5, concerning the civil proceedings brought against her against by her former domestic helper.

2. We understand that the civil proceedings are ongoing and that the matter was brought to your attention by a Note Verbale from the Ministry of Foreign Affairs of [State], requesting [UN entity]'s assistance in executing a decision rendered by the relevant [State] Tribunal on [date]. Your email further indicates that [Name] has appealed the decision before the [State's highest court of appeal].

3. [Name], as an official of grade P-5, enjoys diplomatic immunity pursuant to article XIII, section 31(*c*) of the Agreement of [date] regarding the Headquarters for the [Organization] (hereinafter "the Agreement"). In accordance with article XIII, section 34, of the Agreement, the privileges and immunities "are conferred in the interest of [UN entity] and not for the personal benefit of the individuals themselves".

4. As the [UN entity] is a joint subsidiary organ of the United Nations and the Food and Agriculture Organization, any decision to waive immunity must be made jointly by the Secretary-General of the United Nations and the Director-General of the Food and Agriculture Organization. Article XIII, section 34, of the Agreement provides that "[c]onsistent with Section 20 of the Convention on Privileges and Immunities of the United Nations and Section 22 of the Convention on the Privileges and Immunities of the Specialized Agencies, the immunity of an official shall be waived whenever the immunity would not impede the course of justice and can be waived without prejudice to the interests of [UN entity]". Article V, section 20 of the Convention on the Privileges and Immunities of the United Nations provides that "[t]he Secretary-General shall have the right and the duty to waive the immunity of any official in any case where, in his opinion, the immunity would impede the course of justice and can be waived without prejudice to the interests of the United Nations".

5. As the aforementioned civil proceedings relate to a private matter which does not affect the official functions of [Name] and can be waived without prejudice to the interests of the United Nations, we have no objection to a waiver of the diplomatic immunity of [Name] for the limited purpose of these proceedings.

6. We therefore wish to confirm that, for the sole purpose of the civil proceedings against her former aid worker, the immunity from civil jurisdiction that [Name] enjoys under article XIII, section 31(*c*) of the Agreement has been waived by the Secretary-General of the United Nations in accordance with article V, section 20, of the Convention.

7. We understand that the Food and Agriculture Organization has reached the same determination and will communicate the decision by the Director-General of the Food and Agriculture Organization to waive [Name]'s immunity for the same purpose.

8. Please inform the Government of [State] of the Secretary-General's decision as well as [Name]. We would also be grateful if you would provide us with a copy of your communication to the Government of [State].

8 September 2016

(*g*) Note to [State] concerning privileges and immunities of United Nations staff members regarding contributions of national staff members to the national social security and pension scheme

Privileges and immunities of United Nations officials under Article 105 of the Charter of the United Nations and article V, section 18 (*b*) of the Convention on the Privileges and Immunities of the United Nations—Appointment of staff members under Article 101, paragraph 1 of the United Nations Charter by the Secretary-General "under regulations established by the General Assembly"—Comprehensive social security scheme pursuant to Staff Regulation 6.2—Staff members do not have an obligation to contribute to the national social security and pension scheme

The Office of Legal Affairs of the United Nations presents its compliments to the Permanent Mission of [State] to the United Nations and has the honour to refer to the attached letters from the Pension and Social Security Authority in [State] […] addressed to [Name], [Name], [Name], [Name], [Name] and [Name], staff members of the United Nations Development Programme (UNDP). The Office also wishes to refer to its note verbale of 24 July 2015 regarding this matter.

The Office of Legal Affairs understands that the staff members have been asked to enrol in and contribute to the national social security and pension scheme as nationals of [State]. The Office further understands that most of the abovementioned letters have been described by the [State] Pension and Social Security Authority as "persuasive action". In the particular case of [Name], we understand that she has been informed that unless she responds to the request for information from the Pension and Social Security Authority she will be subject to penalties.

In this connection, the Office of Legal Affairs respectfully wishes to recall the applicable legal framework. The United Nations, including UNDP, 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 such privileges and immunities. Paragraph 1 of Article 105 provides that "the 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 the same Article provides 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".

In order to expand on and to give effect to Article 105, the United Nations General Assembly adopted the Convention on the Privileges and Immunities of the United Nations (hereinafter the "General Convention") on 13 February 1946. [State] acceded to the General Convention on 6 [date] without reservations. Furthermore, in […],

the United Nations and [State] signed an agreement concerning Assistance by the United Nations Development Programme to the Government of [State] (the "Agreement"), which in its article IX confirms the application of the General Convention to UNDP.

Pursuant to article V, section 18 (*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". It is well understood that this provision includes being exempted from contributing to the national social security and pension schemes.

United Nations officials are exempt from taxation on the salaries and emoluments paid to them, regardless of their nationality. This is a necessary corollary of the privileges and immunities' rationale of ensuring both the independence of officials and their freedom from external instructions, control or pressure in respect of their duties. In this regard, the General Assembly resolution 76 (I) provides "the granting of privileges and immunities referred to in articles V and VI [of the General Convention] (…) to all members of the staff of the United Nations, with the exception of those who are recruited locally and assigned to hourly rates". The Office of Legal Affairs wishes to confirm that none of the staff members referred to above is assigned to hourly rates. Therefore, all of them enjoy the exemption provided for in article V, section 18(*b*) of the General Convention.

The Office of Legal Affairs also notes that the United Nations has its own comprehensive social security scheme, as an obligatory and essential element of the status of the Organization's staff members. Paragraph 1 of Article 101 of the Charter of the United Nations provides that staff members are appointed by the Secretary-General "under regulations established by the General Assembly". Staff Regulation 6.2, as established by the General Assembly, provides that "the Secretary-General shall establish a scheme of social security for the staff, including provisions for health protection … and reasonable compensation in the event of illness, accident or death attributable to the performance of official duties on behalf of the United Nations". It would be inconsistent with Staff Regulation 6.2. for a Member State to insist that a staff member also participate in its national scheme. In this regard, however, the Office wishes to note that United Nations' staff members are not prohibited from voluntarily participating in their national scheme as they see fit and at their own expense.

The Office of Legal Affairs wishes to confirm to the Government that all the abovementioned UNDP staff members are currently enrolled in the United Nations compulsory social security system and are entitled to benefits including pension, sick leave, maternity and paternity leave, compensation in the event of illness, accident or death in official duties, as well as compensation for loss or damage to personal effects.

Pursuant to section 34 of the General Convention, [State] is under an obligation to "be in a position under its own law to give effect to the terms of [the General Convention]".

The Office of Legal Affairs therefore respectfully requests the Government to take appropriate steps to ensure that the abovementioned UNDP staff members and, more broadly, all officials of the United Nations based in [State] who are nationals or permanent residents of [State], are not compelled to enroll and contribute to national social security and pension schemes of [State]. The Office further requests that the proceedings by the Pension and Social Security Authority in [State] against those staff members be dismissed and brought to a close.

The Office of Legal Affairs wishes to note that it remains available to discuss this matter further with the relevant [State] authorities, as appropriate.

22 November 2016

(*h*) Note to [State] concerning privileges and immunities of the United Nations regarding the exemption from the payment of customs duties for the import of stamps by the United Nations Postal Administration (UNPA)

General Assembly resolutions 454(V) and 657(VII) authorize the issuance of postage stamps by UNPA for sale to philatelists—UNPA enjoys privileges and immunities under the Charter of the United Nations and the Convention on the Privileges and Immunities of the United Nations—Direct tax and customs duties exemptions under article II, section 7 of the General Convention—Characterization of United Nations stamps as publications whose importation and distribution constitutes official use

The Office of Legal Affairs of the United Nations presents its compliments to the Permanent Mission of [State] to the United Nations and has the honour to refer to the [State] [Year] [Continent] International Stamps Exhibition to be held in [City] from [day] to [day] December [Year]. In this regard, the Office of Legal Affairs notes that the United Nations Postal Administration ("UNPA") has been invited and intends to attend the aforementioned exhibition in order to exhibit and sell United Nations stamps.

The Office of Legal Affairs has been informed that the organizers of the exhibition are requesting the UNPA to prove that it is exempt from the payment of customs duties for the import of stamps into [State].

The Office of Legal Affairs would be grateful for the Permanent Mission's assistance in confirming the applicable legal framework to the organizers of the exhibition so as to enable the UNPA to take part in the [State] [year] [Continent] International Stamps Exhibition without being required to pay customs duties on the import of United Nations stamps or taxes on the sale of these stamps at the exhibition. In this regard, the Office of Legal Affairs wishes to reiterate the applicable legal framework as follows.

The UNPA was established in 1951. Pursuant to General Assembly resolutions 454(V) and 657(VII), dated 16 November 1950 and 6 November 1952 respectively, the UNPA was authorised *inter alia* to issue postage stamps for sale to philatelists.

As an integral part of the United Nations, the UNPA is governed by the Charter of the United Nations (the "UN Charter") and enjoys the privileges and immunities provided for in the Convention on the Privileges and Immunities of the United Nations (the "General Convention") adopted by the General Assembly of the United Nations, to which [State] acceded on [Date].

In accordance with section 7 of the General Convention the United Nations, its assets, income and other property shall be (*a*) exempt from all direct taxes, (*b*) exempt from customs duties on imports in respect of articles imported by the United Nations for its official use, and (*c*), exempt from customs duties for all United Nations publications.

The Office of Legal Affairs wishes to note that the sale of United Nations stamps by the UNPA constitutes a direct sale by the Organisation and that the income from sales is managed by the Organisation in accordance with its budgetary rules.

The Office of Legal Affairs further wishes to recall that the sale of stamps for philatelic purposes is one of the main functions of the UNPA. Furthermore, the United Nations stamps cannot be used for mailing purposes from and within [State] and should be considered as a publication, a term which has consistently been interpreted by the United Nations

to include not only books or booklets but also any other printed matter prepared by or at the request of the United Nations.

It follows from the above that United Nations stamps should be considered as publications and that their importation and distribution should constitute official use within the meaning of article II, section 7 of the General Convention.

As a result, the import of United Nations stamps in [State] for the purpose of their sale at the [State] [Year] [Continent] International Stamps Exhibition should be exempt from customs duties and the income from these sales should be exempt from taxation. In this regard, the Office of Legal Affairs would be grateful if the Permanent Mission would advise the relevant authorities of the status of the UNPA as set out in this Note.

29 November 2016

2. Procedural and institutional issues

(*a*) Inter-office memorandum to the Chief Executive Officer of the United Nations Joint Staff Pension Fund concerning comments by the Office of Internal Oversight (OIOS) on the Draft United Nations Joint Staff Pension Fund (UNJSPF) Financial Rules

No formal role for the Secretary-General in approving the Draft UNJSPF Financial Rules—Responsibility and authority of the Secretary-General for the investment of UNJSPF assets exclusively derived from and governed by article 19(*a*) of the UNJSPF Regulations—Changes to the internal audit function for the Fund would require General Assembly consideration—Section F of the Draft Financial Rules provides for the applicability of the United Nations Financial Regulations and Rules if the UNJSPF uses the Secretariat procurement machinery—Need for Draft Financial Rules D.4 and D.5 to designate the master record keeper and custodians for UNJSPF funds—Other applicable instruments cover financial operations not addressed in the Draft Financial Rules

Introduction

1. This responds to an e-mail message of 11 May 2016 from the Chief, Risk Management and Legal Services Section, UNJSPF (the "UNJSPF e-mail message") seeking OLA's views on the comments given by OIOS in its memorandum (the "OIOS Memorandum"), of the same date, to you and the RSG, UNJSPF on the draft United Nations Joint Staff Pension Fund Financial Rules. The UNJSPF e-mail message stated that, at the request of the Audit Committee of the United Nations Joint Staff Pension Board, the UNJSPF had shared a draft of the proposed Financial Rules for the Fund with both the Board of Auditors and with OIOS for their comments and advice. In this regard, I also note that, in accordance with the request of the General Assembly by its resolution 69/113, of 10 December 2014, as well as in accordance with article 4 of the Fund's Regulations, the Pension Board will consider, at its upcoming 63rd session, the adoption of the Draft Financial Rules for the Fund.

2. Although specific views are provided below on the comments made by OIOS to the Draft Financial Rules for the Fund, you will recall as an initial matter that in previous opinions, OLA addressed the following two issues raised by OIOS's comments:

(i) With respect to OIOS's comments in paragraphs 4 and 5 of the OIOS Memorandum on the role of OIOS in providing internal audit services to the UNJSPF, OLA addressed the authority and responsibility of OIOS in providing an internal audit function to the Fund in its opinion of 12 March 2015 (the "Audit Function Opinion"). A copy of the Audit Function Opinion is enclosed for ease of reference. In the Audit Function Opinion, OLA made clear that the Pension Board was in a position to select the internal auditor of its own choosing for the Fund's administrative operations, but that having already selected OIOS for that function and having reported this to the General Assembly, any change by the Pension Board of the internal auditor for the Fund's administrative operations should be presented to the General Assembly for consideration. By contrast, for the investment management activities carried out by the Secretary-General under article 19 of the Fund's Regulations, OLA's Audit Function Opinion made clear that "such activities would remain subject to internal audits by OIOS".

(ii) With respect to OIOS's comment in paragraph 4 of the OIOS Memorandum that the UNJSPF Financial Rules cannot derogate from the UN Financial Regulations and Rules, in particular Financial Regulation 5.15, I made clear in my opinion of 7 July 2015 (the "Non-Applicability Opinion") that the operations of the Fund are "exclusively governed by the Regulations of the Fund that have been adopted by the General Assembly" and that, accordingly, "the Fund is not subject to the United Nations Financial Regulations." A copy of the Non-Applicability Opinion is enclosed for your ease of reference.

3. Accordingly, the specific points set forth below concerning OIOS's comments on the Draft Financial Rules for the Fund should be read in conjunction with and are subject to the views expressed in both the Audit Function Opinion and the Non-Applicability Opinion.

Specific Views on OIOS's Comments on the Draft UNJSPF Financial Rules

A. Applicability and Authority of the Draft Financial Rules

4. In paragraph 2 of the OIOS Memorandum, OIOS states that the "draft Financial Rules require the approval of the Secretary-General before they can be made applicable to [the] investment management" activities of the Fund.

5. Article 19(*a*) of the Fund's Regulations sets forth the role of the Secretary-General with respect to the assets of the United Nations Joint Staff Pension Fund. That is to say, the role of the Secretary-General in deciding on the investment of the assets of the Fund is exclusively governed by the Fund's Regulations and Rules. In this regard, article 4(*b*) of the Fund's Regulations provides that "the administration of the Fund shall be in accordance with these Regulations and with Administrative Rules, *including Financial Rules for the Operation of the Fund*, consistent therewith *which shall be made by the Board* and reported to the General Assembly and the member organizations" (emphasis added).

6. In accordance with the foregoing, it is for the Pension Board to approve the Fund's Financial Rules, and the Secretary-General would have no formal role in approving the Pension Fund's Financial Rules. In any case, the Financial Rules must be consistent with the Fund's Regulations, which delineate the role and responsibility of the Secretary-General for the investment of the Fund's assets. Moreover, as a practical matter, we note from your e-mail message that the Representative of the Secretary-General (RSG) for the investment of the assets of the Fund has been in consultations with the CEO on the preparation of the draft Financial Rules. Thus, it would appear that, through the RSG, the Secretary-General has been consulted on the content of the Draft Financial Rules for the Fund.

7. In paragraph 3 of the OIOS Memorandum, OIOS states that the "draft rules A.2, A.3 and A.4 need to be revised to more clearly indicate that the Chief Executive Officer (CEO) does not have authority over UNJSPF investment management, which is directly overseen by the Secretary-General through the RSG."

8. The responsibility and authority of the Secretary-General for the investment of the assets of the Fund is exclusively derived from and governed by article 19(*a*) of the Fund's Regulations. In this regard, Draft Financial Rule A.3 makes clear that in applying and administering the Draft Financial Rules, anything that touches upon the responsibility of the Secretary-General for the investment of the assets of the Fund under article 19 of the Fund's regulations requires prior consultation by the CEO with the RSG and further requires the concurrence of the RSG before any action can be taken. Thus, OIOS's concerns, as raised in paragraph 3 of its memorandum, are allayed in this regard.

B. The Internal Audit Function for the Fund

9. In paragraphs 4 and 5 of the OIOS Memorandum, OIOS states that, "the draft Financial Rules concerning internal audit are unacceptable to OIOS because they violate the authority and independence provided by the General Assembly in its resolutions pertaining to [OIOS]." In this regard, in paragraph 4 of the OIOS Memorandum, OIOS cites United Nations Financial Regulation 5.15 as the basis for its authority to provide the internal audit function for the Fund.

10. As discussed above, I made clear in the Non-Applicability Opinion that the United Nations Financial Regulations and Rules do not apply to the Fund. Thus, United Nations Financial Regulation 5.15 does not create any authority whatsoever for the internal audit function of the Fund to be performed by OIOS. As was further made clear in OLA's Audit Function Opinion, the Board selects the internal auditor for the Fund's administrative operations, and OIOS provides the internal audit function for the Secretary-General's investment activities under article 19 of the Fund's Regulations.

11. Notably, as elaborated in OLA's Internal Audit Opinion, since 1993, the Pension Board has relied upon the UN Secretariat's internal audit machinery (provided by OIOS from 1994 onward) to conduct all internal audit functions for the Fund. The Pension Board has regularly proposed and the General Assembly has approved resources in the Fund's administrative budget to support the performance of such internal audit functions for the Fund by OIOS. Thus, as a practical matter and as was made clear in OLA's Internal Audit Opinion, any decision by the Board to change from the current situation whereby OIOS provides the internal audit function for the Fund's administrative processes would require consideration by the General Assembly (see paragraphs 2 and 14 of OLA's Audit Function Opinion).

C. Rules for matters other than Fund administration and investment management

12. In paragraph 7 of the OIOS Memorandum, OIOS states that the general principles of procurement of the United Nations have been disregarded in the Draft Financial Rules for the Fund. In paragraph 8 of the OIOS Memorandum, OIOS raises concerns that the Draft Financial Rules for the Fund specify that certain banking functions be designated by the CEO or the RSG without elaborating on the competitive procurement processes to be followed in the selection of the relevant banking institutions.

13. In paragraph 111 of its report to the General Assembly in 1996, A/51/9, the Pension Board recommended to the General Assembly that it request the Secretary-General to "continue to make available to the Fund the UN machinery for contracting and procurement" provided that final decisions on procurement exercises would be made either by the CEO or by the RSG acting within their respective operations. In its resolution 51/217, dated 18 December 1996, the General Assembly in fact requested the Secretary-General to continue to make available to the Fund the procurement machinery of the UN in relation to the Fund's procurement activities, subject to the final decision-making being undertaken by the CEO or the RSG within their respective operations. It has long been understood and is reflected in section F of the Draft Financial Rules for the Fund that when the Secretariat of the United Nations invokes such procurement machinery, it does so utilizing the United Nations Financial Regulations and Rules. Moreover, section A.1 of the Draft Financial Rules makes clear that for matters not specifically covered by the Fund's Financial Rules, the UN Financial Regulations and Rules would apply, mutatis mutandis. Accordingly, the concerns of OIOS about the application of the UN's procurement policies, as reflected in the UN Financial Regulations and Rules, to the operations of the Fund would seem to be fully addressed by the Draft Financial Rules for the Fund.

14. In paragraph 8 of the OIOS Memorandum, OIOS states, in relevant part, that "the draft rules D.4 and D.5 state that the RSG shall designate the master record keeper and custodians" and suggests that "the draft Financial Rules be revised accordingly to mention the need to conduct a procurement exercise before designating the master record keeper and custodians." As OLA has previously opined (see, copy of OLA's memorandum of 20 December 2013, enclosed), the Controller's obligation under the United Nations Financial Regulations and Rules to designate the bank accounts in which the monies of the Organization are to be kept is not a procurement function subject to the procurement regulations and rules set out in the United Nations Financial Regulations and Rules. By analogy, the designation of banks to hold and account for the funds of the Pension Fund, whether commercial banks designated by the CEO for payment of benefits or custodian banks and master record keepers designated by the RSG for purposes of depositing and tracking the assets of the Fund under investment, would not be subject to procurement regulations or rules.[1] The provisions of D.4 and D.5 of the Draft Financial Rules, accordingly,

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[1] As stated in paragraph 6 of OLA's opinion of 20 December 2013, in designating banks, the Controller should give due consideration to the procurement principles set out in the UN Financial Regulations and Rules. Further applying that analogy, OLA understands that, as a matter of practice, the selection of the Fund's commercial banks, custodians and master record keepers is done through solicitation processes using the UN's procurement machinery, as provided in part F of the Draft Financial Rules for the Fund. Accordingly, OIOS' concern that there is a need to specify in the Draft Financial

are necessary to ensure clarity as to which officials of the Fund have responsibility for the designation of banks for such purposes.

