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UNITED NATIONS JURIDICAL YEARBOOK

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

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

Chapter VI

SELECTED LEGAL OPINIONS OF THE SECRETARIATS OF THE UNITED NATIONS AND RELATED INTERGOVERNMENTAL ORGANIZATIONS[1]

A. Legal opinions of the Secretariat of the United Nations

(Issued or prepared by the Office of Legal Affairs)

1. Privileges and immunities

(*a*) Inter-office memorandum to the Assistant Secretary-General of [Office] concerning the issuance of the United Nations *laissez-passer* (UNLP) on an exceptional basis to individuals who are not officials of the United Nations

Convention on the privileges and immunities of the United Nations—The United Nations may issue United Nations *laissez-passers* to its "officials"—General Assembly resolution 3188 (xxvii)—Privileges and immunities granted to some "officials other than Secretariat officials"—Experts on missions, consultants and individual contractors not "officials" and not entitled to a *laissez-passerz*—Experts on missions may be provided with a United Nations certificate stating that they are travelling on official business—Consultants and individual contractors may be given status of experts on mission

1. This is with reference to your memorandum dated [date] and to the exchanges between our offices seeking our comments concerning the issuance of the United Nations *laissez-passer* (UNLP) on an exceptional basis to individuals who are not officials of the United Nations.

2. We understand that [Office] frequently receives requests for issuance of UNLPs to non-staff members of the United Nations. We further understand that most of these requests concern individuals who are consultants or experts on mission for the United Nations. We note that it is [Office]'s current policy that such categories of individuals are not generally entitled to receive a UNLP.

3. Pursuant to article VII, section 24 of the Convention on the Privileges and Immunities of the United Nations (the "General Convention"), the Organization may issue UNLPs "to its officials". Pursuant to article V, section 17 of the General Convention the Secretary-General specifies the "categories of officials" to which the privileges and immunities set forth in articles V and VII shall apply.

4. In accordance with article V, section 17, the Secretary-General proposed to the General Assembly that the categories of officials to which privileges and immunities under

[1] This chapter contains legal opinions and other similar legal memoranda and documents.

article V shall apply include "all members of the staff of the United Nations, with the exception of those who are recruited locally and are assigned to hourly rates". In resolution 76 (I) adopted by the General Assembly on 7 December 1946, the General Assembly approved the granting of the privileges and immunities referred to in articles V and VII of the General Convention "to all members of the staff of the United Nations, with the exception of those who are recruited locally and are assigned to hourly rates". Pursuant to the Staff Regulations (ST/SGB/2014/2), staff members are those who fall within the meaning of Article 97 of the Charter of the United Nations, and "whose employment and contractual relationship are defined by a letter of appointment subject to regulations promulgated by the General Assembly pursuant to Article 101, paragraph 1, of the Charter".

5. Pursuant to article V, section 17 of the General Convention, the Secretary-General has further proposed to the General Assembly that articles V and VII of the General Convention should apply to other individuals, apart from staff members. For example, in resolution 3188 (XXVII) of 18 December 1973, upon the Secretary-General's proposal, the General Assembly approved the granting of privileges and immunities under articles V and VII of the General Convention to members of the Joint Inspection Unit and the Chair of the Advisory Committee on Administrative and Budgetary Questions. Individuals who fall within this category have been consistently referred to by the General Assembly as "officials other than Secretariat officials".

6. Pursuant to article VII, section 26 of the General Convention, "experts on mission" may be provided with a United Nations certificate, stating that they are travelling on the business of the United Nations. They are not entitled to a UNLP although as holders of a United Nations certificate, experts on mission shall be accorded similar facilities as a holder of a UNLP.

7. Consultants and individual contractors are not considered as "officials" of the United Nations and as such, they are not entitled to the privileges and immunities in article[s] V and VII of the General Convention. However, depending on the circumstances, such consultants and individual contractors, may be considered as experts on mission and may therefore be provided with a United Nations certificate of the kind described in section 26 of the General Convention. Indeed, pursuant to Administrative Instruction ST/AI/2013/4 on consultants and individual contractors:

> "Consultants and individual contractors serve in their individual capacity and not as representatives of a Government or of any other authority external to the United Nations. They are neither staff members under the Staff Rules and Staff Regulations of the United Nations nor officials for the purpose of the Convention on the Privileges and Immunities of the United Nations of 13 February 1946. Consultants and individual contractors may be afforded the status of experts on mission within the meaning of article VI, section 22, of the Convention. If the consultants and individual contractors are required to travel on behalf of the United Nations, they may be given a United Nations certificate in accordance with article VII, section 26, of the Convention".

8. In light of the above, OLA has consistently taken the position that in accordance with the General Convention, only "officials", whether staff members or officials other than Secretariat officials, are entitled to UNLPs. Experts on mission, even where such individuals are former staff members, are not entitled to a UNLP but are entitled to a certificate, confirming that they are travelling on the business on the United Nations. Consultants and individual contractors may, depending on the circumstances, be given the status of

experts on mission and similarly be entitled to a certificate. The issuance of UNLPs to individuals other than officials has been authorized by the Organization in the past only on an exceptional basis, dictated by the operational needs of the Organization. For example, a review of our files indicates that requests for the issuance of UNLPs to individuals other than officials have been approved on an exceptional basis after taking into account the particular political situation and security concerns of such requests. In the cases that we have seen, such approvals were authorized in consultation with OLA. Accordingly, any request for the issuance of a UNLP on an exceptional basis would need to be assessed on a case-by-case basis.

19 March 2015

(*b*) Inter-office memorandum to the Assistant Secretary-General of [Office] concerning the privileges and immunities of the United Nations with regard to the export of weapons and ammunition in support of United Nations peacekeeping and political missions and for the protection of United Nations personnel and premises

Protocol against the illicit manufacturing of and trafficking in firearms, their parts and components and ammunition—2012 European Union rules and regulations on export of firearms—United Nations Convention against transnational organized crime—Article 105 of the Charter of the United Nations—Article II, Section 7(*b*) of the Convention on the privileges and immunities of the United Nations—The United Nations is exempt from national regulations barring export of weapons and ammunition

1. This is with reference to the email received from [Name], [position], [Division and Office] on [date] and the exchanges between our offices seeking our views on the application of the Convention on the Privileges and Immunities of the United Nations (the "General Convention") with respect to national regulations, sanctions and/or embargoes imposed by Member States related to the export of weapons and ammunition in support of United Nations peacekeeping and political missions and the protection of United Nations personnel and premises worldwide.

2. We understand that [Office] regularly purchases weapons and ammunition from vendors who export these items to United Nations field missions and premises worldwide. We also understand that the export of weapons and ammunition by the vendors is often delayed due to requirements under national regulations or sanctions and embargoes on the transfer of weapons to certain countries.

3. We note that [Office] has raised the issue of the applicability of the Protocol against the Illicit Manufacturing of and Trafficking in Firearms, their Parts and Components and Ammunition[2] ("Firearms Protocol") and the 2012 European Union rules and regulation on export of firearms[3] (Regulation No 258/2012) ("EU Firearms Regulation") to

[2] A/RES/55/255. For more information about the Firearms Protocol, please access: http://www.unodc.org/unodc/en/firearms-protocol/the-firearms-protocol.html.

[3] To access this document, please visit: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32012R0258&from=EN.

the United Nations. We note that the Firearms Protocol supplements the United Nations Convention against Transnational Organized Crime,[4] which is open to signature and ratification by Member States and regional economic organizations. The European Union is a signatory to the Firearms Protocol and pursuant to its obligations under article 10 of the Firearms Protocol to establish or maintain an effective system of export and import licensing of firearms, the European Union established the EU Firearms Regulation. While the Firearms Protocol and the EU Firearms Regulation are not directly applicable to the United Nations, we understand that as the United Nations is not listed as an exempt entity under the protocol and regulation, this may create impediments to the export of weapons and ammunition by vendors on behalf of the United Nations.

4. In this connection, we recall that under 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 article II, Section 7(*b*) of the General Convention, the United Nations, its assets, income and other property shall be "exempt from customs duties and prohibitions and restrictions on imports and exports in respect of articles imported or exported by the United Nations for its official use". Accordingly, where the United Nations is itself the exporter, provided that the exports are for the official use of the United Nations, the Organization would be exempt from national regulations that may constitute a "prohibition" or "restriction" on its exports, even if the United Nations has not been listed as an exempt entity under the Firearms Protocol or the EU Firearms Regulation.

5. Where the United Nations is not the direct exporter, but rather is purchasing from a vendor which is responsible for the export of weapons and ammunition to the United Nations, States (and the vendors themselves) may take the position that the vendor is responsible for complying with national regulations or sanctions, including the obligation to obtain an export license for such goods. In these circumstances, Member States should nevertheless assist the United Nations in facilitating the expeditious export of weapons and ammunition by vendors required for the operations of the United Nations in accordance with the principle set out in Article 2, paragraph 5 of the Charter that "[a]ll Members shall give the United Nations every assistance in any action it takes in accordance with the present Charter".

6. In this regard, we understand that [Office] intends to enter into long-term agreements with [State], [State] and [State] for the export of weapons and ammunition. [Office] may wish to enter into bilateral discussions with the relevant Governments (and the European Union, if necessary) to discuss practical options that would facilitate the export of items necessary for the United Nations to implement its operations. We note that a resolution of this issue will require an understanding as to which regulations may be causing the delay, how the regulations are being implemented in relation to the vendors of the United Nations, and an exploration of alternative methods where vendors purchase weapons and ammunition for Organization. OLA is available to assist with respect to the legal aspects of such discussions.

10 April 2015

[4] United Nations, *Treaty Series*, vol. 2225, p. 209.

(*c*) Note to [State] concerning privileges and immunities of United Nations staff members regarding the appointment and conditions of service, and taxation of the salaries and emoluments paid by the United Nations to United Nations officials

Article 101, paragraph 1 of the Charter of the United Nations—Conditions of service of staff members established exclusively by the United Nations Staff Rules and Regulations—Staff members not subject to national labour legislation—Convention on the privileges and immunities of the United Nations—United Nations staff members are exempt from national taxation—National courts are not an available forum to resolve labour disputes between staff members and the United Nations—General Assembly resolution 76 (I)—United Nations officials include locally recruited staff members, unless they are "assigned to hourly rates"—General Assembly resolution 239 (III)—Convention on the privileges and immunities of the specialized agencies—Exemption from taxation also applies to specialized agencies

This letter sets out the position of the United Nations with regard to the appointment and conditions of service of United Nations staff members, and with regard to the taxation of the salaries and emoluments paid by the United Nations to United Nations officials.

Appointment and Conditions of Service of United Nations Staff Members

It is a well-recognized principle of public international law that the employment relationship between the United Nations and its staff is not subject to national law, but is governed by the internal rules of the United Nations. This principle derives from Article 101, paragraph 1 of the Charter of the United Nations (the "Charter"), which provides that "[t]he staff shall be appointed by the Secretary-General under regulations established by the General Assembly". 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".

The Staff Regulations promulgated by the General Assembly provide, *inter alia*, that such Regulations "embody the fundamental conditions of service and the basic rights, duties and obligations" of the United Nations, and that the appointment of staff is subject to the provisions of the Staff Regulations and the Staff Rules promulgated by the Secretary-General to implement those Regulations. Locally-recruited staff, who may be nationals or permanent residents of a host State, are considered as staff within the meaning of Article 101, paragraph 1, of the Charter, and therefore their appointment is subject to the Staff Regulations and Rules. Pursuant to article V, section 17 of the Convention on the Privileges and Immunities of the United Nations (the "General Convention"), the Organization has an obligation to provide the names of these staff members "from time to time" to the Governments of Members.

Pursuant to the provisions in the Charter and the Staff Regulations, I am pleased to confirm that the United Nations has long maintained the position, which has been consistently recognized by its Member States, that the conditions of service of staff members are established exclusively by the Staff Regulations and Rules and, consequently, the conditions of service of staff members, including locally-recruited staff, are not subject to

national labour legislation. 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, including a comprehensive social security and pension scheme, and the requirement to comply with local laws.

Consistent with the above provisions, any requirement that the employment of nationals or permanent residents of a host State with the United Nations must be subject to national or local labour laws would contravene the provisions of the Charter and would interfere with the prerogatives of the Secretary-General and the Regulations approved by the General Assembly, undermining the exclusively international character of United Nations staff members as enshrined in Article 100 of the Charter. Moreover, the Organization would face an impossible administrative and financial burden if it were required to be subject to the labour laws and regulations in each of the 193 Member States in which it undertakes activities.

I am further pleased to confirm the position of the United Nations that national courts are not an available forum to resolve labour disputes between staff members and the United Nations. Pursuant to article II, section 2 of the General Convention, "[t]he United Nations, its property and assets wherever located and by whomsoever held, shall enjoy immunity from every form of legal process except insofar as in any particular case it has expressly waived its immunity". The immunity of the Organization applies to cases in which staff members bring labour-related claims against the Organization in national courts.

It should be recalled that the doctrine of state immunity is not applicable to the United Nations. The jurisdictional immunities of States and the privileges and immunities of international organizations have a different nature and origin. The jurisdictional immunities of States are a part of customary international law that has evolved through the years. The privileges and immunities of the United Nations are of a treaty law nature, originating in the Charter and the General Convention.

Notwithstanding the immunity of the Organization from legal process, United Nations staff members are not without a remedy to redress their complaints. In accordance with their contract of employment with the Organization, staff members have recourse to the justice mechanism provided for in the Staff Regulations and Rules to address any disputes they may have with the Organization.

The above is applicable to subsidiary bodies such as UNICEF, UNDP, UNHCR and UNFPA, which are integral parts of the United Nations. The principles articulated above would also be applicable to the Specialized Agencies under the relevant legal instruments of those agencies.

Taxation of Salaries and Emoluments paid by the United Nations to United Nations Officials

I wish to confirm that the long-standing position of the United Nations is that, in accordance with the privileges and immunities afforded to the Organization and its officials, all officials of the Organization, regardless of nationality, are exempt from the payment of income taxes on their United Nations income.

The applicable legal principles, and instruments, are as follows.