D. Financial Operations of the Fund not Covered by the Financial Rules

15. In paragraph 9 of the OIOS Memorandum, OIOS lists various matters that it considers have not been addressed by the Draft Financial Rules of the Fund. These include, (i) receipt and reconciliation of pension contributions from Member Organizations of the Fund, (ii) recovery of overpayment of pension benefits, (iii) the management and recovery of international income taxes withheld on investment income, (iv) the financial aspects of ASHI, and (v) the financial aspects in income tax matters of retirees.

16. As previously noted, under article 4 of the Fund's Regulations, the Financial Rules are included in and are to be read in conjunction with the Fund's Administrative Rules. Various provisions of the currently existing Financial Regulations and the Administrative Rules of the Fund already deal with the (i) receipt and reconciliation of pension contributions from Member Organizations of the Fund,[2] and (ii) recovery of overpayment of pension benefits.[3] Therefore, there is no need to repeat the provisions of the Administrative Rules of the Fund in the Draft Financial Rules.

17. The other matters raised by OIOS are not issues capable of being addressed by the Financial Rules for the Fund. For example, since the income from the investment of the assets of the Fund is exempt from taxation under article 7 of the Convention on the Privileges and Immunities of the United Nations (General Convention), no provision should be made for the recovery of taxes that a Member State may withhold from the income from investment of the assets of the Fund in contravention of the General Convention. For this same reason, there is no provision in the UN Financial Regulations and Rules for the recovery of taxes withheld on UN income. The financial aspects of ASHI liabilities are addressed in the Fund's accounting policies and need not be addressed in the Fund's Financial Rules. This is the same situation as under the UN Financial Regulations and Rules and the Financial Regulations and Rules of the Funds and Programmes with respect to ASHI liabilities. Finally, the Pension Fund is in no way responsible whatsoever for income tax matters concerning retirees or other beneficiaries of the Fund. This is strictly a matter of their personal legal obligations. Given the status and privileges and immunities to be accorded to the Fund and its assets under the General Convention, the Fund does not engage in income tax withholding or other interactions with the tax authorities of Member

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Rules that a procurement exercise needs to be conducted before designating the master record keeper and custodian(s) is effectively addressed, as set forth in paragraph 13, above.

[2] The Fund's Regulations provide for the definition, amount and receipt of contributions to the Fund in articles 1(*o*) (defining a participant's "own contributions"), article 17 (providing that the assets of the Fund are derived, in part, from contributions to the Fund), and article 25 (providing for the rates of contributions from participants and member organizations). Rules D.1 to D.6 of the Fund's Administrative Rules, of which the Draft Financial Rules are part, provide specific guidance on when and how contributions to the Fund, that are required to be made under the Fund's Regulations, are to be received, maintained and applied.

[3] Article 43 of the Fund's Regulations and Rule J.9(*a*) of the Fund's Administrative Rules, of which the Draft Financial Rules would form a part, already provide for the recovery of overpayments and other indebtedness to the Fund.

States with respect to benefits paid to retirees or other beneficiaries. Thus, the Financial Rules for the Fund should not address such matters.

Conclusion

For the reasons set forth above, the concerns raised by OIOS in paragraphs 4 and 5 of the OIOS Memorandum concerning the basis for the Fund's internal audit function already were addressed in OLA's Audit Function Opinion and OLA's Non-Applicability Opinion. The other concerns raised by OIOS regarding the Draft Financial Rules for the Fund, as discussed above, have been sufficiently addressed in the Draft Financial Rules for the Fund or in the overall legal framework governing the Fund's operations, namely the Regulations of the Fund, the Administrative Rules of the Fund and, for issues concerning the status and privileges and immunities of the Fund, in the General Convention. Given the concerns raised by OIOS, OLA would be available to consult with representatives of the Fund (from both the secretariat and IMD) and with representatives of OIOS in order to ensure that OIOS's concerns are fully addressed so that the Draft Financial Rules for the Fund can be adopted by the Pension Board at its upcoming session.

17 June 2016

ENCLOSURE 1: INTER-OFFICE MEMORANDUM TO THE CHIEF EXECUTIVE OFFICER OF THE UNITED NATIONS JOINT STAFF PENSION FUND

[…]

SUBJECT: OIOS AUTHORITY AND RESPONSIBILITY FOR PROVIDING AN INTERNAL AUDIT FUNCTION TO THE UNITED NATIONS JOINT STAFF PENSION FUND

1. I refer to your memorandum, dated 30 June 2014, seeking advice from the Office of Legal Affairs ("OLA") with respect to the authority and responsibility of the Office of Internal Oversight Services ("OIOS") for providing an internal audit function to the United Nations Joint Staff Pension Fund (the "Pension Fund"), as well as further discussions on this matter, including on the timing of this advice. Thus, you have sought to clarify whether the internal audit mandate of OIOS extends to the Pension Fund. We understand from your memorandum that this question has arisen in the context of discussions within the Pension Fund on the development of financial rules for the Fund. We further understand that this question may be discussed at the 2015 session of the United Nations Joint Staff Pension Board (the "Pension Board").

Executive Summary

2. In responding to your query, the below considers OIOS' mandate and jurisdiction, the status and governance structure of the Pension Fund, and the legal framework under which OIOS was selected to carry out internal audits of Pension Fund operations. For the reasons set forth below, the Pension Fund would appear to be in a position to select the internal auditor of its administrative operations. In light of the obligation of the Pension Board to report to the General Assembly, however, as well as the Assembly's prior consideration of this issue, we would recommend that any proposal that would involve changes

to the present arrangement be presented by the Pension Board to the General Assembly for its consideration.

OIOS' mandate and jurisdiction

3. In accordance with Article 97 of the Charter, the Secretary-General is the Chief Administrative Officer of the United Nations. In this capacity, the Secretary-General is responsible for the administration and oversight of the staff and resources of the Organization.

4. With its resolution 48/218*B* of 29 July 1994 on the establishment of OIOS, the General Assembly provided that "the purpose of [OIOS] is to assist the Secretary-General in fulfilling his internal oversight responsibilities in respect of the resources and staff of the Organization …".[4] The General Assembly mandated OIOS with four specific oversight functions to assist the Secretary-General: (i) monitoring, (ii) internal audit, (iii) inspection and evaluation, and (iv) investigation. While the General Assembly has since adopted a number of additional resolutions regarding OIOS' mandate and jurisdiction, such resolutions are to be read in accordance with the Secretary-General's overall authority over the Organization, including its funds and programmes, as enshrined in the Charter. That is to say, OIOS' mandate to assist the Secretary-General in his oversight responsibilities remains unchanged in this regard.

5. Further, with respect to the internal audit function, the Financial Regulations of the United Nations, as adopted by the General Assembly, provide in Regulation 5.15 that "[OIOS] shall conduct independent internal audits". Accordingly, OIOS' jurisdiction to conduct internal audits extends to all United Nations entities to which the United Nations Financial Regulations are applicable.

The Pension Fund's status and governance structure

6 The Pension Fund was established by the General Assembly in 1949 as an inter-agency entity. Currently, the Pension Fund comprises twenty-three member organizations, including not only the Secretariat and Funds and Programmes, but also a number of Specialized Agencies and other entities which fall outside of the Secretary-General's authority.[5] The administration of the Pension Fund is governed by the Regulations of the United Nations Joint Staff Pension Fund (the "Pension Fund Regulations"), as adopted and amended by the General Assembly.[6] We note in this regard that, while the Pension Fund has on a voluntary basis opted to apply the Financial Regulations of the United Nations to the administration of the Fund, as provided by article 4 of the Pension Fund Regulations, only the Pension Fund Regulations themselves, along with associated Administrative Rules, bind the administration of the Pension Fund.[7]

[4] General Assembly resolution 48/218*B*, para. 5(*c*).

[5] United Nations Joint Staff Pension Fund, Annual Report, at p. 2, https://www.unjspf.org/wp-content/uploads/2017/01/AnnualReport2014-eng.pdf. See also A/68/7/Add.3, para. 3.

[6] The Pension Fund Regulations were first adopted by the General Assembly in resolution 248 (III) and have since been amended by the Assembly a number of times on the basis of recommendations by and consultation with the Pension Board.

[7] In light of the bifurcated structure of the Pension Fund, as explained below, the activities of the Investment Management Division are subject to the Financial Regulations of the United Nations and fall under the jurisdiction of OIOS See infra para. 14. We note that, as provided by article 4(*b*) of the Pension

7. The Pension Fund Regulations set out the governance structure of the Pension Fund and provide that it is to be administered by the Pension Board, a secretariat to the Pension Board (the "Pension Fund secretariat"), and staff pension committees for each member organization..[8] Separately, the investment of the assets of the Pension Fund is to be managed by the Secretary-General through the Investment Management Division ("IMD").[9] The Pension Fund, thus, has a bifurcated management structure.[10] The Chief Executive Officer of the Pension Fund administers the Pension Fund secretariat under the authority of the Pension Board, which reports directly to the General Assembly, whereas the Secretary-General is responsible for the IMD.[11]

The basis on which OIOS conducts Internal audits for the Pension Fund

8. The issue of who would conduct regular internal audits of the Pension Fund was initially raised by the Board of Auditors (BoA) of the United Nations during the General Assembly's 46th session. In its report on the accounts of the Pension Fund for the year ending 31 December 1993, the Board of Auditors observed that, for several years, there had not been systematic internal audits of the Pension Fund's activities.[12] The BoA noted that "investments could be audited by the United Nations Internal Audit Division (IAD) as these are managed by the Secretary-General of the United Nations", and observed that the internal audits conducted by the IAD had "been limited to the activities of the Pension Fund which relate to the participants who are staff members of the United Nations". In its report, the Board of Auditors recommended that "consideration should be given either to formally designating the Office of Inspections and Investigations[13] as the internal auditors of the [Pension] Fund or alternatively establishing arrangements for a separate internal audit function for the activities of the [Pension] Fund".[14]

9. In its report to the General Assembly on the operation of the Fund in 1993 (the "1993 Report"), the Pension Board also agreed that, "for the time being, the use of the internal audit services of the United Nations should be explored, notwithstanding the inter-agency nature of the [Pension] Fund and its operations".[15]

Fund Regulations, the administration of the Fund shall also be m accordance with "Administrative Rules, including Financial Rules for the operation of the Fund", which are consistent with the Pension Fund Regulations.

[8] Pension Fund Regulations, article 4(*a*).

[9] *Ibid*., article 19(*a*) and Annex II, Appendix 3, V, para. 6.

[10] A/68/7/Add.3, para. 31.

[11] In 2013, a proposal to consolidate the management of the IMD and the secretariat of the Fund was considered by the Advisory Committee on Administrative and Budgetary Questions. A/68/7/Add.3, paras. 33–34. The General Assembly took note of the proposal and decided to maintain the current structure of the Fund General Assembly resolution 68/247, para. 12 ("Takes note of paragraphs 33 and 34 of the report of the Advisory Committee, and in this regard decides to maintain the current structure of the Fund").

[12] See A/49/9 (Suppl), Annex III, para. 61.

[13] The Office of Inspections and Investigations was the predecessor entity to OIOS.

[14] A/49/9 (Suppl), Annex III, para. 64.

[15] *Ibid*., para. 150.

10. During the 49th session of the General Assembly, the Advisory Committee on Administrative and Budgetary Questions (ACABQ) took up the 1993 Report. The ACABQ welcomed the comments of the BoA on the establishment of an internal audit function for the Pension Fund, while noting that the "investment activities carried out by the United Nations Investment Management Service for the Pension Fund may be audited without restrictions by the [IAD], as these are managed by the Secretary-General".[16] The ACABQ further requested that the Pension Board present it with the budgetary implications of the two approaches to internal auditing, *i.e.* the resort to OIOS or the establishment of an internal auditing function within the Pension Fund Secretariat.

10. In its resolution 49/224, the General Assembly noted the action taken by the Pension Board regarding the BoA recommendation, as well as the comments of the ACABQ thereon, and called upon the Pension Board to report on the budgetary implications of any arrangements made for internal audits of the Pension Fund.

11. Thereafter, in its report to the General Assembly on the operation of the Fund in 1995, the Pension Board indicated that it had established an internal audit function by providing a budgetary allocation to "enable [OIOS] to carry out that function"[17], and that OIOS audits would commence in September 1996. Finally, on the basis of consideration by the ACABQ and a recommendation of the Fifth Committee, the General Assembly, in its resolution 51/217, took note "of the arrangements made for internal audits of the [Pension] Fund, to be carried out by OIOS".[18]

12. In view of the foregoing, it appears that OIOS was selected to carry out internal audits for the Pension Fund as a result of the approval by the Pension Board of a BoA recommendation, which was also presented to the ACABQ and the General Assembly.

Proposal to adopt Pension Fund-specific financial regulations and the authority of the Pension Fund to select its internal auditor

13. We would also note that the General Assembly, by resolution 69/113, recently approved an amendment to article 4 of the Pension Fund Regulations in order to establish clear authority for the development of financial rules specific to the operation of the Fund.[19] The General Assembly "[e]mphasize[d] the importance of the [Pension] Board promulgating financial rules that will govern the financial management of the Fund, and in this regard looks forward to receiving further information in, the next report of the Board".[20]

14. Accordingly, the Pension Fund would appear to be in a position to adopt financial rules that govern its internal audits, as long as such rules remain consistent with

[16] A/49/576, para. 25.

[17] A/51/9 (Suppl), para. 113.

[18] General Assembly resolution 51/217, V, para. 3.

[19] General Assembly resolution 69/113, para. 9, "*[a]pproves* the amendment to article 4 of the [Pension Fund Regulations], as set out in annex XI to the report of the Pension Board, in order to establish clear authority and reference to the financial rules of the Fund". Accordingly, article 4(*b*) of the Regulations of the Fund now provides "The administration of the Fund shall be in accordance with these Regulations and with Administrative Rules, *including Financial Rules for the operation of the Fund,* consistent therewith which shall be made by the Board and reported to the General Assembly und member organizations" (emphasis added). For more information on the amendment, see A/69/9, Annex XI.

[20] General Assembly resolution 69/113, para. 10 (emphasis omitted).

the Pension Fund Regulations. In this regard, we would note that the Pension Fund Regulations do not provide any limitations on who should conduct internal audits of the Pension Fund. Nevertheless, in light of the obligation of the Pension Board to report to the General Assembly, as well as the Assembly's prior involvement as described above, we would recommend that any proposal that would involve changes to the present arrangement be presented by the Pension Board to the General Assembly for its consideration. We would also note in this regard that the recent amendments to the Pension Fund Regulations appear to apply only to the administrative operations of the Fund.[21] Accordingly, to the extent that the investment activities of the Pension Fund remain subject to the direct authority of the Secretary-General, such activities would remain subject to internal audits by OIOS.

12 March 2015

Enclosure 2: Inter-office memorandum to the Chief Executive Officer of the United Nations Joint Staff Pension Fund

[…]

Subject: Applicability of the UN Financial Regulations and Rules to the UN Joint Staff Pension Fund

Background

1. I refer to your memorandum of 5 May 2015, by which you requested an opinion from OLA on a fundamental issue arising from the proposal by the Board of the UN Joint Staff Pension Fund to establish financial rules specific to the administration of the Fund. As your memorandum indicated, the issue arose from comments made by OIOS, in a memorandum dated 1 May 2015 from the Chief, New York Audit Service, Internal Audit Division, OIOS, concerning proposed financial rules for the Fund that the Fund's secretariat has drafted for consideration by the Pension Board (the "OIOS memorandum"). You had asked to receive OLA' s opinion before the June meeting of the Pension Board's Audit Committee. However, it was agreed at the working level that it would be important to further gauge OIOS's views on the matter, as well as to seek views of the Board of Auditors on the issue during that meeting of the Audit Committee. Thus, it was agreed that OLA's opinion would be given before the Pension Board's 62nd session to be held later this month at UNOG.

2. The issue raised by OIOS arises from the fact that the Fund is seeking to establish financial rules for the Operation of the Fund. In its report to the General Assembly regarding its 61st session in July 2014, the Pension Board "supported the Fund's efforts to finalize its consultative process with all stakeholders in respect of drafting Fund-specific Financial Rules, which take into account the governance structure, mandate and funding source of the Fund."[22] In order to provide a regulatory basis for the Board's establishing such Fund-specific financial rules, the Pension Board proposed to the General Assembly

[21] Article 4 of the Fund Regulations, as recently amended, provides for the development of "Financial Rules for the *operation* of the Fund", and article 14 of the Fund Regulations provides for "annual audits of the *operations* of the Fund", A/69/9, Annex XI (emphasis added).

[22] Report of the United Nations Joint Staff Pension Board on its Sixty-First Session, A/69/9, para. 175.

an amendment to article 4 of the Fund's Regulations, authorizing the Pension Board to make Financial Rules as part of the Fund's Administrative Rules for the administration of the Fund.[23] By its resolution 69/113, the General Assembly "approve[d] the amendment to Article 4" of the Fund's Regulations "in order to establish clear authority [for] and reference to the financial rules of the Fund."[24]

The Legal Issue

3 In the OIOS memorandum, OIOS takes the position that any Fund-specific financial rules are subject to and must be consistent with the United Nations Financial Regulations.[25] Moreover, OIOS concludes that, "in areas where there are no suitable financial regulations, the Fund secretariat should develop and propose appropriate additional financial regulations for approval by the General Assembly." The idea that the financial operations of the Fund are subject to the United Nations Financial Regulations appears also to be shared by the Board of Auditors. In this regard, OLA understands that during the recent meeting of the Audit Committee of the Pension Board and on various other occasions, representatives of the UN Board of Auditors have maintained that the mandate for the Board of Auditors to audit the operations of the Fund derives from article VII of the United Nations Financial Regulations and Rules.

Legal Analysis

4 As an initial matter, the question of the applicable regulatory framework governing the operations of the Pension Fund presents a legal question. As OIOS has itself recognized, the Office of Legal Affairs is the central legal service of the United Nations, including its peacekeeping and other offices and operations away from Headquarters, as well as the principal and subsidiary organs of the UN.[26] Thus, OIOS has recommended, in particular, that OLA should be consulted on the legal implications of new developments or approaches for programme delivery.[27] The Pension Board's proposed adoption of new

[23] *Id,* para. 176.

[24] General Assembly resolution 69/113 of 10 December 2014, para. 9.

[25] The OIOS memorandum states that "the Pension Board has informed the General Assembly that the UNJSPF follows the Financial Regulations of the United Nations, and this has been acknowledged by the General Assembly". The Pension Board has not sought approval from the General Assembly to modify any United Nations Financial Regulations *and should therefore continue to comply with the [UN] Financial Regulations that apply to the Fund secretariat"* (emphasis added). In fact, on the recommendation of the Pension Board, the General Assembly has only authorized the Fund "to apply *mutatis mutandis* the Financial Regulations and Rules of the United Nations to its accounting processes and financial reporting in a manner that allows the Fund to be compliant with the International Public Sector Accounting Standards by 1 January 2012" (General Assembly resolution 66/247, Part V, para. 8). This is hardly an acknowledgement by the General Assembly that the Fund must comply with the UN Financial Regulations in carrying out its operations. Moreover, by issuing Fund-specific financial rules, the Pension Board can now directly address the question of accounting standards for the Fund.

[26] OIOS Report on the In-Depth Evaluation of Legal Affairs, E/AC 51/2002/5, para. 78 ("In well-defined areas of the United Nations legal framework, such as constitutional or procedural matters, the advice provided by OLA was authoritative and solution-oriented").

[27] *See id,* para. 82 ("OLA should systematically be involved in the development and review of new programmes … and of new approaches being considered or used in programme delivery, in order to clarify the legal implications of these new developments or approaches").

financial rules is certainly an example of such a new approach to the administration of the Pension Fund. Accordingly, it is unclear why OIOS would have issued comments concerning the regulatory framework of the Pension Fund without first having consulting with OLA. In this connection, in a memorandum of 12 March 2015, which was issued less than two months before the OIOS memorandum and on which the leadership of OIOS was copied, OLA had opined that "while the Pension Fund has on a voluntary basis opted to apply the Financial Regulations of the United Nations to the administration of the Fund, *only the Pension Fund Regulations themselves, along with the associated Administrative Rules, bind the administration of the Fund*" (emphasis added).