The United Nations and its officials have been accorded certain privileges and immunities which are necessary for the fulfillment of the purposes of the Organization. Article 105 of the Charter provides the general basis for the privileges and immunities of both the United Nations and its officials, by expressly stating that the Organization shall enjoy such privileges and immunities as are necessary for the fulfillment of its purposes.

In order to give effect to Article 105 of the Charter, the General Assembly of the United Nations adopted the General Convention on 13 February 1946. As integral parts of the United Nations, subsidiary bodies such as UNICEF, UNDP, UNHCR and UNFPA and their respective officials are entitled to the privileges and immunities provided for in the General Convention.

Pursuant to article V, section 18, sub-paragraph (*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 should be noted that the General Assembly in its resolution 76 (I) decided who may be considered as an official under the General Convention. That resolution provides that the privileges and immunities referred to in article V of the General Convention are granted "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). Therefore, all staff members of the United Nations are considered officials for the purposes of the General Convention, with the sole exception of those who are both recruited locally and assigned to hourly rates, and are entitled to exemption from such taxation irrespective of their nationality, residence, place of recruitment or rank.

Accordingly, locally-recruited staff members must be afforded the privileges and immunities of article V of the General Convention, including immunity from taxation on the salaries and emoluments paid to them, unless they are "assigned to hourly rates". Individual consultants and/or contractors are not considered as officials of the Organization.

The immunity from taxation applies to taxes levied by any governmental entity, whether national or sub-national.

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

It should be recalled that Member States of the Organization are expected not to make use of United Nations salaries and emoluments for any tax purposes. It will be recalled that in place of national taxation and to avoid the double taxation of United Nations officials, the General Assembly, in 1948, adopted a Staff Assessment Plan designed "to impose a direct assessment on United Nations staff members which is comparable to national income taxes" (General Assembly resolution 239 (III) A of 18 November 1948). The total funds

collected from this staff assessment are distributed among Member States (other than those which impose taxes based on a relevant reservation filed with the Secretary-General at the time of acceding to the General Convention), in proportion to their contributions to the assessed budget of the United Nations; this distribution serves as an offset against amounts otherwise owing by the Member States involved. National taxation would, therefore, impose a double taxation burden on officials of the United Nations and would increase the financial burden of the Organization and its Member States.

As staff members of the funds and programmes are subject to such staff assessment, any taxes that might be applied to the income derived from the United Nations would result in double taxation on those staff members.

A few Member States have, from time to time, in error, sought to levy taxation on the salaries and emoluments paid by the United Nations to their locally-recruited staff. However, once the matter is explained to the relevant national authorities, these States have repealed such measures and fully complied with their obligations under the General Convention. (See page 173, paragraph 63, *1985 Yearbook of the International Law Commission*, Volume 11, Part One, New York, 1989).

The same immunity from taxation is granted to officials of the "Specialised Agencies" of the United Nations. The term, "Specialized Agency", is a term of art and refers to an international, inter-governmental organization which has its own governing or legislative body that is not appointed by, nor reports directly to, the United Nations General Assembly. As set forth in Article 57 of the Charter, Specialized Agencies are those agencies that are "established by intergovernmental agreement and having wide international responsibilities, as defined in their basic instruments, in economic, social, cultural, educational, health, and related fields" which have been "brought into relationship with the United Nations in accordance with the provisions of Article 63". Article 63(1) of the Charter provides that "[t]he Economic and Social Council may enter into agreements with any of the agencies referred to in Article 57, defining the terms on which the agency concerned shall be brought into relationship with the United Nations. Such agreements shall be subject to approval by the General Assembly".

The immunity afforded to officials of the Specialized Agencies is established in the Convention on the Privileges and Immunities of the Specialized Agencies of 21 November 1947 (the "Specialized Agencies Convention"), which parallels the provisions of the General Convention. Under article I of the Specialized Agencies Convention, the "specialized agencies" are: The International Labour Organization (ILO); The Food and Agriculture Organization of the United Nations (FAO); The United Nations Educational, Scientific and Cultural Organization (UNESCO); The International Civil Aviation Organization (ICAO); The International Monetary Fund (IMF); The International Bank for Reconstruction and Development (IBRD, now part of the World Bank Group); The World Health Organization (WHO); The Universal Postal Union (UPU); The International Telecommunications Union (ITU); and "any other Agency in relationship with the United Nations in accordance with Articles 57 and 63 of the Charter".

The following agencies are Specialized Agencies which have been brought into relationship with the United Nations in accordance with Articles 57 and 63 of the Charter: The International Fund for Agricultural Development (IFAD); The International Maritime Organization (IMO); The United Nations Industrial Development Organization (UNIDO);

The World Intellectual Property Organization (WIPO); The World Meteorological Organization (WMO); and The World Tourism Organization (UNWTO). I note that the International Development Association (IDA) and International Finance Corporation (IFC), both part of the World Bank Group, are also considered as Specialized Agencies of the United Nations.

Officials of these Specialized Agencies would enjoy the privileges and immunities under the Specialized Agencies Convention so long as (*a*) the host country is party to the Specialized Agencies Convention; and (*b*) that Specialized Agency has been listed by the host country in its instrument of accession as an Agency to which it will apply the provisions of the Specialized Agencies Convention.

Organizations not listed in this letter might also be afforded privileges and immunities for themselves and their employees based on agreement with the host State.

14 April 2015

(*d*) Note to [State] concerning the privileges and immunities enjoyed by United Nations officials from [State] taxation on the salaries and emoluments paid by the United Nations to its officials and from mandatory contributions to national social welfare schemes, which is also a form of taxation

Article 105 of the Charter of the United Nations—Convention on the privileges and immunities of the United Nations—United Nations officials are exempt from national taxation—General Assembly resolution 76 (I)—United Nations officials include locally recruited staff members, unless they are "assigned to hourly rates"—General Assembly resolution 239 (III)—Staff assessment plan replaces national taxation—Exemption from taxation also applies to specialized agencies—Mandatory contributions to social welfare schemes or social security schemes are a form of taxation

This letter sets out the position of the United Nations with regard to the taxation of the salaries and emoluments paid by the United Nations to United Nations officials and mandatory contributions by United Nations officials to national social welfare schemes.

I understand that the Government of [State] intends to implement a procedure requiring international organizations, including the United Nations in [State], and diplomatic missions to withhold and transfer to the Government income taxes and contributions to the mandatory social welfare scheme from the salaries and emoluments paid to locally-recruited United Nations officials by the United Nations. In this regard, I wish to confirm the long-standing position of the United Nations that, in accordance with the privileges and immunities afforded to the Organization and its officials, the Organization does not withhold or deduct taxes on the income earned by officials of the Organization and that all officials of the Organization, regardless of nationality, are exempt from the payment of income taxes on their United Nations income and from mandatory contributions to social welfare schemes under national legislation.

The applicable legal principles, and instruments, are as follows.

Exemption from Taxation

The United Nations and its officials have been accorded certain privileges and immunities which are necessary for the fulfillment of the purposes of the Organization. Article 105 of the Charter of the United Nations (the "Charter") provides the general basis for the privileges and immunities of both the United Nations and its officials, by expressly stating that the Organization shall enjoy such privileges and immunities as are necessary for the fulfillment of its purposes.

In order to give effect to Article 105 of the 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] is a party since [date] without reservation. As integral parts of the United Nations, subsidiary bodies such as UNICEF, UNDP, UNHCR and UNFPA and their respective officials are entitled to the privileges and immunities provided for in the General Convention.

Pursuant to article II, section 7(*a*) of the General Convention, "[t]he United Nations, its assets, income and other property shall be exempt from all direct taxes." Pursuant to article V, section 18, sub-paragraph (*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 should be noted that the General Assembly in its resolution 76 (I) decided who may be considered as an official under the General Convention. That resolution provides that the privileges and immunities referred to in article V of the General Convention are granted "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 are considered officials for the purposes of the General Convention, with the sole exception of those who are both recruited locally and assigned to hourly rates, and are entitled to exemption from such taxation irrespective of their nationality, residence, place of recruitment or rank. The immunity from taxation applies to taxes levied by any governmental entity, whether national or sub-national.

Accordingly, locally-recruited staff members must be afforded the privileges and immunities of article V of the General Convention, including immunity from taxation on the salaries and emoluments paid to them, unless they are "assigned to hourly rates". Individual consultants and/or contractors are not considered as officials of the Organization.

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

It should be recalled that Member States of the Organization are expected not to make use of United Nations salaries and emoluments for any tax purposes. It will be recalled that in place of national taxation and to avoid the double taxation of United Nations officials,

the General Assembly, in 1948, adopted a Staff Assessment Plan designed "to impose a direct assessment on United Nations staff members which is comparable to national income taxes" (General Assembly resolution 239 (III) A of 18 November 1948). The total funds collected from this staff assessment are distributed among Member States (other than those which impose taxes based on a relevant reservation filed with the Secretary-General at the time of acceding to the General Convention), in proportion to their contributions to the assessed budget of the United Nations; this distribution serves as an offset against amounts otherwise owing by the Member States involved. National taxation would, therefore, impose a double taxation burden on officials of the United Nations and would increase the financial burden of the Organization and its Member States.

As staff members of the funds and programmes are subject to such staff assessment, any taxes that might be applied to the income derived from the United Nations would result in double taxation on those staff members.

A few Member States have, from time to time, in error, sought to levy taxation on the salaries and emoluments paid by the United Nations to their locally recruited staff. However, once the matter is explained to the relevant national authorities, these States have repealed such measures and fully complied with their obligations under the General Convention. (See page 173, paragraph 63, *1985 Yearbook of the International Law Commission*, Volume II, Part One, New York, 1989).

The same immunity from taxation is granted to officials of the "Specialized Agencies" of the United Nations. The term, "Specialized Agency", is a term of art and refers to an international, inter-governmental organization which has its own governing or legislative body that is not appointed by, nor reports directly to, the United Nations General Assembly. As set forth in Article 57 of the Charter, Specialized Agencies are those agencies that are "established by intergovernmental agreement and having wide international responsibilities, as defined in their basic instruments, in economic, social, cultural, educational, health, and related fields" which have been "brought into relationship with the United Nations in accordance with the provisions of Article 63." Article 63(1) of the Charter provides that "[t]he Economic and Social Council may enter into agreements with any of the agencies referred to in Article 57, defining the terms on which the agency concerned shall be brought into relationship with the United Nations. Such agreements shall be subject to approval by the General Assembly".

The immunity afforded to officials of the Specialized Agencies is established in the Convention on the Privileges and Immunities of the Specialized Agencies of 21 November 1947 (the "Specialized Agencies Convention") which parallels the provisions of the General Convention. [State] has been a party to the Specialized Agencies Convention since [date], without reservation. Under article I of the Specialized Agencies Convention, the "specialized agencies" are: The International Labour Organization (ILO); The Food and Agriculture Organization of the United Nations (FAO); The United Nations Educational, Scientific and Cultural Organization (UNESCO); The International Civil Aviation Organization (ICAO); The International Monetary Fund (IMF); The International Bank for Reconstruction and Development (IBRD, now part of the World Bank Group); The World Health Organization (WHO); The Universal Postal Union (UPU); The International Telecommunications Union (ITU); and "any other Agency in relationship with the United Nations in accordance with Articles 57 and 63 of the Charter."

The following agencies are also Specialized Agencies which have been brought into relationship with the United Nations in accordance with Articles 57 and 63 of the Charter: The International Fund for Agricultural Development (IFAD); The International Maritime Organization (IMO); The United Nations Industrial Development Organization (UNIDO); The World Intellectual Property Organization (WIPO); The World Meteorological Organization (WMO); and The World Tourism Organization (UNWTO). I note that the International Development Association (IDA) and International Finance Corporation (IFC), both part of the World Bank Group, are also considered as Specialized Agencies of the United Nations.

Officials of these Specialized Agencies would enjoy the privileges and immunities under the Specialized Agencies Convention, irrespective of nationality, so long as that Specialized Agency has been listed by [State] in its instrument of accession as an Agency to which it will apply the provisions of the Specialized Agencies Convention.

Organizations not listed above might also be afforded privileges and immunities for themselves and their employees based on agreement with [State].

Exemption of United Nations officials from mandatory national social welfare schemes

It has also been the long-standing position of the Organization that mandatory contributions to social welfare schemes or social security schemes under national legislation are considered a form of taxation and therefore are contrary to the provisions of article V, section 18, sub-paragraph (*b*) of the General Convention. Accordingly, for the reasons articulated above, I wish to confirm that all officials of the United Nations, including locally-recruited [State] officials, are entitled to an exemption from such mandatory contributions required under national laws.

The exemption from mandatory contributions to national social security schemes is further evidenced by the fact that the United Nations has its own comprehensive social security scheme. The establishment of such scheme is required under regulation 6.2 of the United Nations Staff Regulations, which are established by the General Assembly according to Article 101 of the Charter of the United Nations. Pursuant to the Staff Regulations, the Secretary-General has promulgated Rule 6.1 (Participation in the United Nations Joint Staff Pension Fund), Rule 6.2 (Sick leave), Rule 6.3 (Maternity and paternity leave), Rule 6.4 (Compensation for death, injury or illness attributable to service), Rule 6.5 (Compensation for loss or damage to personal effects attributable to service) and Rule 6.6 (Medical Insurance). It should be noted that, with the exception of Rule 6.6 (Medical Insurance) in which staff members "may be required to participate … under conditions established by the Secretary-General", the United Nations social security system is compulsory. It would therefore be inconsistent with Staff Regulation 6.2 for a Member State to insist that staff members not participate in the United Nations scheme, but participate in its national scheme. Moreover, as the United Nations social security scheme is subsidized by the United Nations and often offers benefits that other national schemes do not, mandatory contributions to the [State] scheme could deprive [State] nationals and permanent residents of the favourable benefits of the United Nations social security scheme.

In this regard, however, I note that United Nations officials are not prohibited from voluntarily participating in such schemes as they see fit at their own expense. Accordingly, it is the view of the United Nations that staff should be allowed to choose whether they would like to contribute to [State's] social welfare scheme, but should not be compelled to contribute to the scheme.

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

17 April 2015

(*e*) Note to the Permanent Mission of [State] concerning the privileges and immunities of United Nations officials performing functions in [State] and who are [State] nationals or permanent residents

Convention on the privileges and immunities of the United Nations—Article 105 of the Charter of the United Nations—United Nations officials immune from legal process—General Assembly resolution 76 (I)—Privileges and immunities apply to all United Nations staff members, except those who are locally recruited and assigned to hourly rates—The Secretary-General can waive immunity of any official in the interest of justice—The United Nations will cooperate with Member States to administer justice notwithstanding immunities—Privileges and immunities furnishes no excuse for staff failing to observe local laws and police regulations or for staff not performing their private obligations

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 recent questions that have arisen regarding the status, privileges and immunities of the Organization and its officials in [State].

In particular, the Office of Legal Affairs wishes to note the issue raised by the Government during a meeting between representatives of the Permanent Mission and the Office of Legal Affairs on [date] concerning whether United Nations officials performing functions in [State] who are [State] nationals or permanent residents shall enjoy privileges and immunities under the applicable international instruments, including the Convention on the Privileges and Immunities of the United Nations (the "General Convention") as well as various specific host country agreements concluded with United Nations entities. The Office of Legal Affairs also wishes to note that similar questions have arisen in discussions between United Nations entities operating in [State], including the United Nations Development Programme ("UNDP"), the United Nations Population Fund ("UNFPA"), the United Nations Joint Programme on HIV/AIDS ("UNAIDS"), the United Nations Interregional Crime and Justice Research Institute ("UNICRI") and the United Nations

University ("UNU"), and the Ministry of Foreign Affairs of [State] with respect to the conclusion of certain host country and project agreements.

Further to the request of the Permanent Mission made during the meeting of [date], the Office of Legal Affairs wishes to provide the following general information regarding the status, privileges and immunities of the Organization and its officials under international law.

The legal framework applicable to the status, privileges and immunities of the United Nations and its officials derives from the Charter of the United Nations (the "Charter") and the Convention on the Privileges and Immunities of the United Nations (the "General Convention"), which establish a specialized regime that is necessary for the Organization to carry out its important work for the benefit for all 193 of its Member States. It is fundamentally different from the legal framework that applies in bilateral relations between States as codified in the 1961 Vienna Convention on Diplomatic Relations, which is based on the principle of reciprocity and limits immunity to diplomatic agents and not to the administrative, technical and service staff of the mission, including national staff.

Article 105, paragraph 1 of the Charter provides that the Organization "shall enjoy … such privileges and immunities as are necessary for the fulfilment of its purposes". Article 105, paragraph 2 further provides that 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". Pursuant to paragraph 3 of Article 105 of the Charter, the General Assembly was empowered to "make recommendations with a view to determining the details of the application of paragraphs 1 and 2 of this Article or may propose conventions to the Members of the United Nations for this purpose".

As contemplated by paragraph 3 of Article 105, the General Assembly adopted the General Convention on 13 February 1946, to which [State] is a party without relevant reservation since 31 October 1963.

The General Convention defines the privileges and immunities enjoyed by the Organization and its officials. Notably, in accordance with article V, section 18(*a*) of the General Convention, United Nations officials shall be "immune from legal process in respect of words spoken or written and all acts performed by them in their official capacity".

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

The categories established in resolution 76 (I) have remained unchanged and the Secretary-General has accordingly maintained that the determination made by the General Assembly in that resolution precludes any distinction being drawn on grounds of nationality or residence to exclude a given category of staff from the benefit of the privileges and immunities referred to in the General Convention. As a result, the immunity from legal process granted by article V, section 18(*a*) of the General Convention applies to all United Nations staff members, independent of their nationality, provided they are not assigned to hourly rates.

The rationale for such immunity is that the officials of the Organization must be able to carry out their official functions impartially and free from interference. Absent immunity, individuals employed by the United Nations could find themselves vulnerable to criminal prosecution and civil suit in local courts and tribunals around the world for claims arising out of their official acts. This immunity is therefore a vital condition for the United Nations to function, which is why it was granted to the Organization by the agreement of its Member States. It secures the independence of the United Nations and its officials from regulation under national law and relieves the Organization from exposure to litigation in national courts and tribunals in more than 190 Member States with different criminal and civil laws and procedures.

It is also important to note that the privileges and immunities enjoyed by United Nations officials by virtue of the Charter and the General Convention are conferred in the interests of the Organization and not for the personal benefit of the individuals themselves. Pursuant to the United Nations Staff Regulations and Rules, these privileges and immunities furnish no excuse to the staff members who are covered by them to fail to observe laws and police regulations of the State in which they are located, nor do they furnish an excuse for the non-performance of their private obligations.

Moreover, in accordance with article V, section 20 of the General Convention, "[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".

In addition, article V, section 21 of the General Convention provides that "[t]he United Nations shall cooperate at all times with the appropriate authorities of Members to facilitate the proper administration of justice, secure the observance of police regulations and prevent the occurrence of any abuse in connection with the privileges, immunities and facilities mentioned in [article V]".

Pursuant to these obligations, the United Nations has consistently cooperated with the appropriate authorities of Member States to facilitate the proper administration of justice. In criminal matters, the United Nations cooperates fully with national law enforcement authorities, including through the waiver of immunity accorded to United Nations officials, in order to prevent abuse of the privileges and immunities under the General Convention.

It should be recalled that under section 34 of the General Convention, [State] has an obligation to be "in a position under its own law to give effect to the terms of this Convention". Accordingly, the Office of Legal Affairs would be grateful for the assistance of the Permanent Mission in facilitating the resolution of any outstanding issues related to this matter consistent with the status, privileges and immunities of the United Nations under the applicable international agreements.

The Office of Legal Affairs wishes to express its gratitude for the support and assistance that the Organization enjoys in [State]. The Office of Legal Affairs of the United Nations also avails itself of this opportunity to renew to the Permanent Mission of [State] to the United Nations the assurances of its highest consideration.

4 June 2015

(*f*) Inter-office memorandum to the Deputy Director of the [Division] concerning the privileges and immunities of United Nations officials to use the United Nations diplomatic pouch service to transmit and receive medical items

ARTICLE III, SECTION 10 OF THE CONVENTION ON THE PRIVILEGES AND IMMUNITIES OF THE UNITED NATIONS—DIPLOMATIC POUCH HAS SAME STATUS AS DIPLOMATIC BAG—DIPLOMATIC BAGS MAY CONTAIN DOCUMENTS OR "ARTICLES INTENDED FOR OFFICIAL USE"—PERMISSIBLE USE OF THE DIPLOMATIC POUCH TO SHIP ITEMS NOT ABLE TO BE SHIPPED THROUGH OTHER MEANS AND, SPECIFICALLY, FOR HEALTH SUPPLIES FOR STAFF MEMBERS AND THEIR DEPENDENTS—EXEMPTION OF IMPORTS AND EXPORTS BY THE UNITED NATIONS FOR ITS OFFICIAL USE MAY NOT TO BE USED TO CIRCUMVENT DOMESTIC LAWS

1. This is with reference to your memorandum of [date] addressed to [Name] and the discussion between our offices on [date] requesting OLA's views on the use of the diplomatic pouch for medical items.

2. We understand that [Division] is currently reviewing its policies and procedures regarding the use of the diplomatic pouch to send medical items to United Nations clinics in field duty stations. We further understand that [Division] also receives requests from staff members working in the field to send medical items to them through the diplomatic pouch for their own use or for the use of their dependents. We set out below the legal issues which we recommend be taken into account by [Division] in formulating the appropriate policies and procedures in dealing with such requests.

3. We note that pursuant to article III, section 10 of the Convention on the Privileges and Immunities of the United Nations ("General Convention"), "[t]he United Nations shall have the right to use codes and to dispatch and receive its correspondence by courier or in bags, which shall have the same immunities and privileges as diplomatic couriers and bags." Based on this provision, the United Nations has established the diplomatic pouch service. We note that the main purpose of the United Nations diplomatic pouch service is to provide a secure means of transmitting and receiving the Organization's correspondence. The United Nations diplomatic pouch is seen to have the same status as diplomatic bags. The legal status of diplomatic bags is codified in the 1961 Vienna Convention on Diplomatic Relations. Pursuant to article 27(4) of the 1961 Vienna Convention on Diplomatic Relations, diplomatic bags may contain documents or "articles intended for official use". From a review of the practice of Member States, it appears that States send a wide range of items for official use through their diplomatic pouch. What constitutes "articles for official use" is interpreted by each State according to its internal regulations. It appears that some States allow medical supplies not available in the receiving State to be sent through the diplomatic pouch.

4. As you are aware, the United Nations has developed internal policies on what may be included in United Nations diplomatic pouches, which are set out in Administrative Instruction ST/AI/368 of 10 January 1991 on "Instructions Governing United Nations Diplomatic Pouch Service". At paragraph 3(*b*), it states that "[a]rticles intended for official use appropriate for inclusion in the pouch, where shipment by other means is not feasible" may be sent through the diplomatic pouch. Accordingly, medical supplies which are required by United Nations field clinics would be considered as "articles intended for official use" and therefore may be sent through the diplomatic pouch.

5. Further, paragraph 3(*c*) of ST/AI/368 provides that health supplies for staff members and their dependents may also be sent in the diplomatic pouch:

> "Urgently needed health supplies, including medicines, spectacles and hearing aids prescribed by a physician for the use of United Nations staff members or their dependents when such items are not obtainable locally and are requested in reasonable quantities. All shipments of health supplies must be certified by a United Nations medical officer".

In accordance with the above, the Organization may also use the diplomatic pouch to send medical items to staff members and their dependents as long as the conditions set out in this provision are met.

6. We understand from our discussions that in most cases, the medical items requested by staff members and their dependents are over-the-counter medications. We also understand that in a small number of cases, [Division] receives requests from staff members for medical items which are controlled in the country the staff member is situated. We further note that [Division] anticipates that there may be cases where the medical item requested is available elsewhere but is illegal in the State to which it will be sent. In this regard, we note that pursuant to article II, section 7(*b*) of the General Convention of the United Nations, its assets, income and other property shall be "exempt from customs duties and prohibitions and restrictions on imports and exports in respect of articles imported or exported by the United Nations for its official use". Accordingly, we note that while the United Nations would be exempt from any national restrictions on medical items, staff members and their dependents are required to comply with such restrictions. In this regard, we note that using the United Nations diplomatic pouch to routinely dispatch restricted medical items to staff members or their dependents may be seen to facilitate the circumvention of domestic laws which apply to them and may be considered as an abuse of the diplomatic pouch service.

7. We would therefore recommend that every request for a medical item by a staff member or their dependent be considered on a case-by-case basis. We understand that it is currently the practice of [Division] to require a prescription before certifying a request for a controlled medicine. We would recommend that this practice be maintained. If [Division] becomes aware that a certain medical item requested by a staff member is illegal in the receiving State, [Division] may wish to inform the relevant staff member and discuss suitable alternatives with the staff member. Another option may be for restricted medicines to be dispatched through diplomatic pouch to the nearest United Nations clinic and for the medicine to be dispensed by a United Nations medical officer to the staff member or their dependent at the clinic. The appropriate procedures and processes to be followed when considering a request for medical items from staff members will depend on [Division's] policies. We note that the aim of such policies should include the establishment of sufficient internal monitoring and regulation to ensure that the use of the diplomatic pouch is consistent with the objectives of the United Nations and not abused. This office would be happy to advise further on specific legal issues that may arise.

19 June 2015

(*g*) Note to the Ministry of Foreign Affairs of [State] concerning privileges and immunities of United Nations officials to be granted visas, and other travel documents, necessary to enter [State] on official United Nations business

ARTICLES 97, 100; 101, PARAGRAPHS 1 AND 3; AND 105 OF THE CHARTER OF THE UNITED NATIONS—ACCREDITATION AND *PERSONA NON GRATA* AS DESCRIBED IN THE VIENNA CONVENTION ON DIPLOMATIC RELATIONS NOT APPLICABLE TO OFFICIALS OR EXPERTS ON MISSION OF THE UNITED NATIONS—THE SECRETARY-GENERAL HAS EXCLUSIVE AUTHORITY TO DECIDE ON STAFFING OF THE UNITED NATIONS—OBLIGATION ON GOVERNMENTS TO FACILITATE ENTRY OF UNITED NATIONS OFFICIALS—CONVENTION ON THE PRIVILEGES AND IMMUNITIES OF THE UNITED NATIONS—MEMBER STATES NOT TO APPLY PASSPORT AND VISA REQUIREMENTS TO PREVENT UNITED NATIONS STAFF FROM TAKING UP THEIR POST OR TRAVELLING ON OFFICIAL BUSINESS

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 assignment of officials by the United Nations Offices, Funds and Programmes in [State] and the issuance of visas to such officials.

The Office of Legal Affairs has the further honour to refer to the note verbale of [date] from the United Nations Office in the [State] concerning the case of [Name], [United Nations Programme] Country Director of [State] and [State], who was based in [City]. The Office of Legal Affairs understands that [Name's] extension of appointment as [United Nations Programme] Country Director was not accepted by the Government of [State] and accordingly, the Government of [State] has declined to renew [his/her] visa. Accordingly, [Name], together with [his/her] spouse, was required to leave [State] immediately. The Office of Legal Affairs further understands that a request to extend [Name]'s stay in [State] in order to conclude official matters was refused. The Office of Legal Affairs understands that no reasons were provided for the decision not to allow [Name] to continue in [his/her] capacity as [United Nations Programme] Country Director of [State] and [State]

The Office of Legal Affairs wishes to express its concern that [Name] is one of several United Nations officials in the past ten years who have been unable to exercise the functions assigned to them by their respective organization due to the unilateral decisions by the authorities of [State], including non-renewal of their visa. In this regard, the Office of Legal Affairs wishes to inform the Government that such actions are not in accordance with the obligations of [State] to the United Nations and incompatible with the status, privileges and immunities of the United Nations established under the Charter of the United Nations (the "United Nations Charter") and applicable legal instruments.

The Office of Legal Affairs notes that in accordance with Article 101, paragraph 1 of the UN Charter, "[t]he staff shall be appointed by the Secretary-General under regulations established by the General Assembly". Article 101, paragraph 3 provides that "[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, competency and integrity. Due regard shall be paid to the importance of recruiting the staff on as wide a geographical basis as possible". Article 100 further provides that "[i]n the performance of their duties, the Secretary-General and the staff shall not seek or receive instructions from any government […] 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".