Applicability of the UN Financial Regulations and Rules to the Pension Fund

5. The contention by OIOS and the apparent understanding by the Board of Auditors that the Fund is subject to the United Nations Financial Regulations is not consistent with the regulatory framework for the administration of the Fund established by the General Assembly. By its resolution 248 (III), of 7 December 1947, the General Assembly adopted regulations for the establishment and operation of the United Nations Joint Staff Pension Fund in order to provide a UN System-wide retirement and disability benefit scheme. Article 14 of those regulations adopted by the General Assembly in 1947 established the Fund as follows:

"Article 14
"Establishment of a Pension Fund

> "A Fund shall be established to meet the liabilities resulting from these regulations. All moneys deposited with bankers, all securities and investments and other assets which are the property of the Fund shall be deposited, acquired and held in the name of the United Nations. The Fund shall be administered *separately from the assets of the United Nations* by the Joint Staff Pension Board *in accordance with these regulations, and shall be used solely for the purposes provided for in these regulations.*"[28]

Thus, at the time it was established, the General Assembly made clear that the Pension Fund was to be administered exclusively in accordance with regulations promulgated by the General Assembly for the operation of the Pension Fund. Moreover, the Pension Fund was to be administered separately from the financial assets of the United Nations that are subject to the UN Financial Regulations.

6. Over the years the Pension Fund Regulations have been amended on numerous occasions by the General Assembly, such that the Pension Fund Regulations have evolved and have been reorganized.[29] But the salient feature that the administration of the Pension Fund is to be governed exclusively in accordance with the Regulations established therefor by the General Assembly has remained unchanged. Thus, article 4 of the Regulations of the UN Joint Staff Pension Fund currently provides as follows:

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[28] General Assembly resolution 248 (III), annex, emphasis added.

[29] Article 49 of the Pension Regulations, JSPB/G.4/Rev.20, provides that only the General Assembly may amend the Fund's Regulations.

"Article 4
"Administration of the Fund

"(*a*) The Fund shall be administered by the United Nations Joint Staff Pension Board, as staff pension committee for each member organization, and a secretariat to the Board and to each such committee

"(*b*) The administration of the Fund *shall be in accordance with these Regulations and with Administrative Rules, including Financial Rules for the operation of the Fund, consistent therewith* which shall be made by the Board and reported to the General Assembly and the member organizations

"…

"(*d*) *The assets of the Fund shall be used solely for the purposes of, and in accordance with, these Regulations."*[30]

7. Given article 4 of the Fund's Regulations, the operations of the Fund cannot be subject to the UN Financial Regulations. The Fund's Regulations and the corresponding Administrative Rules of the Fund, including Fund-specific Financial Rules, exclusively govern the operation of the Fund. Considering the nature of the Pension Fund, such exclusivity is appropriate.

8. The nature of the Pension Fund is just that: it is a pooled fund of financial resources made available to pay benefits.[31] Consequently, the Regulations adopted by the General Assembly for the Operation of the Fund are *ipso facto* "financial regulations." In this regard, the Fund's Regulations provide for the sources of income to the Fund as well as for the administration of the assets and liabilities of the Fund.[32] The Fund's regulations further provide for the actuarial methodologies for determining the long-term value of the Fund's income, assets and liabilities,[33] as well as for the accounting, auditing and currency of the Fund.[34]

9. By contrast, the United Nations Financial Regulations provide for the financial administration of activities that are periodically programmed and financed by the Member States. As such, the UN Financial Regulations are ill-suited to the Operation of a pension fund that the General Assembly had specifically designed in order to accrue and maintain assets and to pay benefits over the lifetime of its beneficiaries. In this regard, the UN Financial Regulations provide for sources of income to the United Nations through assessments from Member States and from voluntary contributions and other miscellaneous sources.[35] The UN Financial Regulations and Rules also provide for the authority to

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[30] JSPB/G.4/Rev.20, as amended by General Assembly resolution 69/113, of 10 December 2014, emphasis added.

[31] The "Scope and Purpose" provision of the Fund's Regulations states that "the United Nations Joint Staff Pension Fund is a fund established by the General Assembly of the United Nations to provide retirement, death, disability and related benefits for the staff of the United Nations and the other organizations admitted to membership in the Fund". *See id* page 1.

[32] *Id. See* article 17 (derivation of the assets of the Fund), articles 21–26 (contributions and other payments into the Fund), and articles 27–40 (benefit payments and other liabilities of the Fund).

[33] *Id. See* articles 9–13 (Fund's actuaries, actuarial bases and valuations, and pension transfers).

[34] *Id. See* article 14 (annual reporting and auditing of the Fund), article 19(*b*) (accounting for the Fund's assets), and article 47 (currency).

[35] Secretary-General's Bulletin, ST/SGB/2013/4, of 1 July 2013, entitled, "Financial Regulations and Rules of the United Nations", article III, Financial Regulations 3.1 to 3.14.

commit and utilize funds in order to implement programmes based on programme budgets and appropriations therefor voted on by the General Assembly.[36]

10. Thus, the UN Financial Regulations provide for the financial administration of the Organization's periodic operations based on activities programmed, budgeted and ultimately financed mainly through assessments on the Member States, whereas the Pension Fund Regulations provide for the ongoing accrual of assets and payment of long-terms liabilities from the Fund. Given the fundamental differences in approach of the two operations and their respective regulatory schemes, it is inconceivable that the Pension Fund's operations could be subject to the application of the UN Financial Regulations. And, indeed, given the clear provisions of article 4 of the Fund's Regulations, the operations of the Fund are not.

Authority of the Pension Board to Make Financial Rules for the Fund

11. As previously noted, the General Assembly recently amended article 4(*b*) of the Fund's Regulations to expressly authorize the Pension Board to make Fund-specific financial rules. As is stated in article 4(*b*), such Fund-specific financial rules must be consistent with, and thus are subject to, the Fund's Regulations as adopted by the General Assembly Additionally, as is the required practice under article 4(*b*) of the Fund's Regulations, once made by the Board, such Fund-specific financial rules would have to be reported to the General Assembly. This allows the Assembly an opportunity to consider and comment on them. Accordingly, the Pension Board has the authority under the Fund's Regulations to promulgate financial rules for the proper administration of the Fund, and it need not seek further authority from the General Assembly to do so.

12. OLA understands that the proposed Fund-specific financial rules are still being prepared, and that OLA is being separately consulted on their contents. It is further understood that the Fund secretariat will take time to ensure that OIOS, the Board of Auditors and others concerned with the contents of the proposed financial rules are appropriately consulted before the draft financial rules are finalized and submitted to the Pension Board for its consideration. Finally, OLA understands that the proposed Fund-specific financial rules will fill in gaps not otherwise covered by the Fund's Regulations, such as specifying accounting standards, procedures for the certification and payment of benefits authorized under the Fund's Regulations, and the manner in which the Fund's administrative expenses are proposed and allocated from the assets of the Fund. To the extent that such gap-filler financial rules can be drafted in a manner consistent with the wording of UN Financial Regulations and Rules, particularly when common administrative practices, such as in budgeting, are involved, this would be advisable. However, the only requirement for the Fund-specific financial rules is that they be consistent with, and thus subject to, the Fund's Regulations.

Mandate of the Board of Auditors to Audit the Fund's Operations

13. Lastly, as previously noted, OLA understands that representatives of the Board of Auditors have taken the position that the BOA's mandate to audit the operations of the Fund derives from article VII of the United Nations Financial Regulations and Rules.

[36] *Id. See* article II, Financial Regulations 2.1 to 2.14 (budgets), and article V, Financial Regulations 5.1 to 5.14 (utilization of appropriated funds).

Given that the Fund's Regulations exclusively govern the operations of the Fund, this cannot be the case. Moreover, OLA understands that there is some uncertainty in the Board of Auditors about how its audit reports on the operations of the Fund should be transmitted to the General Assembly. Article 14 of the Regulations of the Fund provides the mandate for the Board of Auditors to audit the operations of the Fund and specifies how the audit reports of the Board of Auditors concerning the operations of the Fund should be transmitted to the Assembly:

"Article 14
"Annual Report and Audit

"(*a*) The [Pension] Board shall present to the General Assembly and to member organizations [of the Fund], at least once every year, a report, including financial statements, on the operation of the Fund and shall inform each member organization of any action taken by the General Assembly upon the report.

"(*b*) There shall be annual audits of the operations of the Fund, in a manner agreed upon between the United Nations Board of Auditors and the [Pension] Board. An audit report on the accounts of the Fund shall be made every year by the United Nations Board of Auditors; a copy of the audit report shall be including in the report under [Article 141] (*a*) above."[37]

14. Based on the foregoing, the mandate of the Board of Auditors to audit the operations of the Fund is exclusively derived from article 14 of the Fund's Regulations. Article VII of the United Nations Financial Regulations and Rules has no bearing *per se* on the manner in which the Board of Auditors audits the operations of the Fund. In particular, article 14(*b*) of the Fund's Regulations requires the Board of Auditors to agree with the Pension Board on the manner in which the Fund's operations are audited. It would be enormously helpful for both the Board of Auditors and the Pension Board to reduce such an agreement to writing.[38] Finally, article 14(*b*) makes clear that the Board of Auditors should transmit its audit reports on the operations of the Fund to the General Assembly by including copies of those audit reports in the Pension Board's annual report to the General Assembly.

Conclusion

15. The operations of the United Nations Joint Staff Pension Fund are exclusively governed by the Regulations of the Fund that have been adopted by the General Assembly. The Fund is not subject to the United Nations Financial Regulations. The General Assembly has authorized the Pension Board to promulgate Fund-specific financial rules to the extent that such financial rules are consistent with the Regulations of the Fund. In matters of common application, such as administrative matters of budgeting, accounting standards,

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[37] JSPB/G.4/Rev.20.

[38] In Annex XI to its report to the Assembly, A/69/9, the Pension Board proposed to amend article 14(*b*) to require that an "agreement with the Board of Auditors on the terms of reference for the annual audits of the operations of the Fund shall be set out in an annex to the Fund's Administrative Rules". However, the Assembly did not approve amending article 14(*b*) to require that such an agreement be reduced to writing and added to the Fund's Administrative Rules. See General Assembly resolution 69/113, para. 13.

etc., such Fund-specific financial rules could be drafted to be consistent with the UN Financial Regulations and Rules, provided that this is to be regarded only as a matter of convenience and to avoid duplication where possible. Finally, the mandate for the Board of Auditors to audit and report on the operations of the Fund is exclusively governed by article 14(*b*) of the Fund's Regulations. It would be helpful for the Board of Auditors and the Pension Board to agree on the manner in which such audits are to be carried out.

16. You may wish to bring the foregoing views of OLA to the attention of the Pension Board and any other relevant parties interested in this matter.

7 July 2015

Enclosure 3: Inter-office memorandum to the Under-Secretary-General for Management

[…]

Subject: Authority of the Controller to Designate Banking Institutions in which the Funds of the United Nations Shall be Kept

1. I refer to your memorandum of 16 December 2013 (copy enclosed), addressed to both the Under-Secretary-General for Internal Oversight Services and the United Nations Legal Counsel. By your memorandum, you seek OLA and OIOS's views and recommendations in connection with the memorandum, dated 22 November 2013, from the Controller regarding the authority of the Controller to designate banking institutions in which the funds of the United Nations shall be kept. The particular issue raised by the Controller's memorandum is whether the Controller's authority under the Financial Regulations and Rules to designate banking institutions can be exercised outside of any requirements to acquire services for the Organization through procurement exercises conducted in accordance with the UN Financial Regulations and Rules.

2. Financial Regulation 4.15 provides that "the Secretary-General shall designate the bank or banks in which the funds of the Organization shall be kept." Financial Rule 104.4 further specifies that "the Under-Secretary-General for Management shall designate the banks in which the funds of the United Nations shall be kept, shall establish all official bank accounts required for the transaction of United Nations business and shall designate those officials to whom signatory authority is delegated for the operation of those accounts." In accordance with Financial Rule 101.1 and Administrative Instruction, ST/AI/2004/1, of 8 March 2004, entitled, "Delegation of Authority under the Financial Regulations and Rules of the United Nations" (the "Delegation of Authority AI"), the authority of the Under-Secretary-General under Financial Rule 104.4 has been delegated to the Controller.

3. In other words, by Financial Regulation 4.15, the General Assembly has given the Secretary-General the authority to designate the bank or banks in which the funds of the Organization shall be kept. That authority has been delegated to the Under Secretary-General for Management by Financial Rule 104.4, who has delegated that authority to the Controller by Financial Rule 101.1 and the Delegation of Authority AI.

4. However, Financial Regulation 5.12 provides that "procurement functions include all actions necessary for the acquisition by purchase or lease, of property, including products and real property, and of services, including works." The designation of banks

to hold the funds of the Organization necessarily involves the acquisition of commercial banking services by the Organization. Thus, the designation of banks falls within such a definition of procurement functions. Financial Regulation 5.12 also states that "the following principles shall be given due consideration when exercising the procurement functions of the UN: (*a*) best value for money; (*b*) fairness, integrity and transparency; (*c*) effective international competition; [and] (*d*) the interests of the United Nations." Consequently, in exercising the authority given under the Financial Regulations and Rules to designate banks to hold the UN's funds, the Controller would be exercising the procurement functions of the UN. Thus, the Controller should give due consideration whenever doing so to the principles set forth in Financial Regulation 5.12.

5. Financial Rule 105.13(*a*) provides that "the Under-Secretary-General for Management is responsible for the procurement functions of the United Nations, shall establish all United Nations procurement systems, and shall designate the officials responsible for performing procurement functions." In the Delegation of Authority AI, the Under-Secretary-General for Management further delegated such responsibility to the Assistant Secretary-General for Central Support Services. That Financial Rule and the delegations of authority thereunder cannot override the separate authorization given to the Secretary-General under Financial Regulation 4.15 and the delegations made under Financial Regulation 104.4 and the Delegation of Authority AI to the Controller regarding the designation of banks.

6. Accordingly, under the Financial Regulations and Rules and relevant administrative issuances thereunder, the Controller has been given specific authority to designate the banks in which the Organization's funds shall be kept.[39] In designating banks to hold the UN's funds, however, the Controller must be guided by and give due consideration to the principles for procurement set forth in Regulation 5.12. In certain circumstances, the Controller may wish to make use of the procurement machinery of the Organization, as elaborated in Financial Rules 105.13 to 105.19.

7. Based on the foregoing, you may wish to work with the Controller and the Assistant Secretary-General for Central Support Services to develop criteria as to when and how the Controller could make use of the procurement machinery of the Organization, as elaborated in Financial Rules 105.13 to 105.19, when designating banks in which the funds of the Organization shall be kept.

20 December 2013

[39] Pursuant to Financial Rule 101.1 and under section 1 of Administrative Instruction, ST/AI/2004/1, on the delegation of authority under the Financial Regulations and Rules of the United Nations, the Controller and the Assistant Secretary-General for Central Support Services "may, in turn, delegate authority and responsibility to other officials, as appropriate." Thus, for example, the Controller could delegate authority to designate banks to the United Nations Treasurer.

(*b*) Inter-office memorandum to the Director of a unit in the Department of Peacekeeping Operations concerning an arrangement between a Member State and the participating United Nations organizations for the establishment of a trust fund for that Member State

Terms of Reference of a United Nations Trust Fund—Independence of the Secretary-General pursuant Article 100 of the Charter of the United Nations and United Nations Staff Regulation 1.2 (d)—The United Nations has the sole authority to make the final decisions on the allocation of United Nations funds

1. I refer to your memorandum of 1 June 2016, requesting OLA's review of an umbrella "Arrangement between the Government of [State], through the Administrative Department for the Presidency of [State] and the [State] Presidential Agency of International Cooperation, […], and the Participating United Nations Organizations in [State] signing this Arrangement, for the establishment of the [Trust Fund]" (hereinafter the "Agreement"). We note that the Agreement has already been signed by the Government of [State], and you have indicated that it has been signed by UNDP, UN Women, FAO, the Office of the UN Resident Coordinator in [State], OCHA, UNICEF, UNESCO, UNODC, UNFPA and WFP. The [Trust Fund] is managed by United Nations Development Programme (UNDP) as the Administrative Agent, under UNDP's Financial Regulations and Rules according to your memorandum. UNMAS [United Nations Mine Action Service]'s participation in the Fund "will provide an opportunity to receive funding through the United Nations Voluntary Trust Fund for Assistance in Mine Action to support mine action projects in [State]."

2. I further refer to the meeting of 17 June 2016 between members of our respective offices, as well as to subsequent communications between our offices regarding the Terms of Reference (ToR) for the [Trust Fund], including an exchange of emails on 22 and 29 June. Although the ToR were not attached to your memorandum of 1 June, we were subsequently provided with the English translation of the ToR, dated 17 February 2015, and understand that, pursuant to such terms, the Steering Committee governing the [Trust Fund] will be responsible for, inter alia, the "supervision" of the Fund, "[a]pprov[ing] projects to be financed by the Fund, [a]pprov[ing] Funds' direct costs, especially those related to the Secretariat support operations, evaluations and audits", making fund allocation decisions and overseeing the effective monitoring and evaluation of the activities financed by the Fund (see, *e.g.*, section 5.1.1 of the ToR). The Steering Committee may also "[a]pprove and update the Fund's Terms of Reference, as required" (see sections 5.1.1 and 13 of the ToR). We further understand that the Steering Committee will include non-UN entities, such as the Government of [State] (*i.e.*, "the Minister Counsel[l]or for the Post-Conflict, the Director of […] (International Cooperation Presidential Agency), [State], and the Ministry of Foreign Affairs or the Director of the National Planning Department; the latter in a rotational basis", two representatives of the "contributors" (donors), in rotation, and "[t]wo [State] civil society/private sector representatives designated by the President of [State]" *(see* section 5.1.1).

3. The funds in the [Trust Fund] may be disbursed to UN System organizations, Governmental entities and non-Governmental entities (see section 5.3 of the ToR). In order to receive the funds, the UN System organizations as well as the Governmental and non-Governmental entities must sign a Memorandum of Understanding with UNDP as the Administrative Agent of the [Trust Fund] (see *Ibid*.).

4. While the Agreement itself does not raise concerns from a legal point of view, the ToR for the [Trust Fund] are legally problematic. As explained by my colleagues in the aforementioned meeting and communications with UNMAS, the inclusion of non-UN entities in the Steering Committee that makes fund allocation decisions in the [Trust Fund] is not consistent with Article 100 of the Charter of the United Nations and with Staff Regulation 1.2, which governs the United Nations. While it would not be objectionable for external entities to provide advice and suggestions on the use of UN [Trust Fund] funds, the authority to make decisions on which projects to approve for funding needs to remain solely with the Organization.

5. Pursuant to Article 100 of the Charter of the United Nations, "[i]n the performance of their duties the Secretary-General and the staff shall not seek or receive instructions from any government or from any other authority external to the Organization." This principle is elaborated in the Staff Regulations of the United Nations, which embody the fundamental conditions of service and the basic rights, duties and obligations of the United Nations staff members. Pursuant to UN Staff Regulation 1.2 (*d*), "[i]n the performance of their duties staff members shall neither seek nor accept instructions from any Government or from any other source external to the Organization." Indeed, upon becoming UN international civil servants, staff members must take a written oath that they will not "seek or accept instructions in regard to the performance of [their] duties from any Government or other source external to the Organization." (Staff Regulation 1.1 (*b*)).

6. Last, but not least, once donors' contributions are received by the UN, including UNDP, they become UN funds, and pursuant to the UN and UNDP Financial Regulations and Rules, only the Organization and its officials are authorized to make decisions with respect to the use of such UN funds. In making such decisions, UN staff members may not accept instructions from external sources, for the reasons mentioned above.

7. In view of the foregoing, we recommend that, before UNMAS signs the Agreement, the UNDP [Trust Fund] Office be requested to revise the ToR of the [Trust Fund] and the Agreement in order to clarify that, while the Government of [State] and its representatives may provide advice and recommendations with respect to which projects to fund from the [Trust Fund], the authority to make the final decisions on the allocation of funds needs to rest with the United Nations.

9 August 2016

(*c*) Internal email message concerning the administrative format for issuance of standing administrative measures ("SAMs")

Recommendation to set out SAMs in an administrative instruction (AI)—Delegations of authority should be based on an AI in accordance with section 3 of ST/SGB/2015/1 and Financial Rule 101.1 of ST/SGB/2013/4

I refer to your request for OLA's advice on whether the standing administrative measures ("SAMs") for crisis response and mission start-ups should be issued in the form of an administrative instruction ("AI").