It is the long-standing position of the United Nations that the concepts of "accreditation" and *persona non grata*, as described in the Vienna Convention on Diplomatic Relations, do not apply to officials or experts on mission of the United Nations. As set forth in the *1964 United Nations Juridical Yearbook*, "the principle of *persona non grata* which applies with respect to diplomats accredited to a government has no application with respect to United Nations staff" as these staff members "are not accredited to a government but must serve as independent and impartial international officers responsible to the United Nations". As explained by the International Law Commission in paragraph 364 of its 1967 study,[5] the United Nations has consistently denied the application of the *persona non grata* doctrine on the grounds that United Nations personnel are not sent 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. Rather, United Nations personnel "are employed, as determined by the Secretary-General, on behalf of all Member States, for purposes chosen by those States as a result of action taken on a multilateral plane".

The above makes clear that it is for the Secretary-General, as the Chief Administrative Officer of the Organization pursuant to Article 97 of the UN Charter, to ultimately decide upon the staffing of the United Nations offices and the manner in which it operates. Once the Secretary-General 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 entry of those officials into the country to enable them to carry out their functions.

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". Pursuant to paragraph 2 of the same Article "… officials of the Organization shall similarly enjoy such privileges and immunities as are necessary for the independent exercise of their functions in connection with the Organization". 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").

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

The Office of Legal Affairs 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

[5] For the full text of the study entitled "The practice of the United Nations, the specialized agencies and the International Atomic Energy Agency concerning their status, privileges and immunities: study prepared by the Secretariat" (regarding the topic "Representation of States in their relations with international organizations", please visit: http://legal.un.org/docs/?path=../ilc/documentation/english/a_cn4_l118.pdf&lang=EFS.

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".

In addition, the provisions of the bilateral agreements between the United Nations and the Government make clear that the Government shall impose no impediment to the exit (or entry) of United Nations officials. Article XII of the [year] 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". 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". 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 [State] … ." Accordingly, the Government of [State] has an obligation to grant visas to officials of the United Nations in a timely manner to enable them to carry out their functions in fulfilment of the purposes of the Organization. As noted by the Secretary-General in paragraph 115 of his report to the 7th 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".

The Office of Legal Affairs notes that the presence of United Nations Offices, Funds and Programmes in [State] is upon the invitation of the Government of [State] and the work carried out by its officials is for the benefit of the people of [State]. The Organization has established close and sustained cooperation with the relevant governmental agencies of [State] and wishes to continue such cooperation. If the Government has any specific issues concerning individual United Nations officials, which are not related to nationality, religion, professional or political affiliation of the individual, the United Nations is willing to cooperate with the Government to resolve the matter in a manner consistent with the UN Charter, the General Convention and the Agreements referred to above.

In light of the above, the Office of Legal Affairs urges the Government of [State] to take all necessary steps to ensure that the Government's obligations under the UN Charter and the other applicable legal instruments are fulfilled with respect to the appointment by the Secretary-General of officials of the United Nations.

…

29 October 2015

2. Procedural and institutional issues

Inter-office memorandum to the Assistant Secretary-General, Controller Office of Programme Planning, Budget and Accounts Department of Management, concerning what constitutes official documents of the United Nations that need to be issued in the six official languages of the United Nations

Administrative instruction ST/AI/189/Add.3/Rev.2—Definition of "official document"—General Assembly rules 51, 56, and 47—"All resolutions and other documents" to be published in the languages of the General Assembly—Paragraph 107(*a*) of Annex II to General Assembly resolution 2837 (XXVI)—Requirement of timely distribution of documents in the official languages—Paragraph 9 of the Annex to General Assembly resolution 2 (I)—Conference room papers and working papers are informal papers, not documents—Paragraph 2(*d*), section II of General Assembly resolution 33/56—"Six-week" rule for distribution of General Assembly documents

1. I wish to refer to your memorandum dated [date] by which you have asked for our responses on the following questions posed by a member of the Advisory Committee on Administrative and Budgetary Questions ("ACABQ") at its meeting held on [date]:

(*a*) a legal interpretation of what constitutes an official United Nations document, and which documents are issued in the six official languages of the United Nations;

(*b*) whether a letter from the Controller to the ACABQ is an official document;

(*c*) what the legal basis is for not providing documents such as the letter to the ACABQ in the six official languages of the United Nations; and

(*d*) whether or not it is legal not to provide official documents in the six official languages to the ACABQ, given that the ACABQ does not always receive official documents in the six languages, even though the Committee works in the six languages.

2. We would like to note that the primary responsibility of the Office of Legal Affairs ("OLA") is to provide legal advice to the Secretary-General, Secretariat departments and offices and United Nations organs. Therefore, this Office is not in a position to provide legal advice to individual members of United Nations organs. It can, however, provide legal opinions to United Nations intergovernmental organs at the formal request of those organs.

3. Thus, in the present case, we are only able to provide information with regard to the questions you have transmitted to us as opposed to a formal legal opinion. We would recommend that this information be transmitted as information from the Secretariat, and not as information from OLA. Subject to this understanding, relevant information is provided below, which was compiled in consultation with DGACM [Department of General Assembly and Conference Management].

4. With respect to the question as to what constitutes an official document of the United Nations, paragraph 2 of the Secretariat's administrative instruction entitled "Distribution of documents, meeting records, official records and publications" (ST/AI/189/Add.3/Rev.2) provides that "[a] document is a text submitted to a principal organ or a subsidiary organ of the United Nations for consideration by it, usually in connection with item(s) on its agenda".

5. As to which documents are issued in the six official languages of the United Nations, this depends on the rules of procedure applicable to the United Nations organ concerned, and the intergovernmental decisions and practice that regulate the issuance of documents of that organ. As far as the General Assembly and its subsidiary organs are concerned, the following rules of procedure, decisions and practice may be relevant to the question.

6. First, the rules of procedure of the General Assembly contain provisions that deal with the issuance of documents of the Assembly and its subsidiary organs. Rule 51 of the rules of procedure of the General Assembly provides that "Arabic, Chinese, English, French, Russian and Spanish shall be both the official and the working languages of the General Assembly, its committees and its subcommittees." Rule 56 of the rules of procedure of the General Assembly then provides that "[a]ll resolutions and other documents shall be published in the languages of the General Assembly." Rule 47 of the rules of procedures of the General Assembly also provides that "[t]he Secretariat shall receive, translate, print and distribute documents, reports and resolutions of the General Assembly, its committees and its organs".

7. In addition, we note that paragraph 107 (*a*) of annex II to General Assembly resolution 2837 (XXVI) of 17 December 1971, which contains the conclusions of the Special Committee on the Rationalization of the Procedures and Organization of the General Assembly and which supplements the rules of procedure of the General Assembly as its annex IV, provides that "[t]imely distribution of documents in all working languages should be scrupulously observed."

8. The General Assembly has also adopted a series of other resolutions concerning the issuance of official documents of the General Assembly in the official languages of the United Nations. Initially, by paragraph 9 of the annex to resolution 2 (I) of 1 February 1946, the General Assembly decided that "[a]ll resolutions and other important documents shall be made available in the official languages" and that "[u]pon the request of any representative, any other document shall be made available in any or all of the official languages." Subsequently, the General Assembly introduced the "six-week rule" by paragraph 2 (*d*), section II of resolution 33/56 of 14 December 1978 entitled "Control and limitation of documentation", which requested the Secretary-General "[t]o take measures to ensure that pre-session documents for meetings shall be distributed not less than six weeks before the meetings, in all languages, in so far as the subjects deal with, the schedule of meetings or the reporting system allow." The six-week rule was reiterated in a number of subsequent General Assembly resolutions, the latest one being resolution 61/236 of 22 December 2006 entitled "Pattern of conferences" (section IV, paragraph 4).

9. By paragraph 5, section Ill of resolution 55/222 of 23 December 2000 entitled "Pattern of conferences", the General Assembly decided that "there should not be any exemption to the rule that documents must be distributed in all official languages, and emphasize[d] the principle that all documents must be distributed simultaneously in all official languages before they are made available on United Nations web sites". This decision has been reiterated in subsequent resolutions of the General Assembly, the most recent one being resolution 69/250 of 29 December 2014 entitled "Pattern of conferences" (section IV, paragraph 71).

10. As far as the practice is concerned, certain documents submitted to United Nations intergovernmental organs have not been translated into the six official languages to the United Nations, such as conference room papers and working

papers. According to paragraph 9 of the Secretariat's administrative instruction entitled "Distribution of documents, meeting records, official records and publications" (ST/AI/189/Add.3/Rev.2), "[c]onference room papers and working papers … are not official documents but are informal papers in one or more languages considered to be of concern primarily to the members of an organ. As such, they are not issued in the normal way … and it is the responsibility of the secretariat of the organ concerned to see to their distribution to the members of the organ." Consequently, conference room papers and working papers are not subject to the requirement to translate documents into the six official languages.

11. As to the question whether a letter from the Controller to ACABQ is an "official document", we have identified one letter from the Controller to the Chairs of the Fifth Committee and of ACABQ which was issued as a document of the Fifth Committee and in the six official languages of the United Nations (A/C.5/69/22). However, we understand that the normal practice in ACABQ has been not to translate letters from the Controller to the Chair of ACABQ in the six official languages or make them available for general distribution.

12. Finally, we would like to point out that the questions raised by the member of ACABQ are not exclusively of a legal nature. They have administrative and financial implications, such as whether adequate resources are available to carry out the requests made by the General Assembly. In this regard, the General Assembly, by paragraph 2, section E of its resolution 50/206 of 23 December 1995 entitled "Pattern of conferences", stressed "the need to continue to ensure the availability of the necessary resources to guarantee the timely translation of documents into the different official and working languages of the Organization and their simultaneous distribution in those languages".

31 July 2015

3. Procurement

(*a*) Inter-office memorandum to the Director, Procurement Division, Office of Central Support Services, Department of Management concerning the applicability of liquidated damages under a contract for the provision of household appliances

Applicability of liquidated damages under contract for the provision of household appliances—No right to claim liquidated damages when such provisions only apply to delays for delivery—In which case rights to claim such damages will depend on whether similar goods from another vendor were obtained at an increased cost[6]

1. I refer to PD's memorandum, dated 22 October 2014, requesting OLA's advice on the applicability of liquidated damages with respect to Contract No. [Number], signed [Date], with [Vendor]), for the provision of household appliances for regional missions (the "Contract"). I further refer to the subsequent communications between the representatives of PD and OLA, at the working level, regarding this matter.

[6] Footnotes omitted except as provided.

2. Enclosed is our legal analysis of the foregoing issues, which is based on documentation and information made available to OLA by PD. In summary, OLA's conclusion and recommendations are as set forth below:

(i) The UN does not have the right to claim liquidated damages for failure to deliver household appliances because the liquidated damages provision only applies to delays for delivery. In this case, given that [UN mission] had cancelled the relevant purchase orders, the goods were never delivered;

(ii) [UN mission] is advised to consider whether it suffered any actual damages as a result of [Vendor]'s failure to deliver the goods, *i.e.* whether [UN mission] obtained similar goods from another vendor at an increased cost, in order to determine whether the Organization has a right to claim damages from [Vendor].

3. It should be noted that our assessment of the matter and recommendations is based upon the information that PD has provided to us. It is conceivable however that our assessment of this matter could change should further information be provided. …

Legal analysis

Liquidated Damages Under Contract No. [number omitted] with [Vendor] for the Provision of Household Appliances

Background

1. On 8 March 2013, the UN signed Systems Contract No. [number omitted] for the provision of household appliances for regional missions with [Vendor].

2. [UN mission] issued two orders under the Contract: (*a*) On 27 April 2013, [UN mission] issued order No. [number] for delivery DAP Port [name] on 15 July 2013 of various household items for the total amount of Euro 2,197,490.00 ("Order No.1"), which receipt [Vendor] acknowledged on 1 May 2013; and (*b*) On 18 June 2013, [UN mission] issued order No. [number] for delivery DAP Port [name] on 31 July 2013 of fifteen hundred television screens for the total amount of Euro 502,845.00 ("Order No.2"), which receipt [Vendor] acknowledged on 18 June 2013.

3. On 17 October 2013, [UN mission] issued an amendment to Order No. [number] with revised terms for delivery FCA [name] on 17 December 2013 ("New Order"). The New Order was for Euro 1,656,525.00. [Vendor] acknowledged receipt of the New Order on 21 October 2013. However, on 28 January 2014, [UN mission] sent a fax to [Vendor], cancelling Orders No.1 and No.2. On 7 February 2014 [Vendor] sent a fax to [UN mission], acknowledging cancellation of the purchase orders and asking [UN mission]'s help in selling cooker ovens.

4. On 24 June 2014, [UN mission] sent a fax to PD, providing factual background of the matter, and recommending that [Vendor]'s performance be reviewed by the Vendor Review Committee and that liquidated damages be applied for failure to perform. On 16 July 2014, PD sent a fax to [UN mission], noting that liquidated damages cannot be applied because [UN mission] cancelled both Orders. On 19 August 2014, [UN mission] sent a fax to PD, outlining its reasons for application of liquidated damages.

Analysis

5. We understand that PD/[UN mission] is inquiring whether liquidated damages may be applied to [Vendor]'s failure to deliver the goods under the now cancelled Orders.

6. Section 4.9 ("Liquidated Damages") provides in relevant part:

> [The] Contractor acknowledges that the UN will suffer both financial loss and inconvenience as a result of late performance … In the event that the Contractor fails to supply Goods within a period specified by an Order, the UN shall, without prejudice to other remedies under this Contract, deduct from the price of the Order, as liquidated damages, a sum equivalent to 0.5 per cent of the delivered price of the delayed Goods for each week of delay until actual delivery, up to a maximum deduction of 10 per cent of the Order value … The Parties further agree that any rights to terminate this Contract shall have no effect on the right of the UN to claim liquidated damages as hereinbefore provided. (emphasis added).

7. The provision makes clear that the remedy of liquidated damages is only applicable when the performance is late but not where there is a total failure to perform Further, the remedy is no longer available to the Mission, as the Mission has exercised its right under Section 3.9 to cancel the Orders. In this respect, we would like to note that the survival clause in Section 4.9—"any rights to terminate this Contract shall have no effect on the right of the UN to claim liquidated damages"—is not applicable because the Contract itself has not been terminated but only the Orders placed under the Contract have been cancelled.

8. Further, the Contract sets forth in Section 3.5 the minimum requirements that must be included in an order, among them the named place for the delivery and the manner of shipment. The Contract also specifies in Section 4.8 that the delivery should be FCA Port of Exit—[city and country]. The parties, according to Section 3 8, can vary in a written order the terms of the Contract.* However, the provisions in an order, other than those set forth in Section 3.5 that are inconsistent with the Contract are considered void.** The Contract further specifies that no order shall be fulfilled and the contractor shall not supply or deliver any goods unless and until the UN has issued an order that fulfills all the requirements of the Contract, including, at a minimum, the requirements of Section 3.5.***

9. When the Mission issued the Orders with the delivery terms different than in the Contract and when [Vendor] accepted the Orders, the parties modified the terms of the Contract per Section 3.8. As delivery term is one of the terms specifically excluded from application of Section 3.10, it cannot be considered void and, therefore, supplanted by the Contract terms. Further, if the Contract were interpreted as only permitting delivery FCA [country], then [Vendor], oddly, were correct in failing to fulfill the Orders, as Section 3.6 prohibits the contractor from fulfilling an order that does not comport to the Contract requirements. Taken further, [Vendor] cannot be even considered late in fulfilling Order No. 2, as no amendment correcting delivery terms was ever issued and, taken to its logical conclusion, [Vendor] was never under an obligation to deliver the goods. In order to avoid such absurd results, the provisions of the Contract must be read in such a way as to give reasonable meaning to all the provisions and intent of the parties as a whole.

10. Therefore, it cannot be considered that [Vendor] acted contrary to the requirements under the Contract when it accepted the delivery terms different than the ones

provided in the Contract. The parties instead have modified the Contract terms and entered into an agreement based on DAP Port [name].

11. This is not to say that [Vendor] fulfilled its obligations under the Contract since it failed to deliver the goods under the modified terms. The Contract in Section 5.4 provides that the UN may exercise a number of remedies, including calling the performance guarantee or procuring all or part of the goods from other sources and holding the Contractor responsible for any excess costs.[****]

12. In this respect, OLA would like to note that if the Mission has suffered actual damages as a result of [Vendor]'s failure to perform, for example, if the Mission had to obtain the same goods at an increased cost from a different vendor, then the Mission may have a right to claim damages for such excess costs. However, the ability of the UN to advance such a claim will depend on the facts and circumstances of the case, which OLA has not been provided with.

Conclusion and Recommendation

13. For the foregoing reasons, and taking into account that [UN mission] cancelled the Orders, the UN does not have the right to enforce liquidated damages under the Contract.

14. [UN mission] should consider whether the Organization has the right to claim actual damages under the Contract, as outlined in this Memorandum.

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[*] Section 3.8 states "The Parties, in particular, acknowledge and agree that, unless otherwise clearly agreed in writing by both the Contractor, on the one hand, and the UN as the case may be, on the other, and unless specifically provided in such Order, nothing contained in such Order shall be deemed, interpreted or otherwise construed as varying from, derogating from, adding to, or in any other way altering the essential terms and conditions of this Contract that would otherwise apply to the transaction contemplated by such Order."

[**] Section 3.10 states m relevant part "Any provision of any Order, other than those set forth m Article 3.5, above, that may be inconsistent with any provision of this Contract, including but not limited to, purchase price, shall be void, and the applicable provisions of this Contract shall be used and shall apply in lieu of any such inconsistent term of the Order."

[***] Section 3.6 provides in relevant part "The Parties specifically acknowledge and agree that the Contractor shall not supply or deliver, and the UN shall not be bound to accept or to pay for any Goods unless and until the UN has issued an Order therefore to the Contractor, which Order fulfills all of the requirements of this Contract, including, at a minimum, those set forth in Article 3.5, above."

[****] Article 74 of the United Nations Convention on the International Sale of Goods (CISG), similarly provides that "[d]amages for breach of contract by one party consist of a sum equal to the loss, including loss of profit, suffered by the other party as a consequence of the breach" Article 75 further states that "[i]f the contract is avoided and if, in a reasonable manner and within a reasonable time after avoidance, the buyer has bought goods in replacement …, the party claiming damages may recover the difference between the contract price and the price in the substitute transaction …"

(*b*) Inter-office memorandum to the Director, Procurement Division, Office of Central Support Services, Department of Management concerning an increase in hourly rates under Contract for the provision of Global Tax Consultancy Services

ARTICLES 2 (3), 6.1 AND 6.2 OF THE CONTRACT FOR THE PROVISION OF GLOBAL CONSULTANCY SERVICES—AND ARTICLE 22 OF THE UNITED NATIONS GENERAL CONDITIONS OF CONTRACT—REQUEST FOR INCREASE IN HOURLY RATES OUTSIDE NOTIFICATION PERIOD—NO OBLIGATION ON THE UNITED NATIONS TO ENGAGE IN NEGOTIATIONS—WAIVER OF NOTIFICATION PERIOD NOT PROHIBITED UNDER CONTRACT—ACCORDINGLY, MODIFICATION OF CONTRACT POSSIBLE FOLLOWING NECESSARY CONSULTATIONS

1. I refer to PD's memorandum, dated 25 March 2015, requesting OLA's advice in relation to Contract No. [number] between the United Nations on behalf of the United Nations Joint Staff Pension Fund (the "UNJSPF") and [Vendor] for the provision of global tax consultancy services, effective as of [date omitted] (the "Contract"). I also refer to subsequent communications between the representatives of PD and OLA, at the working level, regarding this matter.

2. [Vendor] has submitted a request for four per cent increase in [Vendor]'s hourly rates under the Contract. However, such request was not submitted within the timeframe set forth in the Contract. For this reason, PD has sought OLA's advice regarding [Vendor]'s untimely request.

Factual Background

3. The Contract was entered into as of [date] (the "Effective Date") for a period of two years from the Effective Date, unless earlier terminated in accordance with the Contract terms (the "Initial Term").

4. On 22 October 2014, the UN provided [Vendor] with notice that, *inter alia,* the UN wished to exercise its option to extend the Initial Term of the Contract for a period of one year (the "Extension Notice").

5. By e-mail, dated 22 October 2014, [Vendor] acknowledged receipt of the Extension Notice and expressed its agreement to extend the Initial Term as set forth in the Extension Notice (the "[Vendor] Acknowledgement").

6. By letter, dated 18 February 2015 (the "Fee Increase Request"), [Vendor] requested a four per cent increase in [Vendor]'s hourly rates set forth in the Contract.

Analysis

7. Article 2.3 of the Contract provides that:

> "The United Nations may, at its sole option, extend the Initial Term of this Contract under the same terms and conditions as set forth in this Contract, for a maximum of three (3) additional periods of up to one (1) year each, provided the UN provides written notice of its intention to do so at least 30 days prior to the expiration of the then current Contract term (each, an "Extended Term")."

8. Article 6.1 of the Contract provides that "[i]n full consideration for the complete, satisfactory and timely performance by [Vendor] under this Contract, the United Nations shall pay [Vendor] fees for the provision for the Services at the rates as set forth below, which rates shall remain firm and fixed during the Initial Term of this Contract."

9. Article 6.2 of the Contract provides as follows:

> "With respect to the Extended Terms, the Contractor may request an adjustment to the existing rates set forth in Section 6.1 above by providing a written notice to the UN within ten (10) days upon receipt of the notice that the UN intends to extend the Initial Term, in accordance with Section 3.2 [*sic*] hereof. The Parties shall seek to negotiate an adjustment to the rates for the Extension Terms [*sic*] that reasonably reflects changes in costs prior to the expiration of this Contract; provided that such adjustment of the existing rates shall not exceed a maximum of four per cent (4%) of the existing rates set forth in Section 6.1 above for the Extended Terms. The Parties acknowledge that any such adjusted rate may be higher or lower than the rates set forth in Section 6.1 above, taking into account the provision of the preceding sentence hereof. Notwithstanding anything in this Contract, any proposed adjustment of the existing rates based on the foregoing may be accepted or rejected by the UN in its sole discretion. If applicable, such adjustment of the existing rates shall be reflected in a modification to the Contract in accordance with Article 22 *(Modifications)* of the UN General Conditions of Contract."

10. Article 22 *(Modifications)* of the UN General Conditions of Contract provides, in relevant part, as follows:

> "22.1 Pursuant to the Financial Regulations and Rules of the United Nations, only the Chief of the United Nations Procurement Division, or such other Contracting authority as the United Nations has made known to the Contractor in writing, possesses the authority to agree on behalf of the United Nations to any modification or change in the Contract, to a waiver of any of its provisions or to any additional contractual relationship of any kind with the Contractor. Accordingly, no modification or change in the Contract shall be valid and enforceable against the United Nations unless provided by a valid written amendment to the Contract signed by the Contractor and the Chief of the United Nations Procurement Division or such other contracting authority."

11. In the Fee Increase Request, [Vendor] acknowledged that the Fee Increase Request was not submitted within ten days of the [Vendor] Acknowledgement, and explained that the delay was due to the fact that it was not clear to [Vendor] whether additional documents would be required in connection with the proposed extension of the Initial Term. However, under Article 6.2 of the Contract, [Vendor] was obligated to submit the Fee Increase Request within ten days of the [Vendor] Acknowledgement, regardless of whether any additional documentation was required in connection with the Extension Notice.

Conclusion

12. Accordingly, given [Vendor]'s failure to provide the Fee Increase Request in accordance with the notice requirement set forth in Article 6.2 of the Contract, the UN is not obligated under the terms of the Contract to engage in negotiations with [Vendor] for any adjustment to the rates for the Extension Term. Moreover, even if [Vendor] had submitted the Fee Increase Request in a timely manner, Article 6.2 permits the UN to accept or reject the request in its sole discretion.

13. The Contract, however, does not prohibit the UN from waiving the requirement that [Vendor] submit the Fee Increase Request within ten days of 22 October 2014. Hence, if PD, in consultation with the UNJSPF, determines that it would be appropriate to consider an adjustment to the existing rates, then PD could seek to negotiate an adjustment to the rates for the Extension Term that reasonably reflects changes in costs prior to the expiration of the Contract; provided that such adjustment of the existing rates does not exceed a maximum of four per cent (4%) of the existing rates set forth in Section 6.1 of the Contract. Such adjustment of the existing rates should be reflected in a modification to the Contract in accordance with Article 22 *(Modifications)* of the UN General Conditions of Contract.

1 May 2015

(*c*) Inter-office memorandum to the Director, Procurement Division, Office of Central Support Services, Department of Management concerning the misuse of the United Nations name

Misuse of United Nations name—United Nations not entity for certification nor endorser of services provided by vendor—Publication of vendor information on United Nations website not intended for advertisement but transparency to potential bidders—Use of United Nations emblem and name, including abbreviation thereof, reserved for official purposes of the organization

1. I refer to PD's memorandum, dated 15 April 2015, requesting OLA's advice in relation to Contract No. [number] between the UN and [Vendor] Ltd ("[Vendor]") for the provision of aircraft global satellite tracking services (the "Contract"). I also refer to subsequent communications between the representatives of PD and OLA, at the working level, regarding this matter.

2. We understand from your memorandum that [Vendor]'s website found at [web address] advertises that "[Vendor]'s ISAT-200A is the first aircraft tracking system certified compliant to the latest United Nations Aviation Global Satellite Tracking Solution (UNGASTS) protocol …" and that "[Vendor]'s UN Certified ISAT-200A transceivers" have been selected by an air transportation company servicing the United Nations. We further understand from PD that, contrary to the statements published on [Vendor]'s website, the UN does not offer certifications for aircraft tracking systems, and hence, has not provided any certification for [Vendor]'s ISAT-200A as claimed on [Vendor]'s website.

3. Therefore, while the UN's particular requirements for aircraft global tracking solution services are currently met through [Vendor]'s services, the UN is not an entity which certifies such services or provides endorsements relating to such services. In this regard, we note, however, that the UN makes public on PD's external website that air transportation companies that seek to provide air transportation services to the UN are required to have an active compliant aircraft-tracking unit that transmits real-time automatic geospatial tracking flight data to [Vendor]. This publication, in our view, is not intended for advertising purposes and is only intended to make the UN's requirements transparent to potential bidders.

4. The use of the United Nations emblem and name, including any abbreviation thereof, is reserved for the official purposes of the Organization, in accordance with General Assembly resolution 92 (I) of 7 December 1946. That resolution expressly prohibits the use of the United Nations emblem and name in any other way without the express

authorization of the Secretary-General and recommends that Member States take the necessary measures to prevent the use thereof without the authorization of the Secretary-General. Moreover, Article 6 *ter,* of the *Paris Convention for the Protection of Industrial Property* (the Convention), revised in Stockholm in 1967 (828 UNTS 305 (1972)), provides trademark protection in respect of the emblems and names of "international organizations" and requires states party to the Convention "to prohibit by appropriate measures the use, without authorization by competent authorities" of the emblems and names of international organizations.

5. Within the framework of the above policy, the consistent practice of the UN has been to include in its commercial contracts, including in the Contract* with [Vendor], a standard clause preventing any entity contracting with the UN from using the United Nations emblem and name, including any abbreviation thereof, or official seal for any purpose without the UN's permission, and from advertising or making public for purposes of commercial advantage or goodwill that it has a contractual relationship with the UN. The aim of such clauses is to prevent public solicitation for business on the basis of connection with the UN.

6. In view of the foregoing, [Vendor]'s use of the UN name on its website, as described in PD's memorandum, cannot be authorized as such use of the UN name constitutes a form of commercial advertisement or solicitation for business, which is inconsistent with the Organization's policy and the express terms of the Contract. Accordingly, we would recommend that PD inform [Vendor] that it immediately cease its unauthorized use of the United Nations name. Enclosed is a draft letter that PD can send to [Vendor] for that purpose [enclosure omitted]

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* Article 10 of the United Nations General Conditions of Contract—Contracts for the Provision of Services (April 2012), which is annexed to the Contract, states the following:

"Publicity, and use of the name, emblem or official seal of the United Nations: The Contractor shall not advertise or otherwise make public for purposes of commercial advantage or goodwill that it has a contractual relationship with the United Nations, nor shall the Contractor, in any manner whatsoever use the name, emblem or official seal of the United Nations, or any abbreviation of the name of the United Nations in connection with its business or otherwise without the written permission of the United Nations."