We understand that some of the SAMs do not introduce new policies, but identify opportunities to introduce flexibility where necessary, within existing human resources

frameworks. You noted that, in the context of a recent Staff Management Committee meeting, staff raised concerns about using the form of an AI if some of the SAMs have already been promulgated in other AIs. Their concerns are based on the notion that the new AI would simply reproduce certain provisions from other AIs, without including important contextual Information from those AIs. Staff consider that such context needs to be taken into account to properly apply the already existing provisions contained in the new AI. Staff are also concerned that, if the same provisions exist in more than one AI, there might be uncertainty about which AI applies or takes precedence in any given situation. Staff suggest that, in view of those concerns, the format of an Information Circular ("IC") might work better.

While those concerns are understandable, we consider that they will ultimately not apply in the present case. The new AI will not simply reproduce existing provisions out of context, but will specify the particular circumstances and manner in which its provisions may be applied (*i.e.*, in start-up or crisis situations). For the same reason, there should be no uncertainty about which AI applies or takes precedence, as application of the new AI will only be triggered under very limited and expressly delineated circumstances (*i.e.*, by decision of the Secretary-General, who may then either terminate the SAMs or allow them to expire on their designated end date).

In our view, the SAMs should be set out in an AI. We note that several of the SAMs involve new delegations of authority ("DOAs"). For such DOAs, the issuance of an AI would be in accordance with section 3 of ST/SGB/2015/1 (Delegation of authority in the administration of the Staff Regulations and Staff Rules), which states that the USG/DM may delegate authority "through the issuance of an administrative instruction, including to heads of departments and offices, offices away from Headquarters, regional commissions and other entities." The issuance of an AI would also accord with Rule 101.1 of ST/SGB/2013/4 (Financial Regulations and Rules), which states that the USG/DM may "delegate, by administrative instruction, authority for specified aspects of the Financial Regulations and Rules. Such administrative instructions will state whether the delegated official may assign aspects of this authority to other officials."

It would technically be possible to issue AIs only for the new SAMs and then (or simultaneously) issue an information circular setting out the entire SAM framework along the lines of the recently issued Information circular ST/IC/2016/25 on the Anti-Fraud and Anti-Corruption Framework of the UN Secretariat. However, since most of the SAMs are new, it seems cleaner and simpler to issue only one AI with the entire framework.

We hope the above will assist you and we are happy to discuss if you have any questions.

[…]

28 October 2016

3. Procurement

(*a*) Inter-office memorandum to concerning the review of a Statement of Services for the fast track migration of United Nations email accounts from [Company] to [Company] pursuant to the Master Business Agreement between the United Nations and [Company] and its related agreements

Need to eliminate the risk that a third party could access United Nations data in violation of United Nations privileges and immunities—Decisions to use a public cloud should be reviewed by the relevant ICT governance entities in accordance with relevant administrative issuances

1. I refer to PD's request, dated 30 August 2016, seeking OLA's review of a draft Statement of Services between the United Nations and [Company] for the provision of services by [Company] to migrate the UN's email accounts from an IBM Domino 7 0 3+ source environment to [Software]. The Statement of Services will be signed by the UN and [Company] pursuant to, (*a*) the Master Business Agreement between the UN and [Company] ([…]), dated 16 April 2004 ("MBA"), and (*b*) the Master Services Agreement between the UN and [Company] dated 19 April 2004 ("MSA"), that was issued pursuant to the MBA. The services to be provided by [Company] are a benefit already included in and come as part of the [Software] licenses purchased by the UN. Accordingly, [Company] would not charge any additional fee for the performance of these services. However, [Company] requires a Statement of Services to be concluded between the parties in order to begin providing such services and to clarify the responsibilities of the parties under the proposed arrangement.

A. *Background*

2. In 2014, OLA assisted PD, in consultation with OICT, in negotiating the terms and conditions of seven (7) [Company] documents, […] (the "[Company] Documents"). OLA understands that as the email migration may eventually entail hosting of the bulk of UN users in the external cloud (with the balance of UN user mailboxes hosted in-premises), the optional Online Services[1] terms negotiated with [Company] in 2014 would become operational. […], OLA had highlighted generally the risks associated with the UN's use of cloud-based services, the terms and conditions for which are set forth in the document entitled, […].

3. The migration of UN email accounts to the external cloud raises considerations of security and confidentiality of UN data and issues in relation to the UN's privileges and immunities. When OLA assisted PD to negotiate the [Company] Documents referenced above, OLA included provisions in the applicable documents in order to address such concerns from the legal perspective, including provisions asserting the inviolability of UN data wherever located and by whomsoever held. However, the open nature of the public cloud means that UN data could be seized pursuant to subpoenas and, in the [State], for example, [Domestic legislation] orders, targeting other cloud tenants or even the UN itself Such actions would not be consistent with the UN's privileges and immunities as set forth in the 1946 Convention on the Privileges and Immunities of the United Nations ("UN Convention").

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[1] As defined in the document, […] signed by the UN on 26 November 2014.

4. This was the case with the events that occurred in relation to the UN's contract with [Company] for the provision of the metropolitan area network, local telephony and internet services under Contract No. [date] (the "[Company] Contract"). In that case, on [date], the New York Times published an article entitled, *"[Company] Helped [...] on Internet on a Vast Scale—emails in the billions—'partnership' included wiretapping at UN Headquarters"*. According to that article, [Company] provided technical assistance to the [State] in carrying out a secret court order permitting the wiretapping of all internet communications at the United Nations Headquarters. The [Company] Contract expressly prohibited [Company] from seeking or accepting instructions from any authority external to the United Nations in connection with the performance of [Company]'s obligations under the [Company] Contract and further stipulated that should any authority external to the UN seek to impose any instructions concerning or restrictions on [Company]'s performance under the [Company] Contract, [Company] would have to promptly notify the UN and provide all reasonable assistance required by the UN. In that case, the UN asserted its privileges and immunities under the UN Convention with the Member State concerned. But, such assertion could only be made after the violations had occurred. Accordingly, the Organization cannot eliminate the risk that a third party will gain access to UN data under the proposed arrangement.

B. *Business Case*

5. As noted in the last attachment to the enclosed memorandum dated 24 November 2014, titled the *"Statement by the Legal Advisers of the Specialized, Related and Other Organizations of the UN Common System with respect to the employment of cloud computing services,"* the Legal Network acknowledged that the use of the public cloud carries with it numerous benefits. Nonetheless, the Legal Network remained cautious about such use and emphasized that, in light of the potential implications of cloud computing on the privileges and immunities of the UN System Organizations, the decision to use the public cloud should be taken at the highest management or inter-governmental governance level. OLA has been provided with a copy of *"The United Nations Future Email System Project"* Business Case ("Business Case"), signed by three OICT officials in August 2015. OLA notes that Option 3 of the Business Case document: "Hybrid Exchange Infrastructure—Migrate directly the bulk of users to [Software] in the external cloud, with a selected group of users handling confidential information hosted in the in-premise Exchange," has been endorsed. However, it is not clear whether the policy decision contained in the Business Case document has been reviewed by the applicable boards and committees in the ICT Governance structure published on *iSeek* and in accordance with applicable administrative issuances, for example, ST/SGB/2003/17 and ST/AI/2005/10.

C. *Draft Statement of Services*

6. The enclosed draft Statement of Services has been developed alter extensive discussions among representatives of PD, OICT, OLA and [Company], and we understand that it is acceptable to both PD and OICT at the working level. As stated above, the attached Statement of Services is subject to the provisions of the Master Business Agreement and the Master Services Agreement and is, therefore, acceptable from the legal perspective.

Nevertheless, OLA recommends that PD, in consultation with OICT, review the enclosed Statement of Services in order to ensure that it accurately reflects the proposed arrangement from the commercial and operational perspectives, respectively. OLA also wishes to highlight for PD, in consultation with OICT, the matters set forth in the *Attachment* to this memorandum [Attachment omitted].

7. In relation to email archives, it is not clear in the draft Statement of Services whether the services being provided by [Company] thereunder would include any necessary computer protocol or applications to transition or recover data from UN users' email archives in the [Software] databases. As email archives are used by many UN users on a daily basis, if such matters are not already addressed in the Statement of Services, PD may wish to consult with OICT to see whether such matters would require further elaboration.

D. *Upcoming requirements*

8. We note that OLA was recently requested to review other [Company] documents in relation to the transition of UN email accounts to an [Software] environment by 31 December 2017. We also understand that additional requests may be forthcoming. Should OICT know now that it will be seeking further services from [Company] in relation to such migration or related matters and should further agreements need to be reviewed and negotiated with [Company], for which OLA's assistance will need to be sought over the next 12 months or so, we would appreciate receiving a copy of a Joint OICT and PD project plan showing OICT's upcoming requirements in order to assist OLA's planning for future requests and in order to better understand OICT's overall ICT strategy for the Organization. This should also assist OLA to provide advice on how to best manage upcoming Statements of Services or other [Company] documents in order to both meet OICT's timeframes and maintain a coherent set of agreements, together with their subordinate documents, with [Company].

30 September 2016

(*b*) Inter-office memorandum to the Director, Office of Central Support Services, Department of Management concerning the terms of a performance security required under a contract between the United Nations and a vendor

Letters of credit by vendors should conform with the United Nations standard form of letter of credit—United Nations policy and practice on outsourcing set forth in the General Assembly resolutions 55/232 and 59/289

1. I refer to PD's memorandum, dated 17 November 2016, requesting OLA's assistance in reviewing a draft irrevocable letter of credit proposed by [Company] in connection with Contract No. […] concluded between the UN and [Company] for the provision of personnel in support of Commercial Activities Services (the "Contract").

2. The Contract, which came into effect as of 1 November 2016, has an initial term that expires on 30 September 2019, with an option for the UN to extend the term for two additional periods of up to one year each. Article 9 of the Contract requires [Company] to provide a performance security in the form of a standby letter of credit or an independent bank guarantee in accordance with the form set forth in Annex D to the Contract, or a

similar instrument acceptable to the UN in its sole discretion, in the amount of US$ […]. According to article 9 of the Contract, [Company] was to provide such a performance security to the UN within ten days following the effective date of the Contract. We understand from PD's memorandum that, after the Contract was signed, [Company] submitted a draft irrevocable letter of credit which includes terms that are different than those set forth in the form of a standby letter of credit that PD provided to [Company] during the solicitation process for this requirement as well as article 9 of the Contract.

3. Based upon the foregoing, we have reviewed the draft irrevocable letter of credit proposed by [Company] and found it to be legally objectionable in several aspects, particularly as that draft provides that: (i) the letter of credit is due to expire in less than one year on 27 October 2017 contrary to the requirements of article 9.4 of the Contract, which states that the letter of credit must remain valid and in force until, at least, 30 December 2019; (ii) the letter of credit incorrectly states that the letter of credit is being issued by the issuing bank in connection with a lease agreement between the UN and [Company]; (iii) any legal action regarding the letter of credit must be commenced only in Supreme Court, State of New York, New York County; and (iv) the letter of credit will be governed by the substantive laws of the State of New York.

4. In view of the foregoing, and based on information provided by PD, we have drafted and enclose for PD's consideration a draft letter of credit for use in connection with the Contract ("Revised Draft"). The Revised Draft is largely based on the UN's standard form of letter of credit.

5. In order to ensure the suitability of the enclosed Revised Draft from commercial and operational perspectives, we recommend that PD review the Revised Draft and provide us with any comments that PD may have in order for us to further modify the Revised Draft to reflect PD's comments, prior to PD's sharing the Revised Draft with [Company]. However, if PD is satisfied with the Revised Draft, we suggest that PD forward it to [Company] for its consideration.

6. Based on the review of the Statement of Work included in the Contract, we note that the Contract requires [Company] to provide ushers, bus persons, administrative and clerical personnel ("Personnel") in support of the activities of the Special Services Section ("SSS") and the Travel and Transportation Section ("TTS") on an as-needed basis. It appears that the Contract is for the provision of manpower to support SSS's and TTS's operations, rather than a contract for the provision of services by [Company]. With respect to such Personnel, the Statement of Work attached to the Contract states that the UN will have the responsibility, *inter alia,* for: (i) managing the work of the Personnel; (ii) monitoring daily time and attendance of the Personnel; (iii) coordinating with the designated representative of [Company] on the Personnel's training, replacements, working hours/schedules, staff incidents, staff illness on the job, *etc.;* (iv) training the Personnel in the functions required for their individual assignment; and (v) providing evaluation of the Personnel every six months and providing feedback on performance as required. In this connection, we note that there is a risk that the various responsibilities assumed by the UN under the Contract could lead to the Organization being seen as the *de facto* employer of the Personnel, irrespective of contractual stipulations to the contrary, which could, in turn, expose the Organization to potential claims and liability. In order to minimize such

liability, we would recommend that the Organization enter into contracts with vendor providing such services in question rather than simply providing personnel or manpower.

7. Finally, it is unclear whether the procurement of the services to be provided by the Personnel under the Contract is in accordance with the Organization's policy and practice on outsourcing, which are set forth in the General Assembly resolutions 55/232 of 16 February 2001 and 59/289 of 29 April 2005. We recommend that PD, in consultation with SSS and TTS, review the activities to be undertaken under Contract in light of the criteria, guidelines and goals established by the General Assembly in its resolutions 55/232 and 59/289 in order to determine whether the engagement of the Personnel under the Contract conforms with the outsourcing practices of the Organization.

21 November 2016

Enclosure: Standby letter of credit

Date [ ]

Beneficiary United Nations,

United Nations Headquarters

New York, NY

Irrevocable standby letter of credit number: [ ]

1. At the request and for the account of […] ("Applicant"), we hereby issue our irrevocable documentary credit in your favor in the aggregate amount of USD […], effective immediately, which shall be available by sight draft or drafts presented at our office at [address], New York, New York, when accompanied by your signed and dated statement worded substantially as follows:

> "The undersigned representative of the United Nations ("Beneficiary") represents that the Beneficiary is entitled to draw upon the referenced letter of credit in the aggregate amount of USD […])"

2. We hereby engage to honor your drafts when presented in accordance with the terms of this credit.

3. Partial drawings are permitted. This letter of credit may be drawn down in multiple drafts.

4. This letter of credit is governed by the International Standby Practices (ISP98), ICC document No. 590.

5. This letter of credit expires with our close of business on 31 December 2019 it is a condition of this letter of credit that it shall be automatically extended, without amendment except as to the extended expiration date, for successive twelve month periods (and a final extension period that may be less than twelve months) up to and including 31 December 2021. We hereby agree to give you written notice of such extensions in writing not later than the (30th) thirtieth day preceding any date on which this letter of credit would otherwise expire, and on or before the same date of each year thereafter during the term hereof if for any reason we determine that this letter of credit shall not be extended, we hereby agree to send you written notice thereof in writing by certified mail, return receipt requested, at

least thirty (30) days prior to the expiration date in the event this credit is not extended for an additional period as provided above, you may draw up to the full balance hereunder.

6. Such drawing is to be made by means of a draft on us at which must be presented to us before the then expiration date of this letter of credit.

7. This letter of credit cannot be modified or revoked without your written consent.

8. Your rights under this letter of credit shall be performed strictly in accordance with the terms of this credit, irrespective of any lack of validity or uneforceability of the contract or the existance of any claim, set-off, defense or any other rights which the applicant may have against yourselves your rights under this credit shall be enforceable without the need to have recourse to any judicial or arbitral proceedings any obligations hereunder shall be fulfilled by us without any objection, opposition or recourse.

9. This credit is not transferable or assignable in any respect or by any means whatsoever.

10. Nothing herein or related hereto (i) shall be deemed a waiver or an agreement to waive any of the privileges and immunities of the United Nations, or (ii) shall be interpreted or applied in a manner inconsistent with such privileges and immunities.

Yours faithfully,

For and on behalf of […]

{Bank's Official Seal}

Name, Title

At sight, pay to the order of the United Nations the sum of […] United States dollars (USD […])

This Malt is presented pursuant to Letter of Credit No. [ ] issued by the drawee and dated [date]

THE UNITED NATIONS

Name

Title

Date

To […]

[Address of […]]

(*c*) Inter-office memorandum to the Director, Office of Central Support Services, Department of Management concerning the procedure for payment and reimbursement of excise duties under a fuel contract

REIMBURSEMENT OF EXCISE TAXES FOR FUEL LOCALLY PURCHASED TO THE UNITED NATIONS—AMENDMENT OF A CONTRACT TO IMPLEMENT REIMBURSEMENT PROCEDURES AGREED BETWEEN THE UNITED NATIONS, A VENDOR AND A MEMBER STATE IS DESIRABLE—EXCHANGE OF LETTERS AS AN ALTERNATIVE

1. I refer to PD's request for advice with respect to Contract No. […] (the "Contract") between the UN and [Company] in relation to the imposition and refund of excise taxes

on fuel purchased locally in [State]. I also refer to the various communications between representatives of OLA and PD, at the working level, in relation to this matter.

I. *Background*

2. The Contract was signed on [date]. Under the Contract, [Company] purchases bulk diesel locally from its subcontractor, [Subcontractor]. As part of the purchase price of such locally purchased fuel, [Company] is invoiced excise duty.

3. Until April 2016, [Company] had been seeking reimbursement of such excise duty from the [State] Revenue Authority […]. However, in April 2016 in a meeting, the [Revenue Authority] advised [Peacekeeping operation] and [Company] that only the tax-exempt entity, *i.e.,* [Peacekeeping operation], may directly receive tax exemption reimbursement from the Government. Accordingly, the Mission has suggested that instead of [Company] seeking reimbursement of such excise taxes, the Mission would have to do so, using the procedure agreed with the [Revenue Authority].

4. [Company] has also informed PD, *via* e-mail dated 26 June 2016, that it has not yet received reimbursement of excise duties amounting to US$ […], as a result of the [Revenue Authority]'s requested change in procedure for reimbursement of excise duties.

5. OLA understands that both the Mission and [Company] have asked PD whether an amendment to the Contract needs to be concluded in order to reflect the fact that [Company] should pay the excise tax on locally purchased fuel and invoice the Mission for such excise tax. More specifically, PD is seeking OLA's advice, (i) on whether an amendment to the Contract is necessary in order to implement the reimbursement procedures agreed between the UN, [Company] and the [Revenue Authority], and (ii) if the inclusion of excise duties into the Contract for the purpose of outlining the reimbursement procedures is acceptable.

II. *The Memorandum between the United Nations and [State]*

6. The Memorandum of Understanding between the United Nations and [State] concerning the use of Facilities at […] by the United Nations, dated 20 July 2010 ("MOU")[1] provides, in article VIII, in relevant part as follows:

> "1. (*c*) *Fuel* and lubricants for United Nations' official use and activities may be imported, exported or *purchased in [State] free of* customs duties, and *all taxes*, prohibitions and restrictions". (Emphasis added).
>
> 2. "In respect of equipment, provisions, supplies, *fuel*, materials and other goods and services purchased in [State], or otherwise imported into [State] for the official and exclusive use of the United Nations, [State] shall make appropriate administrative arrangements for the *remission of any excise tax*, or monetary contribution payable as part of the price, including value added tax (VAT)." (Emphasis added).

[1] OLA notes that an earlier MOU, the "Memorandum of Understanding between the United Nations and [State] concerning the activities of the [Peacekeeping operation] in [State]" was signed between the UN and the Government of [State] on [date].

III. *Conclusion*

7. While both paragraphs in the MOU refer to the purchase of fuel locally and exemption from certain taxes on such purchases, paragraph 2 makes specific reference to "excise tax". In this connection, the MOU contemplates that in respect of fuel purchased in [State], the Government shall make appropriate administrative arrangements for the remission of excise tax. Accordingly, it is for the United Nations (represented by [Peacekeeping operation]) to seek reimbursement of the excise taxes which [Company] incurs when purchasing fuel locally for the official purposes of [Peacekeeping operation] and for [Peacekeeping operation] to seek such reimbursement.

8. In order to ensure that such reimbursement occurs smoothly, it is important that there is a clear understanding between the Mission, the Government and [Company] about the procedures to be followed when [Company] purchases the fuel locally and incurs excise taxes *(e.g.,* (*a*) the documents to be obtained and to be passed to the United Nations for the reimbursement process including, OLA assumes, evidence that the excise tax has been paid to the Government in each instance). It would be advisable to obtain the Government's requirements for such procedure in writing.

9. While it is not necessary to include this procedure in a Contract amendment from the legal perspective, should the Parties wish to do so, they certainly could but only with respect to the arrangements between the UN and […] The UN's arrangements with the Government are outside the scope of the Contract. An amendment may be desirable in order to provide clarity for both the UN and [Company] and provide [Peacekeeping operation] with the mechanism "to open a dedicated excise duty budget line and use the funds to pay the excise duty portion to [Company] and replenish the line by receiving the refunds from the [Revenue Authority]".[2] Alternatively, the Parties could reflect the procedure in an exchange of letters.

10. While PD has not requested advice in relation to the US$ […] that [Company] has not been reimbursed by the Government *(see* paragraph 4, above), OLA recommends that [Peacekeeping operation] work with [Company] and the Government in order to resolve this issue amicably and as soon as possible. If, after such consultations, it is determined that [Company] invoice the United Nations for the US$ […] in order to enable the UN to seek reimbursement from the Government, OLA recommends that [Peacekeeping operation] first consult with the Government in order to verify the procedure to be followed in relation to this amount as well as the documents required for the refund to be processed.

20 December 2016

(*d*) Inter-office memorandum to the Director, Office of Central Support Services, Department of Management concerning the suspension of a vendor from the United Nations Register of Vendors

The Procurement Division has sole authority over vendor registration and management pursuant Chapter 7 of the United Nations Procurement Manual—Article 7.13 (2) of the United Nations Procurement Manual requires the suspension or removal of vendors from the Register of

[2] See [Peacekeeping operation] Note-to-File, dated 24 June 2016, paragraph 3.

Vendors to be "based on substantial and document evidence"—The Procurement Manual generally regulates vendors at the corporate level and not with individuals associated with vendors—Procurement Division's practice of entering a note to file regarding individuals associated with a vendor

1. I refer to PD's memorandum, dated 15 September 2016, seeking OLA's advice regarding a recommendation by the Vendor Review Committee ("'VRC") to suspend from the UN's Register of Vendors [Name], founder and CEO of suspended vendor [Company]. I also refer to subsequent communications between representatives of our Offices, at the working level, regarding this matter.

Background

2. We understand from the documents provided to OLA that on 31 July 2014, based on VRC's recommendation at VRC […] of [date], the ASG/OCSS decided to suspend [Company] from the Register of Vendors due to significant performance issues under [Peacekeeping operation] Contract […]. Following the ASG/OCSS's decision to suspend [Company], [Company] requested review of the suspension decision, and [Company]'s vendor registration status was again reviewed by the VRC at […] of [date]. At that meeting, VRC took note of the fact that [Company] had not requested reinstatement and concluded that no changes to the registration status were required. According to the minutes of VRC meeting […] of [date], during the suspension period, [Company] was not eligible for new contract awards, and [Company] and its subsidiaries were not be permitted to participate in any new solicitations. It is our understanding that, to date, [Company] remains listed as an "ineligible vendor" in UNGM [United Nations Global Marketplace] and as a "suspended vendor" on the UN's Register of Vendors.

3. By a memorandum, dated 19 August 2016, DFS provided PD with OIOS report No. […], dated [date] ("OIOS Report"), regarding an OIOS audit of [Company] in relation to a different [Peacekeeping operation] Contract, […]. The OIOS Report found that:

(i) [Name], [Company], failed to cooperate in an authorized OIOS investigation, as stipulated in paragraph 23.2 of the United Nations General Conditions of Contract (signed as part of contract […]; and

(ii) [Company] failed to provide OIOS investigators with separate and complete records as stipulated in Article 14 of contract […].

4. The OIOS Report concluded that "[t]he established facts constitute[d] reasonable grounds to conclude that [Name] and [Company] failed to comply with Article 14 of contract […] and paragraph 23.2 of the United Nations General Conditions of Contract." Based on the above, OIOS recommended that: (1) "[Company] be removed from the United Nations Procurement Division Approved Vendor List[;]" and (2) "[Name] be removed from the United Nations Procurement Division Approved Vendor List[.]"

5. On 2 September 2016, noting DFS's memorandum of 19 August 2016, the VRC reviewed [Company]'s and [Name]'s status in VRC meeting […]. The VRC again noted that since its Suspension in July 2014, [Company] had not requested to be reinstated and remained as a suspended vendor. Therefore, the VRC recommended no further action with respect to [Company] itself. The VRC also recommended that [Name] be added to PD's suspension list.

Analysis

6. The issue raised by the VRC's recommendation at VRC meeting […] is whether [Name] should be named individually on PD's suspension list for actions taken in his capacity as CEO of [Company], and based on the findings summarized in the OIOS Report.

7. At the outset, we note that determinations with respect to vendor registration and management, including the maintenance of vendor files and the Register of Vendors, as well as the recommendation of vendor suspension and removal, are decisions within PD's authority pursuant to chapter 7 of the UN Procurement Manual (rev. 7, 2013). As OLA has advised in similar cases involving potential suspension or removal of vendors, the UN should scrupulously adhere to the procedures set forth in the Procurement Manual, regarding the criteria for suspension or removal of a vendor from the Register of Vendors. The authority to suspend a vendor, whether temporarily or indefinitely, or to remove a vendor from the Register of Vendors, lies only with the ASG/OCSS. The ASG/OCSS's decision is based on the review and recommendation of the VRC and, pursuant to article 7.13(2) of the Procurement Manual, must be "based on substantial and documented evidence."

8. Article 7.13 of the Procurement Manual does not specifically provide for the suspension of a vendor's owners, principals or agents in their individual capacity. Generally, the provisions of chapter 7 of the Procurement Manual regulate the Organization's relationship with a vendor at the corporate level, *i.e.*, with the vendor as a legal entity rather than with individual representatives of the vendor. For example, articles 7.4 to 7.9 and 7.11 generally refer to the registration and management of legal entities which meet the registration requirements set forth therein and which have the formal status of vendors registered with PD, and not to the individuals associated with such registered vendors in their personal capacity. Articles 7.13–7.15 deal with the Suspension of registered vendors, not individuals associated with those vendors.

9. In the present case, the VRC has recommended that [Name], who is not a registered UN vendor himself, be named individually on PD's list of suspended vendors for actions taken in his capacity as CEO of [Company]. Such course of action is not expressly addressed by the provisions of chapter 7 of the Manual. Moreover, we understand from PD that such suspension would not be consistent with PD's practice. We understand from communications between our offices, at the working level, that, in PD's practice, agents of registered UN vendors are not usually listed as suspended vendors in their individual capacity. PD has also indicated that, on a limited number of occasions, it has only listed named individuals who have been placed under prohibition by the UN Security Council.

10. We further understand that, in PD's practice, the names of such individuals are entered in the form of a note to file for the respective vendor. In OLA's view, it would be within the purview of PD's discretion under chapter 7 of the Procurement Manual, to place a note under [Company]'s file with respect to [Name], in his capacity as officer of [Company], provided that any note regarding [Name] is based on substantial and documented evidence that supports the content of such note.

11. Finally, we note that [Company]'s original suspension was related to contract CON/MIN/10/068, and its conduct with respect to that contract is not at issue in the present case. Therefore, a separate determination would need to be made with respect to whether the actions of [Company] and those of [Name] in his capacity as officer of [Company] with respect to contract CON/MIN/10/084 amounted to conduct warranting Suspension of

the vendor. As already noted above, under article 7.13(2) of the Procurement Manual, the decision whether to suspend must be "based on substantial and documented evidence." Therefore, in deciding whether to proceed with placing a note on [Name] in [Company]'s file, PD and the ASG/OCSS should satisfy themselves that such decision is based on "substantial and documented evidence" sufficient to support the imposition of a measure of suspension.

22 December 2016

(*e*) Inter-office memorandum to the Assistant Secretary-General, Office of Central Support Services, Department of Management concerning the procurement of heavy engineering capabilities in Africa using voluntary contributions

Treatment of voluntary contributions for a specific purpose as trust funds or special accounts under Financial Regulations 4.13 and 4.14—Trust funds or special accounts are administered in accordance with the Financial Regulations—Exercise of procurement functions under Financial Regulation 5.12 and Financial Rules 105.13 through 105.19—Goods and services must be procured through a competitive international solicitation exercise

1. I refer to your memorandum, dated 20 October 2016, requesting OLA's advice regarding the procurement of heavy engineering equipment ("HEE") and other related equipment required in connection with the implementation of phase III of the United Nations triangular partnership project for rapid deployment of engineering capabilities in Africa ("Project").

Background

2. We understand from your memorandum and DFS's memoranda to DM, dated 29 June 2015, 8 February 2016, and 18 August 2016, copies of which were attached to your memorandum, that the Project involves a proposed partnership arrangement among (i) the Government of [State] ("Government") which has offered to the United Nations a voluntary contribution in the amount of US$ […] to fund the Project; (ii) the Secretariat, which is tasked with implementing the Project; and (iii) various troop contributing countries, whose engineering contingents would be trained to "deploy with strong horizontal engineering capabilities and full set of Heavy Machinery to rapidly engage on high priority mission horizontal engineering tasks."[1] We further understand from DFS's memoranda that, of the three phases that comprise the Project, phase I of the Project was completed in October 2015 and phase II of the Project was expected to be completed in October 2016.

3. According to DFS's 18 August 2016 memorandum to DM, phase III of the Project involves the UN's procurement of HEE and related equipment for both training and operational use. The cost of such equipment to be procured is estimated by DFS to be US$ […] million. Concerning the procurement of HEE and related equipment, DFS stated in its 18 August 2016 memorandum to DM that:

> "Given the high-risk, expensive nature of the equipment as well as the high-visibility and multi-lateral nature of the project, uncompromising safety, reliability and avoidance

[1] UN Project Document/Project Initiation Document (25 March 2016), page 8.

of liability remain fundamental requirements for the equipment to be procured. It is, therefore, essential that the equipment procured be *similar* to the equipment procured for phases I and II." (Emphasis added).

In addition, DFS stated in that same memorandum that:

> "The current United Nations systems contracts for engineering, equipment and vehicles only cover only about 45 percent of the total equipment required for the project; none of these are brands that the [State] training teams are accustomed to. Thus, procuring from the systems contracts will not fit the project needs. In this respect, consideration should be given to conducting a separate solicitation for the required equipment."

Applicable Financial Regulations and Rules

4. As a preliminary matter, we note that under Financial Regulation 3.12 "[v]oluntary 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 further that the acceptance of voluntary contributions that directly or indirectly involve additional financial liability for the Organization shall require the consent of the appropriate authority." Financial Rule 103.4(*a*) provides that "[i]n cases other than those approved by the General Assembly, the receipt of any contribution, gift or donation to be administered by the United Nations requires the approval of the Under-Secretary-General for Management." Pursuant to Administrative Instruction ST/AI/2016/7, concerning the delegation of authority under the Financial Regulations and Rules, the authority and responsibility to implement Financial Rule 103.4 has been delegated to the Controller. Therefore, the acceptance of the Government's donation would require the Controller's approval. Moreover, the Government's donation should be accepted pursuant to an appropriate written contribution agreement between the UN and the Government setting out the terms and conditions of the donation.

5. With respect to the Government's donation of US$ […], the Government stated in its note verbale to the UN Secretariat, dated 24 February 2015, that the Government is contributing the US$ […] specifically for the purpose of funding the Project. Financial Regulation 3.13 provides that moneys accepted for purposes specified by the donor, such as the Government's contribution for the Project, must be treated as trust funds or special accounts under Financial Regulations 4.13 and 4.14 relating to such funds and accounts. Pursuant to Financial Regulation 4.14, unless otherwise provided by the General Assembly, such funds and accounts must be "administered in accordance with the present Regulations." Therefore, the moneys received from the Government for the purpose of supporting the Project must be administered in accordance with the relevant Financial Regulations and Rules, including those relating to the procurement of goods and services by the Organization. Indeed, the Government's note verbale to the UN Secretariat stipulates that:

> "The Permanent Mission of [State] to the United Nations has further the honour to request the DFS to assure …

(2) The Contribution will be used appropriately and exclusively for the execution of the Project *in accordance with the United Nations Financial Regulations and Rules* …”[2] (Emphasis added).

Hence, it would appear that one of the conditions of the Government’s contribution to the Project is that the UN Secretariat utilizes the moneys contributed by the Government in accordance with the relevant Financial Regulations and Rules, which would surely include those governing the Organization’s procurement activities, namely, Financial Regulation 5.12 and 5.13 and Financial Rules 105.13 through 105.19.

6. Financial Regulation 5.12 states that when exercising procurement functions of the United Nations, due consideration should be given to: (i) best value for money, (ii) fairness, integrity and transparency, (iii) effective international competition, and (iv) interest of the United Nations. Further, Financial Rule 105.14 provides, in relevant part, that:

> “Consistent with the principles set out in regulation 5.12 and except as otherwise provided in rule 105.16, procurement contracts shall be awarded on the basis of effective competition, and to this end the competitive process shall, as necessary, include:
>
> …
>
> (*b*) Market research for identifying potential suppliers;
>
> (*c*) Consideration of prudent commercial practices;
>
> (*d*) Formal methods of solicitation …”

Above cited Financial Regulations and Rules require that procurement activities undertaken by the Organization must be conducted on the basis of effective and fair competition, except when using formal methods of solicitation is not in the interest of the UN as provided under Financial Rule 105.16.

7. Regarding the procurement of HEE and related equipment required for phase III of the Project, your memorandum to OLA of 20 October 2016 states, in paragraph 4, that you are “concerned about the limitation of using only [State] brand equipment …” I note, however, that DFS’s 18 August 2016 memorandum to DM does not state that PD should limit the procurement of HEE and related equipment to [State] brand equipment. Rather, as quoted in paragraph 3 above, DFS has requested that HEE and related equipment to be procured for phase III of the Project be “*similar* to the equipment procured for phases I and II.” (Emphasis added). Thus, in procuring HEE and related equipment to meet the requirements of the Project, the Organization could procure from any vendors, regardless of their nationality, who are capable of supplying to the Organization equipment that have *similar* functionalities as the ones that have been utilized in the earlier phases of the Project. We agree with your concern that limiting the procurement of HEE and related equipment to only one [State] brand or only to vendors from [State] to the exclusion of equipment supplied by vendors from all other Member States would be inconsistent with the Financial Regulations and Rules and, as noted in paragraph 5 above, contrary to terms of the Government’s contribution. Accordingly, if the Government’s contribution is accepted, all involved should understand that HEE and related equipment to be procured under the Project will be similar only in functionality to the equipment used in phases I

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[2] Note Verbale from Permanent Mission of [State] to the United Nations to the Department of Field Support of the United Nations (SC/15/061), dated 24 February 2015, paragraph 2(2).

and II of the Project but that, otherwise, such equipment would be sourced through a competitive international solicitation exercise.

8. For all of the above reasons, and based on the information and documentation made available to OLA, we would stress the need for the Organization to adhere scrupulously to the relevant regulations and rules of the Organization and the procedures set forth in the Procurement Manual in carrying out the Organization's procurement of HEE and other related equipment required for phase III of the Project.

22 December 2016

(*f*) Inter-office memorandum to the Director, Office of Central Support Services, Department of Management concerning the failure of a government to respect a peacekeeping operation's exemption from taxation on fuel imported for the official activities

Whether a peacekeeping operation may "suspend" the reimbursement of taxes paid by a vendor to a government—Payment of taxes by the vendor in good faith—Whether a vendor should stop paying taxes due to government failure to reimburse—Possibility to "pay under protest" and with notice regarding the privileges and immunities of the United Nations—Whether the United Nations would be responsible for reimbursing a vendor for additional taxes

1. PD is seeking OLA's advice with respect to [Company] request for reimbursement of taxes and duties (the "Taxes") paid by [Company] to the Government of [State] (the "Government") in respect of fuel imported for the exclusive use of [Peacekeeping operation].[1] The Government has, since April 2015, been requiring [Company] to pay such Taxes in contravention of the Agreement between the United Nations and the Government of [State] in relation to the [Peacekeeping operation], signed on [date] (the "SOFA"). PD is also seeking advice on two other matters, as set forth in sections I and IV of this memorandum. As the background to this matter is extensive, OLA has summarized the salient facts in the *Attachment* to this memorandum and set forth PD's three questions, together with the short answer to each, immediately below. I also wish to refer to the various communications between representatives of OLA, PD and [Peacekeeping operation], at the working level, in relation to this matter.

II. *Questions and short answers*

Question 1. (*a*) Is [Peacekeeping operation] entitled to "suspend" reimbursement of the Taxes paid by [Company] to the Government, for which [Peacekeeping operation] advised [Company] to pay?

Short Answer: No. [Peacekeeping operation] should promptly reimburse [Company] the Taxes [Peacekeeping operation] instructed [Company] to pay, after obtaining the applicable evidence set forth in paragraph 7 of this memorandum.

[1] The United Nations signed a Fuel Supply and Services Agreement with [Company] in support of the [Peacekeeping operation], effective [date], Contract No. […] (the "Contract").

(*b*) If the answer is no, then should [Peacekeeping operation] pay [Company] the outstanding balances of Taxes paid under instruction from [Peacekeeping operation]?

Short Answer: Yes.

Question 2. Should [Company] stop paying the Taxes to the Government?

Short Answer: This is an operational matter for [Peacekeeping operation], in consultation with DFS.

Question 3. Will the UN be responsible for reimbursing [Company] in the event that the Government imposes additional taxes, charges and/or other costs on [Company] as a result of [Peacekeeping operation]'s instructions to [Company] that it register a local company in order to benefit from the tax exemptions already provided for under the SOFA?

Short Answer: The question of how a contractor organizes itself in the country of operation is not a matter for the United Nations. Moreover, as [Company] has not made a claim for any taxes, charges or other costs incurred as a result of registering a local company, it is not possible to provide legal advice on this matter.

II. *Background*

2. […].

III. *The SOFA and the Contract*

3. The SOFA provides, in relevant part that [Peacekeeping operation] and its contractors are exempt from taxes, duties and charges on the import of fuel for the exclusive use of [Peacekeeping operation]. (See paragraphs 1(*g*) and 15(*a*) of the attached SOFA)

4. The Contract provides in section 17.1, in relevant part, that in the event a governmental body refuses to recognize the UN's tax exempt status, the Contractor:

> "shall immediately notify and consult with the UN to determine a mutually acceptable procedure. Contractor authorizes the UN to deduct from Contractor's invoice any amount representing such taxes, duties or charges, unless Contractor has consulted with the UN before the payment thereof and the UN has, in each instance, specifically authorized Contractor to pay such taxes, duties or charges under protest with written notice to the Governmental Body stating that such payment is made subject to, and without any waiver of, the privileges and immunities of the UN. In that event, Contractor shall provide [Peacekeeping operation] with written evidence that payment of such taxes, duties or charges has been made and appropriately authorized."

IV. *Legal analysis of PD's three questions*

Question I. (*a*) Is [Peacekeeping operation] entitled to "suspend" reimbursement of the Taxes paid by [Company] to the Government, for which [Peacekeeping operation] advised [Company] to pay?

5. In apparent contravention of the provisions of the SOFA, the Government has been charging [Peacekeeping operation]'s contractor ([Company])—through [Company]'s sub-contractor ([Sub-contractor])—taxes and duties on the fuel imported for [Peacekeeping

operation]'s official use. As a result, [Company] consulted with the United Nations, as it was required to do under section 17.1 of the Contract, in order to request advice on how to proceed. Due to the mission critical requirement for a constant supply of fuel, on 16 April 2015 by way of letter to [Company]'s General Manager, [Peacekeeping operation] authorised [Company] to pay fuel taxes while [Peacekeeping operation] continued to engage the Government in order to seek to have the fuel tax removed from the fuel purchased by [Company] for the exclusive use of [Peacekeeping operation]. On 10 February 2016, in an email message from [Peacekeeping operation] to PD, at the working level, the Mission indicated in relevant part that, "The Mission will allow the contractor to pay the taxes in order to avoid supply disruption while the issue will be escalated to a higher level". In addition to the various correspondence and meetings between [Company] and [Peacekeeping operation] and [Company] and PD, on 16 December 2015, by way of letter to the Director/PD, [Company] informed PD of the above arrangements with [Peacekeeping operation], and among other things that [Company] had been paying taxes and duties to the Government on the basis of the 16 April 2015 letter from [Peacekeeping operation]. In conclusion, [Company] indicated that it would continue to supply the fuel and services to [Peacekeeping operation] on the basis of the current arrangements until [Company] is instructed otherwise. In particular, and among other things, [Company] asked PD to advise if [Company] should stop paying the taxes and duties and if [Company] is required to stop paying the taxes that PD confirm [Company] may draw on the local reserves and strategic fuel reserve to meet operational requirements OLA understands that no letter was sent to [Company] in response to its 16 December 2015 letter.