(*d*) Inter-office memorandum to the Director, Procurement Division, Office of Central Support Services, Department of Management concerning eligibility of company to continue to be registered as a UNPD vendor

Decision to permit a vendor to continue to be a registered vendor rests with the Assistant Secretary-General office of Central Support Services—Decision based on the review and recommendation of the vendor review committee and pursuant to the procurement manual—Failure to provide accurate information constitutes potential grounds for suspension or removal—Procurement manual permits vendor that fails the prerequisites, on an exceptional basis, to be registered on the United Nations vendor registry

1. I refer to PD's memorandum, dated 26 May 2015, requesting OLA's advice regarding eligibility of [Vendor], a company organized under the laws of [Country X], to continue

to be registered as a UNPD vendor ("Vendor"). I also refer to the subsequent communications between representatives of PD and OLA, at the working level, concerning this matter.

2. We understand from your memorandum that [Vendor] is a 100% owned subsidiary of [Name], a company organized under the laws of [Country Y] (the "Parent Company"). The Parent Company was suspended by UNPD on [date] due to its appearance on the […] Report of the Independent Inquiry Committee (IIC) into the United Nations Oil for Food Program. We further understand that the Vendor Review Committee reviewed the Parent Company's status on [date] and recommended that PD send a reinstatement condition letter to the Parent Company. In [date], UNPD sent a reinstatement condition letter to the Parent Company and, in [date], the Parent Company's proposed independent ethics and compliance expert was approved by UNPD. However, PD has informed us that, as of the date of PD's memorandum, the approved ethics and compliance expert has yet to submit a report, which is required to be submitted, in order to reinstate the vendor. As a result, the Parent Company continues to be listed as "suspended" on the UNPD's list of registered vendors.

3. We understand from PD's memorandum that in 2010, [UN Office] registered [Vendor] as a vendor. It further appears that until recently, [UN Office] was conducting business with [Vendor] without the knowledge of its affiliation with the Parent Company. We understand from the documents provided by PD that at the time of the registration, [Vendor] declared on its registration application that neither [Vendor], nor its affiliates, appeared on the IIC list.

4. According to your memorandum, by Special Approval Request dated 24 April 2015, [UN office] requested registration of [Vendor] at Level 1 in order to establish a system contract with [Vendor]. The VRC reviewed the request on 1 May 2015 and recommended that [Vendor] be approved at Level 1 but only for the award of the specific contract at issue; that [UN office] conduct research to identify alternative sources of supply; and further requested a consultation with OLA on the general approval of [Vendor].

5. As we have 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 (rev. 7, 2013), regarding the criteria for suspension or removal of a vendor from the register of vendors [reference omitted]. A failure to observe those procedures could be used against the UN by aggrieved vendors.

6. The authority to suspend the vendor, whether temporarily or indefinitely, or to remove the vendor from the vendor register, lies only with the ASG/OCSS. The ASG/OCSS's decision is based on the review and recommendation of the vendor review committee and, pursuant to Article 7.13(2) of the Procurement Manual, must be "based on substantial and documented evidence," taking into account "any mitigating factors." In addition, according to Article 7.15 of the Procurement Manual, a notification to suspend or remove a vendor from the vendor register must "specify the reasons for the decision" and "inform the Vendor that it may request review of the decision."

7. Article 7.7(1) of the Procurement Manual permits registration of vendors, on an exceptional basis, who do not meet the pre-requisites for eligibility of Article 7.5. In this instance, we understand that on such an exceptional basis, the VRC recommended the approval of the registration of [Vendor]. We note, at the same time, that [Vendor] has failed in its affirmative duty to provide accurate information to PD at the time of its registration as

a UN vendor, as it declared in 2010 that neither [Vendor] nor its parent or subsidiary companies have been identified on the IIC list. Failure to do so constitutes potential grounds under Article 7.13(2)(*e*) for suspension or removal.

8. Accordingly, the decision on whether to permit [Vendor] to continue to be registered as a UN vendor lies with the ASG/OCSS, upon the recommendation of the VRC. As noted, Article 7.7(1)(*b*) of the Procurement Manual permits a vendor that fails the pre-requisites in Article 7.5, on an exceptional basis, to be registered on the UN vendor registry.

12 October 2015

(*e*) Inter-office memorandum to the Director, Procurement Division, Office of Central Support Services, Department of Management concerning an amendment to a contract on the provision of office supplies

CONTRACT ON THE PROVISION OF SUPPLIES FOLLOWING MERGER—ASSIGNMENT AND ASSUMPTION CONTRACT AND AMENDMENT TO CONTRACT REQUIRED SUBJECT TO OPERATIONAL DETAILS TO BE AGREED UPON

1. I refer to PD's memorandum, dated 17 November 2015, requesting OLA's assistance in the review of a draft Amendment Number [number] (the "Draft Amendment") to Contract No. [number] between the United Nations and [Vendor X] for the provision of office supplies, effective as of 1 August 2013 (as amended by amendments one through four, the "Contract"). I also refer to subsequent communications between representatives of PD and OLA, at the working level, regarding this matter and to a telephone conference on 9 December 2015 (the "Teleconference") among OLA, PD, [Vendor X] and [Vendor Y] ("Vendor Y").

Factual Background

2. Pursuant to Article 4 (Goods Orders by the UN and Eligible UN Entities) of the Contract, the UN Secretariat may place orders for office supplies through an internet-based system maintained by [Vendor X] (the "Vendor Platform") and, upon entering into a participation agreement with [Vendor], Eligible UN Entities, as identified on Annex E (List of Eligible UN Entities) of the Contract, may also place orders for office supplies through the [Vendor X] Platform.

3. Pursuant to a Secretary's Certificate from the Assistant Secretary of [Vendor Y], dated [date], [Vendor Y] informed PD that, on [date], [Vendor Y] completed a merger with [Vendor X] and, as a result thereof, [Vendor X] became a wholly owned subsidiary of [Vendor Y] (the "Merger"). In subsequent communications, [Vendor X] and [Vendor Y] (together, the "Merged Entities") informed PD that, as a result of the Merger, two things would need to occur: (*a*) [Vendor X] would need to assign the Contract to [Vendor Y] (the "Assignment"); and (*b*) due to the fact that the Merged Entities are phasing out the [Vendor X] Platform and replacing it with an internet-based ordering system maintained by [Vendor Y] (the "Vendor Y Platform"), the UN Secretariat and the Eligible UN Entities must transition to the [Vendor Y] Platform.

4. PD informed OLA that, on [date], the UN Secretariat completed its transition to the [Vendor Y] Platform. During the Teleconference, the Merged Entities stated that the Eligible UN Entities have not yet transitioned to the [Vendor Y] Platform, as this process will require coordinated efforts between each Eligible UN Entity and [Vendor Y].

The Assignment and the Amendment Agreement

5. With respect to assignment of the Contract, Article 3.1 of the United Nations General Conditions of Contract—Contract for the Provision of Goods and Services (the "General Conditions"), attached to the Contract as Annex A (omitted), provides, in relevant part, as follows:

> "Except as provided in Article 3.2, below, the Contractor may not assign, transfer, pledge or make any other disposition of the Contract, of any part of the Contract, or of any of the rights, claims or obligations under the Contract except with the prior written authorization of the UN."

Article 3.2 of the General Conditions provides as follows:

> "The Contractor may assign or otherwise transfer the Contract to the surviving entity resulting from a reorganization of the Contractor's operations, *provided that:*
>
> 3.2.1 such reorganization is not the result of any bankruptcy, receivership or other similar proceedings; *and,*
>
> 3.2.2 such reorganization arises from a sale, merger, or acquisition of all or substantially all of the Contractor's assets or ownership interests; *and,*
>
> 3.2.3 the Contractor promptly notifies the United Nations about such assignment or transfer at the earliest opportunity; *and,*
>
> 3.2.4 the assignee or transferee agrees in writing to be bound by all of the terms and conditions of the Contract, and such writing is promptly provided to the United Nations following the assignment or transfer."

Thus, an assignment of the Contract would be permissible under limited circumstances, as set forth above.

6. We have reviewed the Draft Amendment, which was prepared by [Vendor Y], and find that it fails to include provisions that are necessary to protect the legal interests of the Organization and contains certain provisions that raise a number of concerns.

7. Accordingly, we have prepared, and enclose herein a draft assignment and assumption agreement and amendment number five to the Contract, between [Vendor X], [Vendor Y] and the United Nations to reflect the Assignment and the necessary amendments to the Contract resulting from the Assignment, as well as additional, unrelated amendments to certain of the pricing terms as may be agreed by [Vendor Y] and the UN (the "Assignment and Amendment Agreement").

8. In the enclosed Assignment and Amendment [omitted], we have modified or excluded legally objectionable provisions proposed by [Vendor Y] in the Draft Amendment and incorporated provisions that are necessary to protect the legal interests of the Organization in connection with the Assignment, including *inter alia,* provisions: (*a*) setting forth the obligations of the Merged Entities under the Contract upon the effective date of the Assignment; (*b*) containing representations and warranties of the Merged Entities;

and (*c*) obligating [Vendor Y] to provide the insurance and the performance security required under the Contract.

9. In order to ensure the suitability of the Assignment and Amendment Agreement from commercial and operational perspectives, we recommend that PD, in consultation with the Requisitioner, review the Assignment and Amendment Agreement in its entirety. In this regard, please note that the Assignment and Amendment Agreement contains a number of comments that begin with "Note to PD." These comments were inserted where it appeared to us that certain provisions give rise to questions or issues that essentially are of an operational or commercial nature and are within the purview of PD or the Requisitioner. If PD and/or the Requisitioner have any comments on the enclosed Assignment and Amendment Agreement, we would be pleased to further modify the Assignment and Amendment Agreement to reflect such comments before PD provides the Assignment and Amendment Agreement to the Merged Entities.

Enclosure [omitted]

14 December 2015

(*f*) Inter-office memorandum to the Director, Procurement Division, Office of Central Support Services, Department of Management concerning effective international competition

Effective international competition—Compliance with United Nations Financial Regulation 5.12—Need to consider limiting or excluding affiliated entities from participating in any one solicitation to remove risk of collusion (footnotes omitted)

1. I refer to PD's memorandum, requesting OLA's advice with respect to the following three issues arising in the context of effective competition in public procurement in accordance with the UN Financial Regulation 5.12:

(*a*) First, PD seeks advice on the implementation of the proposals outlined in OLA's memorandum of 8 April 2013 (unpublished) regarding whether the principles of fair and open competition allow for subsidiaries of the same parent company, as well as the parent company itself, to bid on one UN solicitation. The concern is that such entities could collude in pricing and prevent the UN from conducting a procurement exercise in accordance with Financial Regulation 5.12, which requires "effective international competition" in procurement.

(*b*) Second, PD wishes to obtain OLA's guidance on which measures may be instituted by PD in order to facilitate diversification of the supplier database so that no vendor is supplying more than a certain percentage of any commodities to the UN.

(*c*) Third, PD wishes to obtain OLA's guidance on which procedures may be adopted to mitigate the risks associated with a high degree of revenue concentration by vendors where such revenues are substantially derived from the supply of commodities to the Organization.

Summary of Recommendations

2. As more fully discussed in OLA's memorandum of 8 April 2013, PD may wish to consider limiting or excluding affiliated entities from participating in any one solicitation in order to effectively remove the risk of collusion. The likelihood of collusion increases

where there is a potential for communication occurring among bidders, particularly in cases of affiliated companies participating in the same solicitation. Allowing subsidiaries of the same company and/or the parent company and its subsidiaries to participate in the same solicitation exercise could increase the opportunity of such bidders to engage in collusive agreements. PD could consider including as part of the requirements of the ITB or RFP, as the case may be, a representation by the vendors that no such affiliated entities are participating in the solicitation exercise. Such representation could be also made in a separate document to be signed by the participating vendors, attesting that the submitted bid is non-collusive and is made with the intent to accept the contract if awarded.

3. Further, the decisions on appropriate measures to implement in order to diversify the supplier database and to mitigate the risks associated with sourcing from vendors whose revenue is substantially derived from the UN contracts mainly involve policy considerations. However, in considering these policy issues, PD should assure itself that any policy measures implemented to address the two concerns identified in PD's 30 January 2015 memorandum are in compliance with the Financial Regulations and Rules of the Organization.

Analysis

A. Implementation of the Approach Described in OLA's Memorandum of 8 April 2013

4. As requested in PD's 1 March 2013 memorandum, OLA's memorandum of 8 April 2013 addressed whether the issue of the principles of fair and open competition allow for subsidiaries of the same parent company, as well as the parent company itself, to bid on one UN solicitation. For the reasons set forth in that memorandum, OLA recommended that PD consider limiting or excluding affiliated entities from participating in any one solicitation in order to effectively remove the risk of collusion.

5. The approach described in OLA's 8 April 2013 memorandum, as noted in that memorandum, could be implemented by including in UN solicitation documents a limitation on bidding by several subsidiaries of the same parent company and/or by the subsidiaries of a parent company and the parent company itself. In this context, the solicitation document could specify as follows:

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

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

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

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

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

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

6. Further, as recommended in OLA's 8 April 2013 memorandum, to the extent that it may be difficult to monitor compliance with the above requirement in every solicitation, PD could consider including as part of the requirements of the ITB or RFP, as the case may be, a representation by the vendors that no such entities, as defined above, are participating in the solicitation exercise. Such representation could be made in a separate document to be signed by the participating vendors. In this regard, PD may also consider whether to require all the bidders to sign a "Certificate of Independent Bid Determination" or an equivalent attestation that the submitted bid is non-collusive and is made with the intent to accept the contract if awarded. (footnote omitted).