6. On the basis of the facts made known to OLA, it appears that [Company] has proceeded to pay the Taxes on fuel imports in reliance of its good faith belief that [Peacekeeping operation] would reimburse the Taxes paid. In this regard, [Company] would also be able to rely on its letter to PD, dated 16 December 2015, wherein [Company] asked PD if it should stop paying such taxes on the basis of [Peacekeeping operation]'s April 2015 authorisation and the fact that [Company] was not subsequently told to stop paying such taxes. Accordingly, the United Nations is, by its conduct, prevented (estopped) from claiming that [Company] should not have paid such Taxes and that [Peacekeeping operation] is entitled to go back on its promise to reimburse such Taxes. As [Company] has been carrying the financial burden of the Taxes from July 2015 (US$ […] as of June 2016), OLA recommends that [Peacekeeping operation]—subject to the points raised in paragraph 7, below—reimburse [Company] without delay.

7. Prior to making such payments, OLA recommends that [Peacekeeping operation] undertake—without delay—the following due diligence, to the extent that such documentation is not already available:

(*a*) Evidence that the taxes and duties on fuel imported for the exclusive use of [Peacekeeping operation] were invoiced by the Government to [Company] (or [Sub-contractor], as applicable, as the sub-contractor of [Company]);

(*b*) Evidence that the taxes and duties were paid to the Government *(e.g.,* receipts);

(*c*) If the taxes and duties were paid by [Sub-contractor] to the Government, OLA recommends that [Peacekeeping operation] obtain evidence that [Company] has made such payments to [Sub-contractor]. [Peacekeeping operation] should satisfy itself that such

Taxes were paid solely in relation to fuel imported for the exclusive use of [Peacekeeping operation] under the Contract.

Question 2. Should [Company] stop paying Taxes to the Government?

8. While the Government's conduct in requiring that such Taxes be paid is in apparent contravention of the SOFA, as [Peacekeeping operation] has repeatedly informed DFS that fuel supply is a mission critical requirement, that [Company] will not keep supplying fuel without being reimbursed the Taxes, and the Mission has confirmed in several communications that it cannot afford any disruption of the fuel supply chain, OLA considers this to be an operational matter for [Peacekeeping operation], in consultation with DFS. DFS may wish to send a Note Verbale to the Permanent Mission of [State] to the United Nations in order to request the Permanent Mission to obtain the assurance of the Government that, in accordance with the provisions of the SOFA, the Government will respect the exemption from taxation and other charges for fuel and lubricants imported for the official purposes of the United Nations. We would appreciate receiving a copy of the Note Verbale once it has been sent.

Question 3. Will the UN be responsible for reimbursing [Company] in the event that the Government imposes additional taxes, charges and other costs on [Company] as a result of [Peacekeeping operation]'s instructions to [Company] that it register a local company in order to benefit from the tax exemptions already provided for under the SOFA?

9. While it is not possible to advise on this matter in the absence of specific facts indicating that [Company] has incurred additional taxes, charges and other costs as a direct result of having registered as a local company, and without knowing the local law in [State], OLA notes that [Peacekeeping operation] did instruct [Company] to register locally for the benefit of the UN obtaining its right to an exemption from tax on fuel imports. OLA also notes that the Mission has confirmed that the Government has provided nothing in writing to either [Peacekeeping operation] or [Company] indicating that [Company] has to be registered locally in order for the UN to benefit from its tax exempt status in relation to the importation of fuel for [Peacekeeping operation].

10. OLA recommends that, in the future, the Mission refrain from advising contractors about whether they should or should not register a local company as the manner in which a contractor organises itself in a country is for the contractor to determine and must be in accordance with applicable laws.

V. *OLA recommendations*

11. OLA recommends that in order to avoid both, (i) disruption to the fuel supply in support of [Peacekeeping operation], and (ii) this matter escalating into a dispute, prompting [Company] to claim interest on the amount of the fuel taxes that have not been reimbursed to date, that [Peacekeeping operation] reimburse [Company] without any further delay, subject to satisfying itself of the matters set forth in paragraph 7 of this memorandum.

12. OLA also recommends that, in future, if [Peacekeeping operation] instructs a third party to pay taxes, duties and/or charges to an authority for which the UN is exempt, that it ensure such instructions require such third party to "pay under protest", as contemplated in section 17.1 of the Contract and, more importantly, to place the applicable

Governmental authority on notice that the UN is maintaining its status and its privileges and immunities in respect of such matter.

22 December 2016

4. Liability and Responsibility of the United Nations

Note to Heads of Secretariat Departments and Offices and Funds and Programmes concerning General Assembly resolution 70/114 on the Criminal Accountability of United Nations Officials and Experts on Mission

Reporting obligations of the Secretary-General regarding criminal accountability of United Nations Officials and Experts on Mission—Request that all credible allegations of criminal conduct be forwarded to the Office of Legal Affairs, whether or not the entity recommends a referral to the State of nationality—Programme Managers should submit investigation reports and other documents that have already been redacted—Guidelines for redaction of investigation reports and other documents

1. I refer to General Assembly resolution 70/114 on Criminal accountability of United Nations officials and experts on mission […], dated 14 December 2015. The General Assembly, as it has in the past, requests the Secretary-General to bring credible allegations that reveal that a crime may have been committed by United Nations officials or experts on mission to the attention of the States against whose nationals the allegations are made, and to seek updates from those States on the status of their efforts to investigate and, as appropriate, prosecute crimes of a serious nature. The General Assembly also requests the Secretary-General to report on the implementation of its resolution to the General Assembly.

2. The obligations of the Secretary-General under the resolutions on criminal accountability have generally remained uniform since the 62nd session, however with resolution 70/114, the General Assembly has expanded the Secretary-General's reporting obligations. In particular, paragraph 25 describes the information to be provided with respect to each case, as follows: "the United Nations entity involved, the year of referral, information about the type of crime and summary of allegations, status of investigations, prosecutorial and disciplinary actions taken, including with respect to individuals concerned who have left the duty mission or the service of the United Nations, any requests for waivers of immunity, as applicable, and information on jurisdictional, evidentiary or other obstacles to prosecution, while protecting the privacy of the victims as well as respecting the rights of those subject to the allegations". The General Assembly requests that this information be provided for all referrals dating back to 1 July 2007, the year the Secretary-General began reporting on referrals.

3. The General Assembly reiterates its request in resolution 70/114 for the Secretary-General to refer all credible allegations of criminal conduct by United Nations officials and experts on mission to their States of nationality. Accordingly, I kindly request that all credible allegations continue to be forwarded to OLA, whether or not the entity recommends a referral. Typically, such allegations have resulted from substantiated findings by an investigative entity.

4. Under current practice, the Programme Manager forwards relevant reports to OLA's attention for review and OLA subsequently liaises with the investigative entity, as well as the substantive office prior to effecting referrals, in order to ascertain whether any information contained in the investigation reports or other documents proposed for inclusion in any referral to a Member State need redaction. While this consultation ensures that the Organization does not release sensitive information, it can take time and cause delays in the referral process. In order to address this, I kindly request, going forward, Programme Managers to provide OLA with investigation reports and other documents that have already been redacted, alongside a copy of the unredacted original versions. Redactions should be limited to information which, if disclosed, would (i) present a risk to the safety of any individual, (ii) violate a duty of confidentiality which the United Nations owes to a third party, (iii) compromise the confidentiality of the Organization's internal decision-making process, or (iv) impede the effective functioning of current or future operations of the United Nations. OLA will consult the Programme Managers or the investigative entity, as needed, regarding the redacted information.

5. Finally, pursuant to the request of the General Assembly, please be informed that the Secretary-General's report on the implementation of resolution 70/114 will contain information on all cases referred since 1 July 2007.

29 January 2016

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

1. International Labour Organization

(submitted by the Office of the Legal Adviser of the International Labour Office)

Legal opinion rendered during second meeting of the Standards Review Mechanism Tripartite Working Group (10–14 October 2016)[1]

Distinction between abrogation of Conventions in force and withdrawal of Conventions that never entered into force or are no longer in force—Juridical replacement of "superseded" or "revised and replaced" Recommendations—Possibility of a self-governing non-metropolitan territory to be bound by a Convention—"Shelving" of instruments as "administrative" arrangements

1. The Legal Adviser provided clarifications to the Standards Review Mechanism Tripartite Working Group (SRM TWG) in relation to certain legal questions that were raised during the course of its discussions.

2. With regard to the distinction between abrogation of Conventions in force and withdrawal of Conventions that either had never entered into force or were no longer in force due to denunciations, the Legal Adviser explained that this distinction was made from the outset,[2] and was based on the "contractual" theory about international labour Conventions, namely the idea that international labour Conventions, once ratified by two or more States and entered into force, became contracts among the States Parties and this explained why the Conference needed explicit constitutional authority to be able to terminate the legal effects of an obsolete instrument. *A contrario*, where a Convention had not received the minimum number of ratifications to enter into force, or the number of effective ratifications had been reduced—as a result of denunciations—to zero or one (thus no longer qualifying as a treaty), the International Labour Conference did not need an express mandate to proceed with the termination of the legal effects of that Convention.[3] In this latter case, the term "withdrawal" was proposed and retained throughout the process of adoption of the 1997 constitutional amendment. In all other cases, the term "abrogation" should be used, which would also be in accordance with article 55 of the 1969 Vienna Convention on the Law of Treaties. It was on this basis that Convention No. 28, which currently had one effective ratification, was placed on the agenda of the 106th Session (2017) of the Conference for possible withdrawal and the SRM TWG might wish to consider the same follow-up action with regard to Convention No. 34 which was in exactly the same situation. The Legal Adviser further clarified that following the entry into force of the 1997 constitutional amendment, the distinction between abrogation and withdrawal of

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[1] See GB.328/LILS/2/1, Annex II, available at http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_534130.pdf.

[2] Provisional Record No. 1, International Labour Conference, 85th Session, Geneva, 1997, para. 13, p. 1/5; GB.283/LILS/WP/PRS/1/2, para. 37, p. 15.

[3] As it was explained at the time of drafting the 1997 constitutional amendment, to argue that a Convention with only one ratification was still in force would not be in accordance with either the usual interpretation of the term "Convention" or the contractual theory itself, which implied at least two parties; see GB.265/LILS/WP/PRS/2, para. 18, p. 7.

Conventions had lost much of its importance since the same procedural guarantees applied to both in terms of Conference majority required, consultation process and timelines for submission to the Conference.

3. In response to the question as to whether or not obsolete international labour Recommendations which have been explicitly replaced or superseded by later Recommendations should be subject to the withdrawal process, the Legal Adviser explained that in case a Recommendation was expressly replaced by another one (normally through a final provision stating that the latter instrument supersedes the former), one could validly argue that there was no text to be withdrawn and that therefore the withdrawal exercise would be without object. This would also be consistent with the ordinary meaning of the term "supersede" which was to "take the place of", "set aside as void", "succeed to the position", "remove" or "override". He further indicated that the procedural guarantees for the adoption or withdrawal of a Recommendation being substantively similar (extensive consultations, record vote, two-thirds majority), there was little value in proposing to the Conference to initiate a formal process of withdrawal of an instrument which it had already decided to replace by adopting a new instrument to that effect. In contrast, an international labour Recommendation which was merely revised by another Recommendation (for instance through a reference in the Preamble indicating the need for revision)—without being explicitly replaced or superseded—should be subject to the withdrawal procedure in accordance with article 45*bis* of the Standing Orders of the Conference. This was, for instance, the approach followed in 2002 for the withdrawal of 20 Recommendations; as the Conference report read, "the Recommendations were considered as having been superseded 'de facto', that is by instruments relating to the same subjects and subsequently adopted by the Conference, without their replacement having been expressly indicated by the Conference".[4] The Legal Adviser recalled that the distinction between Recommendations that had been replaced by express decision of the Conference—"*juridically replaced*"—and Recommendations that had become obsolete following the adoption of subsequent standards on the same subject—"*de facto replaced*"—had guided the work of the Cartier Working Party with respect to obsolete Recommendations.[5] Should the SRM TWG decide to follow the same approach, it could recommend that the Governing Body limit itself to taking note of the juridical replacement of all those Recommendations which had been expressly "superseded" or "revised and replaced" by subsequent instruments and instructing the Office to take appropriate action to ensure that the text of the juridically replaced Recommendations was removed from all collections of standards.

4. With specific reference to the juridical replacement of the Work in Fishing Recommendation, 2005 (No. 196), by the Work in Fishing Recommendation, 2007 (No. 199), even though reference to the latter instrument "superseding" the former was only made in

[4] Report VII(1), International Labour Conference, 90th Session, Geneva, 2002, para. 5.

[5] GB.274/LILS/WP/PRS/3, para. 3. This approach followed the conclusions of another study carried out in 1974, which noted that "Recommendations could at any time be abrogated by Conference action, either as part of the adoption of up-to-date standards or by a decision directed solely to such abrogation" and mentioned the possibility of deleting from the body of ILO texts the Recommendations that have been legally replaced; GB.194/PFA/12/5. A footnote indicated that some Recommendations already provide that they supersede earlier standards but no steps have been taken for the formal deletion of these standards from the body of ILO texts.

the Preamble of Recommendation No. 199 and not in the body of the text, it was explained that this was atypical, linked to the particular circumstances in which Recommendation No. 196 was adopted (supplementing a Convention which eventually was not adopted for lack of quorum) but also the fact that Recommendation No. 199 reproduced textually the provisions of Recommendation No. 196 with the exception of the Preamble which was revised to reflect the fact that the new Recommendation superseded the instrument adopted in 2005.[6]

5. As regards the possibility of a self-governing non-metropolitan territory to be bound by a Convention, even where the member State responsible for its international relations had not ratified it, the Legal Adviser noted that such possibility existed and referred to the examples of Italy which had accepted on behalf of the Trust Territory of Somaliland obligations arising out of Conventions Nos. 17, 65, 84 and 85 and the Netherlands which had declared Convention No. 172 applicable to the Netherlands Antilles without either country being itself bound by the respective Conventions. Further support for this view was found in an Office interpretation that "the possibility of making a declaration under article 35(4) was not dependent on the Convention concerned being ratified by the Member responsible for the international relations of the non-metropolitan territory concerned [and] action under article 35(4) might be taken irrespective of ratification."[7] In so far as denunciation of Conventions was concerned, the Office practice was that article 35(3) of the ILO Constitution did not necessarily involve the automatic cessation of the obligations under a declaration of application to a non-self-governing non-metropolitan territory and that the government could, if it thought fit, maintain in force the obligations accepted in respect to such a territory. When a denunciation involved a self-governing non-metropolitan territory, the Office approach was that as paragraphs 4–7 of article 35 of the ILO Constitution provided for obligations to be accepted in agreement with the government of the territory, denunciation should also be in agreement with the concerned territory, and therefore obligations did not lapse automatically if the metropolitan power denounced the Convention.

6. Responding to points raised around the "shelving" of instruments, the Legal Adviser clarified "shelving" as well as "dormancy" were basically "administrative" arrangements, which were recommended by the Cartier and Ventejol Working Parties respectively and put in place by Governing Body decisions, in the absence of a constitutional provision enabling the Conference to abrogate obsolete Conventions. He confirmed that "shelving" did not close obsolete Conventions to further ratification as this could only be effected in accordance with the terms of a specific provision built-in to most ILO Conventions following the adoption of a revised instrument. Concretely, "shelving" implied that the ratification of the Conventions concerned was no longer encouraged and their publication in Office documents, studies and research papers would be modified. It also meant that detailed reports on the application of these Conventions would no longer be requested on a regular basis. However, the right to invoke provisions relating to representations and complaints under articles 24 and 26 of the Constitution remained intact as well as the right of employers' and workers' organizations to submit observations in accordance with the regular supervisory procedures. Finally, "shelving" had no impact on the status of the Conventions concerned in the legal systems of member States that had ratified them.[8]

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[6] Work in the fishing sector, Report IV(2B), International Labour Conference, 96th Session, Geneva, 2007, p. 65.

[7] Minutes of the 123rd Session of the Governing Body, Nov. 1953, Appendix V: "The ILO and non-metropolitan territories", para. 26, p. 106.

[8] GB.283/LILS/WP/PRS/1/2, para. 32, p. 14.

2. International Maritime Organization

(submitted by the Director of the Legal Affairs and External Relations Division of the International Maritime Organization)

(*a*) Supplemental legal advice regarding the introduction of mandatory safety standards for the carriage of more than 12 industrial personnel

Possibility of a "Mandatory instrument and/or provisions addressing safety standards for the carriage of more than 12 industrial personnel on board vessels engaged on international voyages"—Consideration of legal mechanisms for implementing an interim solution while developing a new chapter in the International Convention for the Safety of Life at Sea (SOLAS) and a Code for industrial personnel

IMO document MSC 97/6 provides legal advice by the Secretariat regarding the introduction of mandatory safety standards for the carriage of more than 12 industrial personnel.

Background

1. The Sub-Committee on Ship Design and Construction (SDC), at its third session, requested the Secretariat to provide legal advice to Maritime Safety Committee (MSC) 96 on the planned output on "Mandatory instrument and/or provisions addressing safety standards for the carriage of more than 12 industrial personnel on board vessels engaged on international voyages". That advice was contained in document MSC 96/7/3. After an in-depth discussion at MSC 96, the Committee, noting the complex nature of the legal issues, agreed that the matter should be further considered at MSC 97, and requested supplemental legal advice taking into account the views expressed in paragraphs 7.3, 7.7 and 7.8 of document MSC 96/25.

Discussion

2. At MSC 96, during a wide-ranging discussion on options available to progress work on standards for the carriage of more than 12 industrial personnel, taking into account several documents submitted on the topic, including the legal advice in document MSC 96/7/3, the Committee noted that there was little support for amending chapter I of the annex to the International Convention for the Safety of Life at Sea (SOLAS) to include a new definition for "industrial personnel". Consequently, the Committee decided to pursue development of a new chapter of SOLAS and a Code, solely for industrial personnel, relying on the "unless expressly provided otherwise" language of regulation I/2 to create a definition of "industrial personnel" within the new chapter. The Committee recognized that development, adoption and entry into force of a new chapter in SOLAS would take some time, perhaps several years. Therefore, many delegations expressed the view that an interim solution should be explored (MSC 96/25, paragraphs 7.4 and 7.3.3).

3. The legal mechanism for implementing the interim solution was the subject of significant discussion within the Working Group on the Carriage of Industrial Personnel and in the Committee. The Committee considered three main options to accommodate an interim solution:

Option 1: Creating a definition of industrial personnel by means of an MSC resolution, specifically stating that industrial personnel are not passengers within the meaning of SOLAS regulation I/2(*e*) and identifying the applicable interim standards within this resolution.

Option 2: Classifying industrial personnel as "other persons employed or engaged in any capacity on board a ship on the business of that ship" in terms of SOLAS regulation I/2(*e*), by means of an MSC resolution identifying the interim standards.

Option 3: Creating a definition of industrial personnel and accompanying interim standards by means of an MSC resolution, to be used as a basis for granting exemptions under regulation I/4 or equivalents under regulation I/5.

4. The Committee recognized that all three options have legal and practical implications, necessitating the request for further legal analysis.

Analysis

5. *Option 1:* Creating a definition of industrial personnel by means of an MSC resolution, with the result that, for the purposes of the resolution, industrial personnel are not passengers within the meaning of SOLAS regulation I/2(*e*) could be accomplished, as noted by one delegation, by deleting paragraph 2.1 of annex 1 and the second clause of paragraph 2 of the annex to annex 1 of document MSC 96/WP.7 (Draft MSC Resolution and Recommendation for the carriage of more than 12 industrial personnel on board vessels engaged on international voyages). This proposal would result in the draft resolution, in relevant part, reading:

> "*Invites* Governments, until such time that a mandatory instrument for the carriage of industrial personnel enters into force, to apply the annexed Recommendation when regulating ships, regardless of size, carrying more than 12 industrial personnel."

and the Recommendation, in relevant part, reading:

> "2 Taking into account the view of the Committee that industrial personnel should not be considered or treated as passengers under regulation I/2(*e*)."

6. The legal effect of this proposal would be that industrial personnel would not be treated as either passengers or crew within the meaning of SOLAS. However, as described in document MSC 96/7/3, paragraph 9, SOLAS only has three types of persons, *i.e.* passengers, crew and infants. Thus, option 1 would have the effect of taking industrial personnel outside the scope of the three categories in SOLAS without amending the Convention itself, raising issues as to the legal validity of such action and to the legal status of industrial personnel so categorized. In effect, option 1 would untether the interim solution from SOLAS in a legal sense, a factor for consideration by the Committee.

7. However, there is precedent for such an action. As described in document MSC 96/7/3, paragraphs 16 and 17, the SPS Code uses a similar device with respect to the definition and application of standards for "special personnel," but also raises similar legal issues.

8. *Option 2:* Interpreting regulation I/2(*e*)(i) of SOLAS to mean that industrial personnel are "other persons employed or engaged in any capacity on board a ship on the business of that ship" is legally possible, but does raise issues for the Committee to consider.

Article 31(1) of the Vienna Convention on the Law of Treaties (VCLT) states that "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." The VCLT does allow taking into account, together with the context, "any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions" (article 31(3)(*a*). Thus, the Parties to SOLAS could decide to interpret regulation I/2(*e*)(i) in the manner envisioned by option 2.

9. In doing so, the Committee may wish to consider two factors. The first is whether industrial personnel are truly "employed or engaged in any capacity on board a ship on the business of that ship." The second, related, factor is that such an approach would create a legal anomaly, because "special personnel," defined in the SPS Code at paragraph 1.3.11, do not fall within the same exception in SOLAS regulation I/2, even though they arguably have more to do with the business of the ship than industrial personnel.[1]

10. *Option 3:* Regulations I/4 and I/5 allow for exemptions and equivalents for certain requirements of the Convention for individual ships. Chapters II-1 (Regulations 1–4 and 55), II-2 (Regulations 2–4 and 17), III (Regulation 2), IV (Regulation 3) and V (Regulation 3) also allow for further exemptions, equivalents and alternative design and arrangements for certain ships. In all cases, SOLAS requires that the Administration communicates to the Organization the particulars of any such exemption, equivalent or alternative design or arrangement. Such communications are routinely made to the Organization and can be found on IMODOCS at: https://docs.imo.org/Category.aspx?cid=183.

11. As was correctly pointed out by some delegations, not all exemptions and equivalents in regulations I/4 and I/5 are relevant or applicable to the issue of industrial personnel. For example, regulation I/4(*a*) allows for exemptions for a single international voyage, which may be impracticable in the case of the carriage of 12 or more industrial personnel.

12. Regulation I/4(*b*) allows for exempting any ship which "embodies features of a novel kind from any of the provisions of chapters II-1, II-2, III and IV […] the application of which might seriously impede research into the development of such features and their incorporation in ships engaged on international voyages", provided that any ship granted such exemption complies "with safety requirements which […] are adequate for the service for which the ship is intended and are such as to ensure the overall safety of the ship". Regulation I/V(*a*) states that, where SOLAS requires that a particular fitting, material, appliance or apparatus shall be fitted or carried in a ship, or that any particular provision shall be made, the Administration may allow any other fitting, material, apparatus or provision, if it is satisfied by trial thereof or otherwise, that such arrangements are at least as effective as those required in the Convention.

[1] It appears that, in excluding SPS Personnel from the exception in regulation I/2(*e*), the Committee and the Assembly recognized that there is some limit to interpreting persons as "being on the business of the ship," otherwise, the interpretation would subsume the definition and defeat the purpose of the Convention. As an extreme example, persons (*i.e.* passengers) participating in a cruise voyage could be argued to be on the business of a cruise ship, but such an interpretation is not only circular reasoning, but would defeat one of the purposes of SOLAS, that is, to create safety rules for persons on board passenger vessels on international voyages. To take a decision on where the limit of the interpretation lies, is the remit of the Committee and the Parties.

13. There appears to be no legal impediment to the Committee and the Contracting States agreeing to a resolution stating that, if the interim recommendations are adhered to, the Administration can be satisfied that such requirements are at least as effective as those in the Convention, allowing for the issuance of an equivalency under regulation I/5. A more extenuated interpretation could allow the adherence to the interim measures to be viewed as research into the development of the new chapter of SOLAS and affiliated Code, justifying exemptions under regulation I/4(*b*). In either case, the requirement for an adequate or equivalent level of safety would prevent any such decision from defeating the purpose and context of SOLAS overall and would avoid abrogation of article 31 of the VCLT.

14. However, one delegation noted that interpreting and utilizing regulations I/4 and I/5 in this manner may differ from past practice and would need to be seen as an exception addressing the specific situation of the interim solution that shall not change the way the regulations are interpreted and implemented in other cases (MSC 96/25, annex 29). Furthermore, as regulations I/4 and I/5 apply to "a ship," not an entire class of vessels, exemptions and equivalents would need to be evaluated and issued on a ship-by-ship basis and the requirements to communicate such exemptions and equivalents to the Organization would remain. While legally permissible, this could entail practical challenges in implementation.

(*b*) Legal advice on the proposal, circulation, adoption, acceptance and entry into force of amendments to the to the Ballast Water Management Convention (BWM Convention)

Circulation, adoption, acceptance and entry into force of amendments to IMO instruments governed by the IMO instrument and the Vienna Convention on the Law of Treaties, 1969—Options and timelines for proposal, circulation, consideration, adoption, acceptance and entry into force of amendments—Option 1: Strict adherence to article 19 of the BWM Convention and the Vienna Convention—Option 2: Accelerated circulation of the amendment—Option 3: Provisional application

IMO document MEPCC 69/4/7 provides legal advice by the Secretariat.

Introduction

1. The Marine Environment Protection Committee (MEPC) 68 agreed in principle with the proposed draft amendments to regulation B-3 and noted different drafting alternatives for those amendments (MEPC 68/WP.8, annexes 3 and 4). However, the Committee agreed that further consideration of the amendments was needed before they could be approved. The Committee also requested the Secretariat to submit a document containing legal advice on the matter to its sixty-ninth session.

Legal framework for amendment of IMO instruments

2. The circulation, adoption, acceptance and entry into force of amendments to IMO instruments is primarily governed by two treaties; the IMO instrument itself, and the Vienna Convention on the Law of Treaties, 1969 (the Vienna Convention). Article 5

of the Vienna Convention indicates that its terms apply to any treaty adopted within an international organization after 1980 (the date of entry into force). Thus, with respect to the BWM Convention, the terms of the Vienna Convention should also be considered.

3. Article 19 of the BWM Convention governs amendment of the instrument. For an amendment to the annex to the Convention, such as the proposed amendments to regulation B-3, the process and timeline is as follows:

1. Any Party may propose an amendment. A proposed amendment is then circulated by the Secretary-General at least six months prior to its consideration by the Committee. The Parties, at the MEPC, then consider the amendment for adoption.

2. After adoption, the Secretary-General shall communicate the adopted amendment to the Parties for acceptance. In the case of an amendment to the annex, the amendment is considered accepted 12 months after the date of adoption, unless the Committee determines another date, or if more than one third of the Parties object to the amendment.

3. After acceptance, an amendment to the annex will enter into force six months after the date of acceptance, except for Parties that have specifically objected to it, or require explicit acceptance of the amendment.

4. The Vienna Convention affects the operation of article 19 of the BWM Convention in one important way. Article 2(1)(*g*) of the Vienna Convention defines a "Party" as "a State which has consented to be bound by the treaty and for which *the treaty is in force*" (emphasis added). Under the Vienna Convention, there are no "Parties" to a treaty until after it has entered into force. Prior to that time, there are only "Contracting States", defined in article 2.1(*f*) as "States which have consented to be bound by the treaty, whether or not the treaty has entered into force". Article 39 of the Vienna Convention states that a treaty may be amended by agreement between the Parties; therefore, it must be in force before it is amended. Because article 19 of the BWM Convention refers only to "Parties", the proposal, circulation, consideration, adoption and acceptance functions can only occur after the treaty has entered into force, otherwise, the terms of the Vienna Convention would be abrogated.

5. IMO and MEPC practice requires "approval" step in the amendment process. As the approval process is not contemplated either by the Vienna Convention, or by the BWM Convention, it is not bound by their strictures, and it can take place prior to the treaty entering into force. As described in the table annexed to this document, approval of initial amendments to some of IMO conventions has occurred a number of times since 1973; for instance in the case of the initial amendments to the International Convention for the Prevention of Pollution from Ships (MARPOL) 73/78 (as highlighted in green in the annex to this document).

Options and timelines for proposal, circulation, consideration, adoption, acceptance and entry into force

Option 1: Strict adherence to article 19 of the BWM Convention and the Vienna Convention

6. Following the terms of article 19 of the BWM Convention leads to two possible timing scenarios for amendment of the Convention, as follows:

1. Option 1*a*, acceptance as stated in article 19:

Process Event	*Minimum time required*
Approval	None—can be accomplished before EIF
Proposal	Any time after EIF (1 day)
Circulation	6 months
Consideration and adoption	Next MEPC following completion of circulation—could be no additional time
Acceptance	12 months
Entry into force (EIF)	6 months
Minimum time required:	24 months and 1 day

Prior to consideration of the draft amendments proposed by Liberia in document MEPC 68/2/18, by the Ballast Water Review Group, and the request for the advice contained in this document, the Committee decided that article 19 would be followed in this manner.

2. Option 1*b*: Amended time for acceptance. Article 19.2.e.ii allows for the Committee to determine an alternate date for an amendment to be deemed accepted, thus the acceptance date could be earlier than the 12 months stated in the Convention. The time could not practically be zero, however, as some time is needed for the Secretariat to distribute the adopted amendments and for Parties to consider whether to object or require explicit acceptance for the amendment. In the view of the Secretariat, trimming more than six months off of the acceptance requirement would present practical and other difficulties, therefore the soonest an amendment to regulation B-3 could enter into force under this scenario would be 18 months from entry into force of the Convention.

Option 2: Accelerated circulation of the amendment

7. As was noted by some delegations at MEPC 68, Parties to IMO instruments have in the past instructed the Secretary-General to circulate amendments for consideration prior to the instrument itself entering into force. This has occurred, for example (as highlighted in yellow in the annex to this document), in the following cases: the initial amendments to MARPOL Annex IV which were circulated one month before Annex IV came

into force; the amendments to MARPOL Annex III which were circulated 10.5 months before Annex III entered into force; the amendments to MARPOL Annex VI which were circulated six months before the entry into force of Annex VI and the amendments to SOLAS Protocol 1988 which were circulated five months before the entry into force of SOLAS Protocol 1988. As described above, this practice does not comply with the Vienna Convention, and at MEPC 68, the Committee decided, prior to consideration of the amendments of regulation B-3 by the Ballast Water Review Group, not to use this method to accelerate entry into force. Also, as noted by some delegations at MEPC 68, this practice has only occurred at IMO for annexes to existing conventions, where the foundational convention itself (*i.e.* MARPOL 73/78) was in force, but the annex was not. IMO has never used this practice where the foundational convention was not yet in force.

8. If this option was decided on by the Committee, it could accelerate entry into force of the amendments by six months. If utilized in combination with an accelerated acceptance date as described in paragraph 6.2, up to one year could be trimmed from the normal 24-month period envisaged by article 19 of the BWM Convention.

Option 3: Provisional application

9. Article 25(1) of the Vienna Convention allows for a process whereby the negotiating States to a treaty or amendment to a treaty can agree to have it apply provisionally pending entry into force. A "negotiating State" means a State which took part in the drawing up and adoption of the text of the treaty. In the case of the BWM Convention, the negotiating States would be those as listed in paragraph 3 of BWM/CONF/37.

10. Provisional application is not considered accelerated entry into force. Instead, it is an agreement by the negotiating States to apply the treaty or amendment as if it were in force until such time as actual entry into force occurs. Provisional application is normally communicated through a resolution. In the case of an amendment to regulation B-3 of the BWM Convention, if provisional application was decided, the amendment could apply provisionally as soon as it is adopted. However, the amendment would not actually enter into force until the time described in paragraph 6. Parties could still object to the amendment or require explicit acceptance under article 19. Further, article 25(2) of the Vienna Convention allows a negotiating State to terminate provisional application by notifying the other States subject to provisional application of its intention not to become a Party to the treaty.

11. Although provisional application has been used in many United Nations instruments in the past, it has been used rarely in IMO instruments, one example being the 1998 amendments to the INMARSAT Convention. A variant of provisional application has been employed for amendments to MARPOL 73/78, Annexes I and IV. If provisional application was used in this circumstance, the time from entry into force of the BWM Convention to the provisional application of amendments to regulation B-3 could be as little as six months, depending on the timing of the MEPC meeting following entry into force.

Treaty	**Date of entry into force of original treaty/ protocol**	**Date of approval of first amend- ment**	**Date of circulation of first amend- ment**	**Adoption dates of first amendment**	**Date of entry into force of amendment(s) to the origi- nal treaty/ protocol**	**Resolution**
Protocol relating to Intervention on the High Seas in Cases of Pollution by Substances oth- er than Oil, 1973 (INTERVENTION PROT 1973)	30/03/1983	12/03/1990	17/04/1990	04/07/1991	24/07/1992	MEPC.49(31)
London Convention 1972—Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, 1972, as amended— amendment re- lated to Settlement of disputes	30/08/1975	30/09/1977	02/02/1978	12/10/1978	Not yet in force	LDC.6(III)
London Convention 1972—annex— amendment relat- ed to Incineration at sea	30/08/1975	30/09/1977	02/02/1978	01/12/1978	11/03/1979	(LDC.5(III))
London Convention Protocol 1996	24/03/2006	-	28/04/2006	03/11/2006	10/02/2007	(LP1.(1))
MARPOL Protocol of 1978 relating to the International Convention for the Prevention of Pollution from Ships, 1973, as amended	02/10/1983	01/05/1985	15/05/1985	05/12/1985	06/04/1987	MEPC.21(22)

Treaty	Date of entry into force of original treaty/ protocol	Date of approval of first amend- ment	Date of circulation of first amend- ment	Adoption dates of first amendment	Date of entry into force of amendment(s) to the origi- nal treaty/ protocol	Resolution
MARPOL ANNEX I	02/10/1983	06/04/1982 and 30/06/1982	16/01/1984	07/09/1984	07/01/1986	MEPC.14(20)
MARPOL ANNEX II	02/10/1983	01/05/1985	13/05/1985	05/12/1985	06/04/1987	MEPC.16(22)
MARPOL ANNEX III	01/07/1992	09/09/1988	23/08/1991	30/10/1993	28/02/1994	MEPC.58(33)
MARPOL Annex IV	27/09/2003	13/03/2000	08/08/2003	01/04/2004	01/08/2005	MEPC.115(51)
MARPOL Annex V	31/12/1988	10/07/1986 and 09/09/1988	13/02/1989	17/10/1989	18/02/1991	MEPC.36(28)
MARPOL Annex VI—Protocol of 1997 to amend the International Convention for the Prevention of Pollution from Ships, 1973, as modified by the Protocol of 1978 relating thereto	19/05/2005	31/03/2000 and 18/07/2003	15/11/2004	22/07/2005	22/11/2006 and 22/11/2007	MEPC.132(53)
CLC PROT 1992—Protocol of 1992 to amend the International Convention on Civil Liability for Oil Pollution Damage, 1969	30/05/1996	N/A	10/04/2000	18/10/2000	01/11/2003	LEG.1(82)

Treaty	Date of entry into force of original treaty/ protocol	Date of approval of first amend- ment	Date of circulation of first amend- ment	Adoption dates of first amendment	Date of entry into force of amendment(s) to the origi- nal treaty/ protocol	Resolution
FUND PROT 1992—Protocol of 1992 to amend the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1971	30/05/1996	N/A	10/04/2000	18/10/2000	01/11/2003	LEG.2(82)
LLMC PROT 1996—Protocol of 1996 to amend the Convention on Limitation of Liability for Maritime Claims, 1976	13/05/2004	N/A	06/12/2010	19/04/2012	08/06/2015	LEG.5(99)
COLREG 1972—International Regulations for Preventing Collisions at Sea, 1960	15/07/1977	05/12/1980	02/02/1981	19/11/1981	01/06/1983	A.464(XII)
CSC 1972—International Convention for Safe Containers (CSC), 1972, as amended	06/09/1977	BC XXII in January 1981 recom- mended amend- ments for adoption by MSC 44 in April 1981	No record of circula- tion found	02/04/1981	01/12/1981	
LL 1966—International Convention on Load Lines, 1966	21/07/1968	February 1970	No record of circula- tion found	12/10/1971	Not yet in force	A.231(VII)

Treaty	Date of entry into force of original treaty/ protocol	Date of approval of first amend- ment	Date of circulation of first amend- ment	Adoption dates of first amendment	Date of entry into force of amendment(s) to the origi- nal treaty/ protocol	Resolution
LL PROT 1988—Protocol of 1988 relating to the International Convention on Load Lines, 1966	03/02/2000	02/12/2002	02/12/2002	05/06/2003	01/01/2005	MSC.143(77)
SAR 1979—International Convention on Maritime Search and Rescue, 1979	22/06/1985	06/06/1997	September 1997	18/05/1998	01/01/2000	MSC.70(69)
SOLAS 1974—International Convention for the Safety of Life at Sea, 1974, as amended	25/05/1980	02/04/1981	08/05/1981	20/11/1981	01/09/1984	MSC.1(XLV)
SOLAS PROT 1978—Protocol of 1978 relating to the International Convention for the Safety of Life at Sea, 1974	01/05/1981	02/04/1981	08/05/1981	20/11/1981	01/09/1984	MSC.2(XLV)
SOLAS PROT 1988—Protocol of 1988 relating to the International Convention for the Safety of Life at Sea, 1974	03/02/2000	28/05/1999	31/08/1999	26/05/2000	01/01/2002	MSC.92(72)
STCW 1978—International Convention on Standards of Training, Certification and Watchkeeping for Seafarers, 1978, as amended	28/04/1984	28/05/1990	31/07/1990	22/05/1991	01/12/1992	MSC.21(59)

Treaty	Date of entry into force of original treaty/ protocol	Date of approval of first amend- ment	Date of circulation of first amend- ment	Adoption dates of first amendment	Date of entry into force of amendment(s) to the origi- nal treaty/ protocol	Resolution
TONNAGE 1969—International Convention on Tonnage Measurement of Ships, 1969	18/07/1982	30/11/2012	11/04/2013	04/12/2013	28/02/2017	A.1084(28)
FAL 1965—Convention on Facilitation of International Maritime Traffic, 1965, as amended	05/03/1967	No record found	03/09/1973	19/11/1973	02/06/1984	
FAL 1965—annex	05/03/1967	No record found	28/11/1969	11/02/1971	12/08/1971	
SALVAGE 1989—International Convention on Salvage, 1989	14/07/1996	N/A	N/A	N/A	N/A	
IMSO CONVENTION 1976—Convention on the International Mobile Satellite Organization	16/07/1979	No record found	No record found	16/10/1985	13/10/1989	
IMSO AMEND-98—1998 amendments to Inmarsat Convention	31/07/2001	No record found	No record found	29/09/2006	Provisional applica- tion from 07/03/2007 pending their formal entry into force de- cided at 19th extraordinary Assembly of IMSO INMARSAT.6/ Circ.1 of 3 July 2007	

3. United Nations Industrial Development Organization

(submitted by the Legal Adviser and Director of the Office of Legal Affairs of the United Nations Industrial Development Organization)

(*a*) Internal email message to the Officer-in-Charge of the UNIDO Policymaking Organs concerning the legal status of [Territory/State] at UNIDO

Rights, if any, of autonomous territories of a Member State of UNIDO—Whether a territory's authorities or NGOs can obtain observer status at UNIDO and use that status for the purposes of representation

I refer to your email dated 29 April 2016 concerning the recent visit of a [State] delegation to UNIDO.

In reverse order, the questions you have asked, and my brief replies, are set out below.

1. *What are the rights, if any, of autonomous territories of a Member State?*

— Under the Constitution of UNIDO, the rights of membership are accorded to Member States, as represented by their national governments. Regardless of domestic status or degree of autonomy, regional governments and autonomous territories enjoy no rights under the Constitution of UNIDO.

2. *Could the [Territory] authorities or NGOs obtain observer status at UNIDO and use that status for the purposes of representation?*

— This Office is not aware of any precedent whereby the General Conference or the IDB [Industrial Development Board] has accorded a regional government or autonomous territory of a Member State any status at UNIDO.

— National or international NGOs based in [Territory] could secure the right to participate in the policymaking organs of UNIDO provided the IDB accords them consultative status. Consultative status is granted, upon application by each NGO, in accordance with the procedures and criteria set out in the *Guidelines for the relationship of UNIDO with intergovernmental, governmental, non-governmental and other organizations* (GC.1/Dec.41).

— The rights of participation of NGOs enjoying consultative status with UNIDO include the right to intervene, with the permission of the President, in debates on matters of particular concern to them (see, *e.g.*, rule 32 of the rules of procedure of the GC [General Conference]). It is conceivable that this right could be used for "representation" purposes.