B. Diversification of Supplier Database

7. At the outset, in considering the issue of diversification of the supplier database and risks associated with a high degree of revenue concentration by vendors whose revenues are substantially derived from the supply of commodities to the UN, it is important for the Organization to assure itself that any policy decisions taken on such matters are consistent with and in full compliance with various norms and principles of internal UN law that bear on these issues. A failure to observe those norms and principles and related procedures may be a basis for claims against the Organization by aggrieved vendors.

8. The General Assembly resolutions and the UN's Financial Rules and Regulations regulate the Organization's procurement activities and establish an overarching framework within which specific policy decisions may be made by the respective decision-makers. In particular, the UN Financial Regulation 5.12 requires that the procurement functions of the Organization shall be governed by the following four principles: (1) best value for money; (2) fairness, integrity and transparency; (3) effective international competition; and (4) the interest of the United Nations. These principles have been recently reaffirmed and stressed in GA's resolution of 17 April 2015, A/RES/69/273.

9. The Procurement Manual, for example, in Sections 1.2, 1.3, 1.4, 8.2, 9.2, 9.8, and 11.1 incorporates the above referenced principles. Section 1.2 specifically discusses the "best value for money" principle and addresses which factors need to be taken into consideration in conducting procurement exercises, *i.e.* market environment, competitive, fair, and transparent sourcing, and various risk factors.

10. While there is no international law that would necessarily apply to this issue, the governments and international organizations, including the UN, have promulgated model laws, guidelines, and regulations aiming to assist decision-makers in conducting public procurement exercises that are based on the principles outlined above (footnoted omitted). Such international standards have been set out for example in the United Nations Set of Principles and Rules for the Control of Restrictive Business Practices (the "UN Set"),

adopted by the General Assembly in its resolution 35/63, of 5 December 1980. The UN Set states, in relevant part, that "[a]ppropriate action should be taken in a mutually reinforcing manner at national, regional and international levels to eliminate or effectively deal with, restrictive business practices, including those of transnational corporations, adversely affecting international trade" (footnote omitted). However, notwithstanding the emergence of such international standards, we are unaware of any legal regime on which the UN could rely in preventing collusive practices among affiliated entities involved in UN procurement activities. However, no single set of model rules or laws applies to the UN. Thus, any proposed procurement policy promulgated within the UN must be first and foremost guided by the principles outlined in Financial Regulation 5.12.

C. Over-Dependency on One Supplier

11. The question of how to deal with over-dependency on a supplier is an issue that various governments and organizations around the world have grappled with. It shares the same features and principles that were discussed in relationship to the diversification above. The question bears a certain relationship to the requirement of effective international competition, as over-dependency may, although not necessarily, distort effective competition. For instance, the Office of Government Commerce of the UK (OGC) issued a Procurement Policy: Guidelines on Factors that Can Be Considered When Trying to Reduce the Risks of Over-dependency on a Supplier (footnotes omitted). The OGC noted that over-dependency may pose the following risks to effective competition: (*a*) a supplier is so over-stretched by existing demand that the risk of capacity failures or financial difficulties arises as a result; (*b*) a supplier's share of the government business is such that it has the potential to exploit its position, or that its dominance may deter other bidders. The OGC's Guidelines then outline several steps that may be taken to reduce over-dependency. For example, OGC's Guidelines advise that it may be necessary to consider "interim arrangements with a supplier whose capacity to deliver is compromised" or to take measures "to lower the barriers to entry to the public sector" in order to avoid the risk of exploitation of a position.

12. Similarly, Queensland State government of Australia issued Procurement Guidance: Planning for Significant Procurement (footnotes omitted) where it addressed the same two potential risks associated with overdependency and outlined several recommendations on how to address it. For example, in order to mitigate capacity failures, it proposed "undertaking supplier development activities to stimulate new entrants to the market" and to "ensure that the incumbent supplier is not led to believe that they will be supported *via* Government business." Noting, however, that "[u]ltimately the supplier's decision to be dependent on the agency's work is a commercial decision." In order to mitigate supplier's potential to exploit its position, it proposed the following strategies: (1) unbundling the requirement into smaller, more manageable packages which may be more attractive to a wider range of suppliers; (2) using market sounding techniques to gauge the market's level of interest in the agency's business, and identify the agency's value to suppliers as a customer; (3) using market development initiatives to stimulate competition in the market for the agency's business.

13. Undoubtedly, the decision on whether to implement a particular strategy to reduce over-dependency on a single supplier properly lies with the relevant decision-maker. Within the UN context, the policy decision must be guided by the principles outlined in

Regulation 5.12 and, if a significant policy change is determined to be warranted, may need to be approved by the member States. In this regard, the UN's procurement requirements may warrant careful review at the vendor registration, solicitation and award stages of the supplier's capacity to perform its obligations if PD determines that there exists a tangible risk to the Organization that a given supplier may be overstretched in its capacity or that its financial ability to perform its obligations to the UN is jeopardized. In this respect, Procurement Manual Section 7.7(4) provides that "the VRO shall evaluate whether the applicant is in sound financial condition based on the financial documentation and information furnished." Similarly, careful attention should be paid to the possibility of a supplier exploiting its dominant position due to its large share of the UN's business, which may lead to creating an entrance barrier to other suppliers. In the latter context, it has been suggested that entering into the so-called "framework agreements" may alleviate such concern. There is no single definition of a "framework agreement," however, the European Parliament defined framework agreement as "an agreement between one or more contracting authorities and one or more economic operators, the purpose of which is to establish the terms governing contracts to be awarded during a given period, in particular with regard to price and, where appropriate, the quantity envisaged."

Conclusions and Recommendations

14. Based on the foregoing, OLA recommends that PD consider limiting or excluding affiliated entities from participating in any one solicitation in order to effectively remove the risk of collusion. Further, the decisions on appropriate measures to implement in order to diversify the supplier database and to mitigate the risks associated with sourcing from vendors whose revenue is substantially derived from the UN contracts mainly involve policy considerations. Of course, any policy measures that may be adopted to address the two concerns identified in PD's 30 January 2015 memorandum should be consistent with the Financial Regulations and Rules of the Organization.

31December 2015

4. Miscellaneous

(*a*) Inter-office memorandum to the Principal Legal Officer in charge of the Office of the Legal Counsel concerning the authority of the Commission on Narcotic Drugs to schedule a substance under the Convention on Psychotropic Substances if there is a recommendation from the World Health Organization that the substance should not be placed under international control

Article 2 (4)–(5) and Article 17 of the Convention on Psychotropic Substances—The Commission must consider a substance before scheduling it, notwithstanding a recommendation from the World Health Organization—Assessments by the World Health Organization are "determinative" on medical and scientific nature of a substance—The Commission must also consider economic, social, legal, administrative, and other factors

1. I refer to your memorandum dated [date] in which you state that the secretariat of the Commission on Narcotic Drugs ("the Commission") was asked to seek our legal advice on the following question:

> "Can the Commission on Narcotic Drugs schedule a substance under the Convention on Psychotropic Substances of 1971[7] if there is a recommendation from the World Health Organization that the substance should not be placed under international control?"

2. We are aware that Parties to the Convention and the Commission may take a different view to the responses we provide. As such, our response should not in any way be construed as the only or definitive view, and we would appreciate your conveying this understanding to the Commission.

3. Subject to that understanding, our response to your question is that, in our view, the Commission can schedule a substance under the Convention on Psychotropic Substances even if there is a recommendation from the World Health Organization that the substance should not be placed under international control, provided that the Commission has taken into account all relevant factors specified in article 2 (5) of the Convention before taking a decision.

4. A detailed analysis is contained in the annex to this memorandum.

Annex

1. The purpose of this annex is to provide a detailed analysis on the following question on which you have asked us for our advice:

> "Can the Commission on Narcotic Drugs schedule a substance under the Convention on Psychotropic Substances of 1971 if there is a recommendation from the World Health Organization that the substance should not be placed under international control?"

2. We understand that this question has been posed in relation to a notification from [State] under article 2 (1) of the Convention on Psychotropic Substances ("the Convention") stating that ketamine should be added to Schedule I of the Convention, to which the World Health Organization (WHO) responded that the substance concerned should not be included in that Schedule. You have noted that the Commission on Narcotic Drugs ("the Commission") is expected to act on the notification of [State] at its [number] session to be held from [date] to [date].

Functions of the Commission under the Convention

3. By way of background, the Commission on Narcotic Drugs was established by the Economic and Social Council (ECOSOC) by its resolution adopted on 16 February 1946, and was mandated, among other things, to "[a]ssist the Council in exercising such powers of supervision over the application of international conventions and agreements

[7] For the full text of the convention, please visit the e-Book entitled "The International Drug Control Conventions" which includes the Convention on Psychotropic Substances of 1971 as well as the Single Convention on Narcotic Drugs of 1961 (amended by the 1972 Protocol) and the United Nations Convention against Illicit Traffic in Narcotic Drugs: https://www.unodc.org/documents/commissions/CND/Int_Drug_Control_Conventions/Ebook/The_International_Drug_Control_Conventions_E.pdf.

dealing with narcotic drugs as assumed by or conferred on the Council". The Convention on Psychotropic Substances, which was adopted on 21 February 1971 and entered into force on 16 August 1976, and which is aimed at preventing and combatting abuse of psychotropic substances and the illicit traffic to which it gives rise, sets out certain functions of the Commission under the Convention. Those functions were formally accepted by ECOSOC by its resolution 1576 (L) of 20 May 1971.

4. Article 17 of the Convention entitled "Functions of the Commission" provides, in paragraph 1, that "[t]he Commission may consider all matters pertaining to the aims of this Convention and to the implementation of its provisions, and may make recommendations relating thereto."

5. Article 2 of the Convention then sets out the specific functions of the Commission in relation to the addition of substances to the Schedules of the Convention, the transfer of substances from one Schedule to another, and the deletion of substances from the Schedules. As far as the Commission's role in adding substances to the Schedules is concerned, which is the relevant scenario in the present case, article 2 (5) of the Convention provides that "[t]he Commission, taking into account the communication from the World Health Organization, whose assessments shall be determinative as to medical and scientific matters, and bearing in mind the economic, social, legal, administrative and other factors it may consider relevant, may add the substance to Schedule I, II, III or IV. The Commission may seek further information from the World Health Organization or from other appropriate sources."

Procedure for adding a substance to the Schedules of the Convention

6. Any consideration by the Commission under article 2 (5) of the Convention is preceded by several steps, in which WHO plays a key role. Under article 2 (1) of the Convention, a notification to include specific substances not yet under international control in a Schedule of the Convention may be made by a Party to the Convention or by WHO. Under article 2 (2), "[t]he Secretary-General shall transmit such notification, and any information which he considers relevant, to the Parties, to the Commission and, when the notification is made by a Party, to the World Health Organization."

7. Pursuant to article 2 (4) of the Convention, WHO should conduct an assessment of a specific substance in accordance with the criteria set out in that article, and communicate its assessment and recommendation to the Commission. The Commission then considers the matter pursuant to article 2 (5) quoted above.

8. In this context, we understand the notification by [State] to include ketamine in Schedule I of the Convention was made under article 2 (1) of the Convention (E/CN.7/2015/7, annex III). We also understand that WHO recommended not to place ketamine under international control at this time, in response to the notification made by [State] (E/CN.7/2015/7, annex IV). Your question relates to whether the Commission may include a substance in a Schedule of the Convention, if WHO had recommended not to place the substance concerned under international control.

Role of the Commission and the Parties

9. In the first instance, it is for the Commission itself to decide whether it has the competence to deal with a specific matter, such as the inclusion of a substance in a Schedule of the Convention in case where WHO had expressed a contrary opinion. In this regard, rule 54 of the Rules of Procedure of the Functional Commissions of ECOSOC, which is applicable to the Commission, provides that "[a] motion calling for a decision on the competence of the commission to adopt a proposal submitted to it shall be put to the vote before a vote is taken on the proposal in question." Therefore, if a member of the Commission puts forward such a motion, it is for the Commission to decide.

10. However, certain indications that may shed light on your question are set out below. We would like to emphasize that the points mentioned below do not purport to be an authoritative or definitive interpretation of the relevant provisions of the Convention and that other parties may take a different view.

Analysis of the relevant provisions

11. We first note that the Convention does not contain provisions that specifically deal with the situation described in your question. Article 2 (4) of the Convention deals with a situation where WHO communicates an assessment on a substance and any control measures necessary for the substance, and article 2 (5) authorizes the Commission to add any substance in the Schedules of the Convention.

12. However, there is no specific provision that explicitly deals with the procedure to be followed when WHO recommends *not* to place a substance under international control, or a specific provision that states that the Commission is free to take a contrary decision in case *not* to place a substance under international control, or a specific provision that states that the Commission is free to take a contrary decision.

13. As far as the nature of the WHO communication under article 2 (4) of the Convention is concerned, that article provides that the communication should contain an "assessment" of the substance concerned, together with "recommendations" on control measures. Article 2 (5) further provides that the assessments of WHO "shall be determinative as to medical and scientific matters". The word "determinative" seems to indicate that WHO's assessments have a special status that serve to conclusively define the medical and scientific nature of a substance.

14. Article 2 (5), however, further provides that the Commission may add the substance to a Schedule "bearing in mind the economic, social, legal, administrative and other factors it may consider relevant". Therefore, it seems that the Commission is required to take into account not only the WHO's assessments as to medical and scientific matters, but also economic, social, legal, administrative and other factors. Only when they have been taken into account can the Commission proceed to decide whether to add the substance to the Schedule or not. Article 2 (5) therefore seems to indicate that the Commission is expected to reach a conclusion after taking into account all the relevant factors, rather than on the basis of only one or several factors, such as the WHO's assessments. This approach seems to have been accepted by the Commission (E/1983/15, para. 195).

15. Article 2(5) of the Convention also clarifies that the Commission alone is authorized to add a substance to a Schedule of the Convention. The Convention does not confer that authority on WHO. The only exception is when a Party appeals the Commission's decision, in which case ECOSOC may decide to add a substance to a Schedule of the Convention (article 2 (8) of the Convention).