25 May 2017

(*b*) Interoffice memorandum to the Officer-in-Charge of the UNIDO Department of Operational Support Services concerning the applicability to members of permanent missions of policies and rules governing common services on United Nations premises

United Nations premises-wide policies and rules apply to members of permanent missions—No duty to consult with permanent missions regarding United Nations premises-wide policies prior to agreeing to a new premises-wide policy or rule.

1. I refer to your emails of 18 and 26 May 2016, requesting legal advice in connection with a letter from the [State] ambassador to the Deputy Director-General of [United Nations Office]. The letter, dated 12 May 2016, objects to a message from [United Nations Office] informing permanent missions of changes made by the Committee on Common Services (CCS) to the smoking policy at the [UN Headquarters]. In his letter, the ambassador expresses the view that,

> "... while the decisions of this Committee fall to the staff of such [UN Headquarters-based] organizations, the measures ... will only apply to the staff of the Secretariat. Decisions involving actions or affecting the Member States and their permanent missions must be taken in an intergovernmental framework and having their consent as well.
>
> Consequently, we understand that the announced measures, with a restrictive approach, will only apply to the staff of international organizations based in [City]."

2. In his reply dated 25 May 2016, the Deputy Director-General of [United Nations Office] draws attention to General Assembly resolution 63/8 of 3 November 2008 on "Smoke-free United Nations premises" and explains that the decision of the CCS to restrict smoking to three designated shelters was an additional effort in providing a healthy and unpolluted environment to delegates, employees and visitors in the [UN Headquarters].

3. The questions you have referred to this Office in connection with the ambassador's letter are as follows:

(i) whether and how far [UN Headquarters]-wide policies and rules apply to members of permanent missions; and

(ii) whether and how far the organizations in the [UN Headquarters] are expected or obliged to consult with permanent missions about [UN Headquarters]-wide policies and changes thereto.

4. In summary, my conclusions are:

(i) that [UN Headquarters]-wide policies and rules are applicable, insofar as they are relevant, to members of permanent missions who use the common services and facilities at the [UN Headquarters]; and

(ii) that the Director General is not obliged to consult with permanent missions prior to the promulgation of [UN Headquarters]-wide policies and rules but that it would be prudent for him to do so where such policies and rules affect their interests.

(i) *Do [UN Headquarters]-wide policies and rules apply to members of permanent missions?*

5. For the purposes of this opinion, the expression "[UN Headquarters]-wide policies and rules" refers to administrative issuances and announcements of the [UN Headquarters]-based organizations governing the provision of common services and related matters at the [UN Headquarters].[1] Examples of [UN Headquarters]-wide policies and rules include the issuances or announcements regulating safety and security, medical services, parking and smoking.

6. Administrative authority over the [UN Headquarters] and over common services at the [UN Headquarters] lies with the executive heads of the [UN Headquarters]-based organizations. No uniform mechanism exists for issuing [UN Headquarters]-wide policies and rules. While generally based on decisions of the Committee on Common Services, they may be found in administrative issuances or announcements promulgated by:

— the executive heads jointly (*e.g.* security rules);

— the organization responsible for the service (*e.g.* parking rules); and/or

— each organization separately (*e.g.* smoking policy).

7. [UN Headquarters]-wide policies and rules do not require the approval of the policymaking organs of UNIDO. The authority of the Director General of UNIDO in respect of [UN Headquarters] matters derives from, and is exercised in accordance with, the provisions of a number of instruments:

— The Constitution of UNIDO, which stipulates in article 13(3) that the Director General is the chief administrative officer of the Organization and has the overall responsibility and authority to direct the work of the Organization, subject to the general or specific directives of the General Conference or the Industrial Development Board.

— The Relationship Agreement of 1985 between the United Nations and UNIDO, article 14 of which regulates administrative cooperation and consultations between the parties, including with regard to common facilities or services.

— The Memoranda of Understanding of 1977 and 1998 between the [UN Headquarters]-based organizations concerning the allocation of common services at the [UN Headquarters], which allocates catering and buildings management to UNIDO. The MOU of 1977 provides that policy direction and overall management in regard to the planning and implementation of the common services rests with the CCS, while the MOU of 1998 confirms that the CCS functions on the basis that each common service is allocated to one of the organizations and is operated under the authority of the respective executive head who bears final responsibility for that service.

— The Headquarters Agreement of UNIDO of 1995, section 16(*a*) of which states that the Organization has the power to make regulations, operative within the headquarters seat, for the purpose of establishing therein conditions in all respects necessary for the full execution of its functions. Section 16(*a*) further provides that no law of

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[1] The reference to "administrative issuances" in this definition excludes treaty-based rules such as those Commissary rules contained in the supplemental agreement of 1972 between the [United Nations Organization] and the [Host Country] on the establishment of an Agency Commissary.

> the [Host Country] which is inconsistent with such a regulation shall, to the extent of such inconsistency, be applicable within the headquarters seat.

8. Each [UN Headquarters]-based organization has a framework of internal rules and agreements similar to that of UNIDO. As far as UNIDO is concerned, the relevant instruments imply not only that the day-today administration of the common services and other facilities at the [UN Headquarters] is the prerogative of the executive heads. They also imply that [UN Headquarters]-wide policies and rules may be made applicable to and binding on all persons who use the services and facilities in question, irrespective of their personal status. In principle, therefore, [UN Headquarters]-wide policies and rules may apply to staff members, consultants, contractors and delegates.

9. The headquarters seat of UNIDO and the other [UN Headquarters]-based organizations could not be effectively administered if an entire category of users were exempt from the application of [UN Headquarters]-wide policies and rules. If members of permanent missions did not have to follow [UN Headquarters]-wide policies and rules unless they had specifically consented to them, there would be no clarity on what rules, if any, would govern their use of the services and facilities in question. The results would be unfortunate. For example, if the garage rules did not apply to members of permanent missions, there would be nothing to prevent them from parking in bays reserved for others, such as the disabled, or from ignoring the requirement that cars be insured for third party liability. And if the ban on smoking did not apply to members of permanent missions, they would be free to smoke in non-designated areas such as the cafeteria, the conference rooms and the rotunda, while everyone else would not.

10. In the light of the above, it must be concluded that [UN Headquarters]-wide policies and rules are also applicable, insofar as they are relevant, to members of permanent missions who use the common services and facilities at the [UN Headquarters].

(ii) *Is there a duty to consult with permanent missions regarding [UN Headquarters]-wide policies?*

11. This Office can identify no provision that expressly or implicitly requires the Director General to consult with permanent missions to UNIDO prior to, or as a condition for, the issuance of a [UN Headquarters]-wide policy or rule.

12. On the other hand, the Terms of Reference of the CCS state that the committee will give "[j]oint briefings, as appropriate, to Member States". An obvious forum for such briefings would be the Multilateral Diplomatic Committee, the full name of which is *Multilateral Diplomatic Committee for Relations with the International Organizations at [City] and the Host Country.*[2] As the chair of the MDC explained in the committee's annual report for 2015, which was tabled at the sixteenth session of the General Conference,

> "2. The MDC addresses matters that are relevant to all Member States and all [City]-based organizations ([…]). These are operating with a collaborative approach, as indicated by the establishment in 1977 of the Committee on Common Services and its Advisory Committees.

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[2] *See* GC.14/Res 7, dated 2 December 2011.

3. In light of the above, in 2015 the MDC promoted the participation in its meetings of representatives of all [City-based organizations]. The direct exchange of information between them and Member States is extremely important. *It can serve as a valuable source of input for the decision-making processes of all organizations*, and also be of value to the Host Country."[3]

13. The annual report of the MDC for 2015 goes on to conclude that there was a "[n]eed to consult with Member States on important matters and decisions involving or affecting Permanent Missions and the diplomatic community" (paragraph 7(*f*)).

14. There is accordingly an expectation on the part of the MDC that member states will be consulted on important [UN Headquarters]-wide policies or rules that involve permanent missions or affect their interests. This expectation does not, however, establish an obligation on the part of the executive heads of the [UN Headquarters]-based organizations to conduct such consultations prior to agreeing to a new [UN Headquarters]-wide policy or rule. Nevertheless, given that the authority of the Director General is subject to the general or specific directives of the General Conference or the IDB, it may be prudent for the Secretariat to brief the MDC on important new [UN Headquarters]-wide policies or rules that are likely to involve or affect the interests of permanent missions. At any rate, permanent missions that object to a [UN Headquarters]-wide policy or rule have the right to raise their objections with the Secretariat or in the policymaking organs of UNIDO.

30 June 2016

(*c*) Letter to the Chief of the Treaty Section of the United Nations concerning UNIDO's objection to the reservations by the [State] to the Convention on Privileges and Immunities of the Specialized Agencies of 1947

Depository practice of the United Nations Secretary-General regarding the Convention on Privileges and Immunities of the Specialized Agencies of 1947—Objection of UNIDO to the reservations by a State to the Convention on Privileges and Immunities of the Specialized Agencies of 1947

I refer to depositary notification C.N.428.2016.TREATIES-III.2 of [date] announcing the receipt by the Secretary-General of the United Nations of the instrument of accession, with reservations, of the Government of the [State] to the Convention on the Privileges and Immunities of the Specialized Agencies of 1947. I also refer to your letter of 13 June 2016 to the Director General of the United Nations Industrial Development Organization, in which you advised that, consistent with depositary practice, the deposit of [State]'s instrument of accession requires the approval of the specialized agencies concerned.

On behalf of the Director General, I wish to inform you that the United Nations Industrial Development Organization objects to the reservations by the Government of the [State] to section 19 (*b*) and section 20 of the Convention on the grounds that the reservations, as currently formulated, would impinge on the independent exercise by UNIDO of its functions in the territory of [State] and are incompatible with the object and purpose of the Convention.

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[3] Document GC.16/CRP.6, dated 25 November 2015, paras. 2–3 (emphasis added).

It would be appreciated if, in accordance with established practice, the position of the United Nations Industrial Development Organization could be communicated to the Government of the [State] with a view to finding an acceptable solution.

4 July 2016

(*d*) Internal email message to the Secretary of the UNIDO Staff Pension Committee (SPC) concerning disability pension case of an unnamed staff member

Determination of incapacity within the meaning of article 33(*a*) of the United Nations Joint Staff Pension Fund (UNJSPF) Regulations by the SPC "in each case"—Decisions of the SPC (or its secretary) are reviewable by the SPC and, thereafter, the Standing Committee, acting on behalf of the Board of the Fund, and, ultimately, the United Nations Appeals Tribunal

Reference is made to your email of 30 August 2016 addressed to the Legal Adviser, which requested advice concerning the disability pension case of an unnamed staff member. In particular, you ask "*under which rule could/should HRM possibly replace the SPC's consideration of the case as required by UNJSPF [United Nations Joint Staff Pension Fund] Administrative Rule H.4 (i.e. to consider whether the individual should receive a disability benefit)?*" You state that this is a matter for the SPC, rather than HRM and the JAB [Joint Appeals Board], and request us to confirm whether HRM's [Human Resources Management] view is correct.

In so far as the determination of incapacity within the meaning of article 33(*a*) of the Fund's Regulations is concerned, we are not aware of other applicable rules in UNIDO. The determination of incapacity for the purpose of disability benefits under article 33(*a*) and (*b*) of the Fund's Regulations shall be made "in each case" by the SPC of the organization by which the participant is employed. Cf. Administrative Rule H.1(*a*). The employer organization has the obligation to request such a determination from the SPC whenever there is reason to believe that the participant may be incapacitated, or if she is placed on LWOP [leave without pay] or her appointment is terminated for reasons of health. Cf. Administrative Rule H.3. If the employer organization has not acted in accordance with rule H.3, the SPC shall make the determination under article 33(*a*) at the request of the participant. Cf. Administrative Rule H.4.

Decisions of the SPC (or its secretary) are reviewable by the SPC and, thereafter, the Standing Committee, acting on behalf of the Board of the Fund, and, ultimately, the UNAT [United Nations Appeals Tribunal], in accordance with section K of the Administrative Rules of the Fund. Appeals against administrative decisions normally lie before the Joint Appeals Board (JAB) under chapter XII of the Staff Rules and, ultimately, the ILO Administrative Tribunal (ILOAT). Cf. Staff Regulation 12.2(*a*). Claims from staff members alleging the non-observance of the Regulations and Rules of the United Nations Joint Staff Pension Fund, however, are appealable to the UN Appeals Tribunal (UNAT), not the ILOAT. Cf. Staff Regulation 12.2(*b*).

Although participation in the Fund in accordance with the Regulations and Rules of the UNJSPF is, indeed, a term and condition of a staff member's appointment (unless excluded by the letter of appointment), cf. Staff Regulation 8.1; Staff Rule 108.01, an appeal

against the SPC's determination of incapacity for the purpose of disability benefits under article 33(*a*) and (*b*) of the Fund's Regulations is *not* appealable to the JAB pursuant to the principle of *lex specialis derogat generali*.

Furthermore, it is the SPC and not the Director General who determines the question of incapacity within the meaning of article 33(*a*) of the Fund's Regulations. An appeal to the JAB would be pointless in so far as the merits is concerned, because the JAB only makes recommendations to the Director General, and the Director General does not have the authority to make the necessary administrative decision regarding disability.

What if a disability claim under article 33(*a*) is, for whatever reason, not forwarded to the SPC or the SPC Secretariat, thus precluding the SPC from making a determination under Administrative Rule H.1(*a*)? In other words, who is competent to decide the issue of whether the employer organization has not acted in accordance with rule H.3? Since the SPC Secretariat is aware of the claim in the present case, the question is academic. In any event, it is for the SPC alone to determine the issue, because the determination of incapacity for the purpose of disability benefits shall be made "in each case" by the SPC.

7 September 2016

(*e*) Internal email message to the UNIDO Senior Human Resource Officer concerning possible retroactive application of the unified salary scale

Implementation of the unified salary scale pursuant to GA resolution 70/244—Obligations arising for UNIDO based on membership in the United Nations common system—Valid justifications for UNIDO to depart from General Assembly decisions—General principles of law underpinning the United Nations common system

This is with reference to your email to the Legal Adviser, dated 5 September 2016, concerning a possible change in the effective date of the unified salary scale for staff in the Professional and higher categories.

The unified salary scale is due to take effect on 1 January 2017 pursuant to GA resolution 70/244. You indicate that two options are being considered because of technical difficulties at the United Nations. The options are to postpone the effective date of 1 January 2017 or, alternatively, to postpone introduction of the unified salary scale but to apply it retroactively from 1 January 2017. You also indicate that [UNIDO Department A], [UNIDO Department B] and [UNIDO Department C] have concluded that the retroactive option would be close to impossible for UNIDO to implement. Consequently, if the General Assembly decides to apply the unified salary scale retroactively from 1 January 2017, UNIDO would not follow the retroactive element of the decision. The question you raise is whether such an approach would be acceptable and in line with the legal obligations of UNIDO.

Generally speaking, membership of the common system means that UNIDO has a legal duty to implement decisions of the General Assembly on matters falling within its competence under the Statute of the ICSC [International Civil Service Commission]. As is well known, such matters include the salary scales of staff in the Professional and higher categories. With the adoption of GA resolution 70/244, UNIDO came under an obligation to implement the unified salary scale as of 1 January 2017.

On the other hand, if the General Assembly adopts a new decision on the unified salary scale that adversely modifies GA resolution 70/244, it appears that the Organization would be able to provide a valid justification for departing from the new decision and for implementing it only to the extent that it is reasonably possible to do so. The Organization's obligations in terms of the Statute of the ICSC do not exist in isolation and are exercised in the light of general principles of law, which underpin the workings of the common system. General principles that are likely to aid UNIDO in the present case include the principles of reasonable reliance (*i.e.* UNIDO reasonably relied on the effective dates set out in GA resolution 70/244 and made its preparations accordingly) and impracticability of performance (*i.e.* it would be excessive and unreasonably difficult for UNIDO to change implementing modalities at this late stage in order to implement the unified salary scale retroactively).

The issue is still somewhat speculative as we do not know what the General Assembly will decide. UNIDO should, however, minimize any deviation from the General Assembly's new decision. One possibility may be to give effect to the unified salary scale on 1 January 2017, without deferring its implementation. From a legal viewpoint, the result would be virtually identical to deferred implementation coupled with retroactive effect as of 1 January 2017.

13 September 2016

(*f*) Email message to the Legal Officer of the [UN Organization] concerning the [Host Country] tax obligations for consultants

UNIDO's Independent Service Agreements extend functional privileges and immunities to consultants—Expert on mission status of consultants derived from Section 42 of the Headquarters Agreement of UNIDO—Consultants receive tax exemptions on their official salaries and emoluments based on their status as experts on mission

I refer to your email of 25 August 2016 to the [city-based United Nations organizations] legal advisers, asking for information on our experience with regard to the issue of exemption from taxation of consultants. The practice of UNIDO, which seems to differ from that of the [UN Organization], may be summarized as follows:

- UNIDO issues its consultants with Independent Service Agreements [ISA], which stipulate that the subscriber may, where relevant, benefit from functional privileges and immunities under international law. In the case of international consultants, the ISA provides that a subscriber who undertakes international travel on behalf of UNIDO shall be given the status of expert on mission under the terms of Annex XVII of the Convention on the Privileges and Immunities of the Specialized Agencies.
- In [Host Country], consultants engaged under an ISA automatically have the status of experts on mission for UNIDO. This status derives from section 42 of the Headquarters Agreement of UNIDO, which defines the term 'experts' to include experts *consulting at its request in any way* with the Organization. Section 43 of the Headquarters Agreement provides that such experts shall be exempt from taxation on their official salaries and emoluments.
- In view of the above provisions, UNIDO does not specifically designate individual consultants as experts on mission in [Host Country]. The Organization is nevertheless obliged to provide the Host Government with a list of experts and to update the list from time to time.

— If a consultant would otherwise have no right to reside in [Host Country] (*e.g.* as an EU [European Union] national), UNIDO will request a legitimation card for him or her. Legitimation cards may also be requested on other grounds if need be. However, consultants engaged under an ISA in [Host Country] are still experts on mission for UNIDO, even if they do not happen to have a legitimation card.

— Concrete problems relating to the taxation of consultants' fees have not been brought to the attention of the Office of Legal Affairs in recent years.

[…]

19 September 2016

(*g*) Internal email message to the UNIDO Human Resource Officer concerning import of medication under HQ Agreement with [Host Country]

The importation of medication is not expressly covered by the Headquarters Agreement of UNIDO—The expression "certain articles for personal use or consumption" in Section 37(*o*)(iii) of the Headquarters Agreement includes prescription and non-prescription medication—Limited quantities of medication may be imported subject to compliance with the laws of the Host Country.

I refer to your email of 27 September 2016 asking whether medication can be imported into [Host Country] under the Headquarters Agreement of UNIDO if members of the [Insurance company] scheme can purchase it cheaper elsewhere.

Before answering your question, I would like to comment on the statement by [Insurance company] that they have increased costs "because certain medicine is more expensive in [Host Country] than in other countries". Most beneficiaries live in [Host Country] and the premiums are calculated on the basis that most expenses are incurred in [Host Country] as well. The focus should not be on the comparative cost of medication, which has always been cheaper elsewhere, but on whether costs have increased due to other factors such as medical inflation, greater use or new treatments.

The importation of medication is not expressly covered by the Headquarters Agreement. In terms of section 37(*o*)(iii) of the agreement, officials of UNIDO have the right to import for personal use, free of duty and other levies, prohibitions and restrictions on imports, "[l]imited quantities of certain articles for personal use or consumption and not for gift or sale". In my view, the expression "certain articles for personal use or consumption" includes prescription and non-prescription medication.

Officials who purchase limited quantities of medication abroad may therefore bring it with them whenever they return to [City] (this right exists under [Host Country] law anyway). In principle, officials who buy limited quantities of medication outside of [Host Country] can also have it shipped duty-free to [City], provided they complete any paperwork that is necessary for importation under the Headquarters Agreement. Section 37(*o*)(iii) only regulates importation and does not permit transactions that would otherwise be unlawful in [Host Country], such as online purchases of prescription or unlicensed medication. The import privileges in section 37(*o*) apply to beneficiaries who are currently officials (*i.e.* staff) and not to retirees or consultants.

Finally, if you wish to issue guidance to staff on this topic, please consult with the General Support Services Unit regarding the procedures for duty-free importation of goods into the EU. Any suggestion that staff are encouraged to import medication should be avoided as advice on medical matters can only be provided by a medical professional.

7 October 2016