Commentary on the Convention

16. In shedding light on your question, we have also consulted *Commentary on the Convention on Psychotropic Substances* (E/CN.7/589), which was published in 1976, and which provides useful guidance in interpreting the provisions of the Convention. The commentary to article 2 (5) provides that:

> "[i]f WHO finds under paragraph 4 [of Article 2] that a substance does not have the dangerous properties described in subparagraph (*a*), clause (i) or (ii), and by consequence expressly or impliedly recommends in its communication to the Commission that the substance should not be controlled, the Commission would not be authorized to place it under control. Doing so would be incompatible with the provision that the WHO assessment should be 'determinative as to medical and scientific matters', and also with the basic assumptions of the authors of the Vienna Convention which is intended to deal only with problems arising from the abuse of substances which have dangerous qualities as defined in the above-mentioned clause (i) or (ii)" *(Commentary,* p. 71).

17. The commentary seems to put emphasis on the determinative nature of the WHO assessments as far as medical and scientific matters are concerned, and the object and purpose of the Convention.

Subsequent practice

18. As far as subsequent practice is concerned, we have identified two potentially relevant cases dealt with by the Commission. In 1997, Spain proposed the inclusion of several substances in Schedules I and II of the Convention, but WHO recommended not to amend those Schedules to extend international controls collectively to some of the substances notified by Spain, and made its own recommendations on two substances in response to the proposal by Spain (E/1999/28/Rev.1, paras. 109 and 111). The Commission approved the WHO recommendations on the two substances, but there is no record of any action taken with respect to the substances to which WHO objected.

19. In 1991, WHO recommended that a substance should be deleted from Schedule IV of the Convention, and that it should not be transferred to any other Schedule (E/1991/24, p. 23). This was a case that concerned the deletion of a substance which was already included in a Schedule, rather than an objection to the inclusion of a new substance to a Schedule. However, the case is relevant in the sense that WHO recommended that the substance should not appear in any of the four Schedules of the Convention. In this case, the Commission unanimously decided to remove the substance from Schedule IV (E/1991/24, p. 23).

20. While these two cases seem to indicate that the Commission has generally followed WHO recommendations not to add substances to or maintain substances in the

Schedules of the Convention, the Commission has, in the past, rejected a number of WHO recommendations to include specific substances in the Schedules of the Convention (E/1983/15, paras. 206 to 208; E/1984/13, para. 11). While the context was different from that envisaged in your question, *i.e.* a case where WHO recommended *not* to include a specific substance in a Schedule, the practice of the Commission to reject WHO recommendations is still relevant as it indicates that the Commission has not felt itself bound by WHO recommendations. that the Commission has generally followed WHO recommendations not to add substances to or maintain substances in the Schedules of the Convention, the Commission has, in the past, rejected a number of WHO recommendations to include specific substances in the Schedules of the Convention (E/1983/15, paras. 206 to 208; E/1984/13, para. 11). While the context was different from that envisaged in your question, *i.e.* a case where WHO recommended *not* to include a specific substance in a Schedule, the practice of the Commission to reject WHO recommendations is still relevant as it indicates that the Commission has not felt itself bound by WHO recommendations.

Conclusions

21. Article 2 (5) of the Convention does provide that WHO assessments are determinative as to medical and scientific matters of a substance, and that the Commission should take them into account, but the ultimate authority to decide whether the substance should be added in a Schedule rests with the Commission. In doing so, the Commission is required to take into account factors broader than medical and scientific factors. If the overall assessment of the Commission is to add the substance in a Schedule, it has the authority to do so, even if WHO had recommended otherwise. Therefore, it does not seem that the narrower assessments by WHO on medical and scientific matters alone could determine the course of action to be taken by the Commission.

22. As far as the views expressed in the *Commentary* are concerned, it placed emphasis on the fact that WHO assessments were "determinative" as to medical and scientific matters of a substance to conclude that the Commission may not add a substance in a Schedule when WHO recommends not to place a substance under international control. However, looking at article 2 (5) as a whole, the Commission is expected to take a broader perspective, and is required to take into account all relevant factors to reach a conclusion. From this perspective, if the Commission takes a decision not to include a substance in a Schedule without considering the relevant factors other than the WHO assessments, it could be said that the requirements under article 2 (5) incumbent upon the Commission have not been fulfilled.

23. Therefore, in response to your question, in our view, the Commission can schedule a substance under the Convention on Psychotropic Substances even if there is a recommendation from WHO that the substance should not be placed under international control, provided that the Commission has taken into account all relevant factors specified in article 2 (5) of the Convention before taking a decision.

18 February 2015

(*b*) Inter-office memorandum to the Under-Secretary-General for Management requesting the application of article 45 *bis* of the UNJSPF Regulations to the pension benefit of a staff member

Application of Article 45 *bis* of the UNJSPF Regulations to the pension benefit of a staff member towards recovery following a court order of restitution—Restitution order by court distinct mechanism of recovery from Article 45 *bis*, which is an internal administrative mechanism

1. This refers to the case of […], a former United Nations staff member, who, following his separation, was convicted in [month and year] of defrauding the United Nations by the United States District Court for the Eastern District of Virginia (the "District Court") for working for the United States Government while on paid sick leave from the Organization.

2. The Organization has calculated its financial losses as a result of […] fraud to be […]. In order to recover a portion, OLA recommends that DM, on behalf of the Organization, submit the enclosed memorandum (text omitted) to the United Nations Joint Staff Pension Fund (the "Pension Fund") requesting the application of Article 45 *bis* of the United Nations Joint Staff Pension Regulations (the "UNJSPF Regulations") to the disposition of the pension benefit of […].

Background

3. In [month and year] […] was convicted of nine counts of interstate wire fraud for concealing his employment with the United States Government while on paid sick leave from his position as […]. As a result of his fraudulent scheme, […] had received salary payments from both the United Nations and the United States between April and September 2009. Accordingly, in [month and year], the District Court issued a "Judgment in a Criminal Case" (…) sentencing […] to (1) eighteen months of imprisonment and three years of supervised release and (2) to pay, firstly, a special assessment of US $900 to the United States and, secondly, restitution in the amount of […] to the United Nations, as a victim in the case, in monthly installments of minimum (the "Restitution Order").

Article 45 bis *of the UNJSPF Regulations*

4. By resolution 67/240, the General Assembly "approve[d] new article 45 *bis*, …, which allows the [Pension] Fund, in very specific circumstances, to pay a portion of a retiree's benefit directly to the retiree's former employing organization towards restitution in cases where amounts had been embezzled by the staff member from the organization". The amendment to the UNJSPF Regulations was made on the recommendation of the United Nations Joint Staff Pension Board, as well as the ACABQ.

5. Article 45 *bis* enables the Pension Fund to remit to a member organization, on request, a portion of the benefit payable to a participant in the Fund where the participant has been convicted of fraud against the member organization, provided that two requirements are met: (1) a participant must be the *"subject of a criminal conviction for fraud against that employing organization"*, and (2) the criminal conviction must be *"evidenced by a final and executable court order issued by a competent national court"*. We note that,

under the UNJSPF Regulations, a participating staff member would have the right to appeal any remittance decision.

Application of Article 45 bis *to […]*

6. OLA has determined that the requirements of Article 45 *bis* are met […] case. As noted in paragraph 3, in [month and year], […] was convicted by the District Court of nine counts of interstate wire fraud against the United Nations. We have been advised that […] has exhausted all of his appeals under United States law and that the District Court Judgment thus represents a final and executable court order.

7. In view of the foregoing, we note that (1) […] is the subject of a criminal conviction by a competent national court for fraud against the United Nations, which is (2) evidenced by a final and executable court order. Accordingly, the requirements of Article 45 *bis* are satisfied in this case and the Pension Fund may, upon the Organization's request, decide to remit a portion of […] pension benefit to the United Nations.

8. As noted above, the District Court ordered […] to pay restitution […] to the United Nations as a victim in the case. The amount of restitution owed to the United Nations was calculated based on a recommendation of the United States Government, the prosecutor in the case. In its Memorandum in Aid of Sentencing submitted to the District Court, the United States recommended that restitution […] be ordered, consisting of (1) […] United Nations salary and emoluments paid *via* direct deposit to […] bank account between April and September 2009, as well as (2) […] in "necessary" legal expenses incurred by the United Nations in the case.

9. In determining the amount of restitution owed to the United Nations, the District Court was aware that the United Nations incurred additional losses that were not included in the restitution recommended by the United States. In its Memorandum in Aid of Sentencing, the United States recommended that *"[o]ther portions of the defendant's gross salary for this period of time, which were intended for the defendant's benefit (e.g. , pension contributions and staff assessments) and properly included in the loss calculation pursuant to [United States law], are directly recoupable by the UN and therefore should not be included in any restitution order"* (emphasis in original). The District Court adopted this recommendation and, therefore, the loss amount reflected in the Restitution Order does not include the United Nations' losses resulting from pension contributions.

10. Accordingly, the loss figure included in the memorandum to the Pension Fund differs from the Restitution Order and reflects the *total* loss of the Organization attributable to […] fraud, including losses resulting from pension contributions and all legal costs incurred by the Organization in connection with the case. The total loss amount consists of […] in salary and emoluments, as well as […] in legal costs.

Relationship between the Restitution Order and Article 45 bis

11. Although the Restitution Order is a welcome means of recovering a portion of the Organization's losses, we note that it is a distinct mechanism of recovery from Article 45 *bis*. Article 45 *bis* is an internal, administrative mechanism that may be utilized by the Organization to recover financial losses resulting from fraud irrespective of whether

a national court has ordered restitution as part of its criminal conviction. We would further note that the Restitution Order was possible in this particular case pursuant to a law in the United States that requires the payment of restitution to the victims of fraud offenses. Analogous laws do not exist in many other jurisdictions and, further, the courts in jurisdictions where such laws exist may not award restitution to the United Nations in all cases. Moreover, even in cases such as this one where restitution is ordered, the restitution order may not enable the Organization to achieve full or practicable recovery of its losses. Accordingly, as recognized by the General Assembly, Article 45 *bis* constitutes an important mechanism for the Organization to utilize in these cases to recover losses as a result of fraud by a staff member.

12. In view of the foregoing, we would recommend that the United Nations request remittance of […] pension benefit to the Organization in order to recover a portion of the Organization's losses in this case. We note that this would be the first request made by the Organization pursuant to Article 45 *bis,* and OLA remains available to assist as needed.

25 March 2015

(*c*) Inter-office memorandum to the Deputy Controller in the Office of Programme Planning, Budget and Accounts, Department of Management on the status of the "Financial Rules" for the United Nations Office on Drugs and Crime (UNODC)

Application of the United Nations Financial Regulations and Rules of the United Nations to the United Nations Office on Drugs and Crimes—Establishment of Financial Regulations and Rules for trust funds established pursuant to the United Nations Financial Regulations and Rules

Introduction

1. This refers to your request, including most recently the one of 11 March 2015, seeking advice concerning the background to, the status of, and revisions that UNODC has proposed to make to the so-called "Financial Rules of the United Nations Office on Drugs and Crime." This also refers to the numerous meetings, exchanges of e-mails and other communications on this matter among representatives of our offices. We understand that your request for advice was a consequence of UNODC's having submitted, for approval by the Controller's Office, a set of revised financial rules which would supersede the current version of the so-called, "Financial Rules of the United Nations Office on Drugs and Crime" that had been promulgated by the Secretary-General in 2008. We understand that the main purpose of the proposed revisions is to make such financial rules consistent with the International Public Sector Accounting Standards (IPSAS). In connection with UNODC's request, your office has specifically questioned the basis for an office of the Secretariat, UNODC, having its own financial rules.

2. Our general comments concerning the (i) background to the promulgation of the so-called "Financial Rules of the United Nations Office on Drugs and Crime" and (ii) the proposed revisions thereto are summarized below and are elaborated more fully in the enclosed Annexes I and II [omitted, except for the annex below]

Status of the Financial Rules to which UNODC Has Proposed Revisions

3. The cover page of the proposed revised set of financial rules provided to the Controller's Office uses the title, "Financial Rules of the United Nations Office on Drugs and Crime." Nevertheless, according to the Preface to the document, the actual title of the proposed revised set of financial rules is, "Financial Rules of the Fund of the United Nations International Drug Control Programme established pursuant to General Assembly resolution 45/179 of 21 December 1990 and the Fund of the Crime Prevention and Criminal Justice Programme established pursuant to General Assembly resolution 46/152 of 18 December 1991." The title, as used on the cover page, "Financial Rules of the United Nations Office on Drugs and Crime," therefore is inaccurate and, given your questions regarding the status of such financial rules, has been misleading. The proposed revised financial rules have been promulgated for the sole purpose of the proper financial administration of the UNDCP Fund and the UNCPCJP Fund and not for the financial management of UNODC, an Office of the Secretariat, the financial administration of which is governed by the UN Financial Regulations and Rules. Accordingly, the title, "Financial Rules of the United Nations Office on Drugs and Crime" should not be used in connection with the promulgation of the proposed revised set of financial rules for the financial administration of the UNDCP Fund and the UNCPCJP Fund. Instead, such financial rules should be entitled, "Financial Rules of the Fund of the United Nations International Drug Control Programme and the Fund of the Crime Prevention and Criminal Justice Programme." Such a title for the proposed revised financial rules, albeit more unwieldy, is more accurate and does not create the misleading impression that UNODC operates under separate financial rules.

4. There can be no question that UNODC, as a unit of the Secretariat, is subject exclusively to the UN Financial Regulations and Rules. Financial Regulation 1.1 provides that such Financial "Regulations shall govern the financial administration of the United Nations, including the International Court of Justice." Financial Rule 101.1 further provides, in pertinent part, that the Financial Rules of the United Nations "govern all the financial management activities of the United Nations except as may otherwise expressly be provided by the Assembly or unless specifically exempted by the Secretary-General". To OLA's knowledge, neither the General Assembly nor the Secretary-General has exempted or otherwise provided that UNODC is not subject to the UN Financial Regulations and Rules.

5. [T]he UNDCP Fund and the UNCPCJP Fund are trust funds established in accordance with the UN Financial Regulations and Rules. Financial Regulation 4.14, in pertinent part, states that, with respect to trust funds, reserve and special accounts, "unless otherwise provided by the General Assembly, such funds and accounts shall be administered in accordance with the [UN Financial] Regulations." As more fully explained in the annexes (omitted), the General Assembly has not provided that the UNDCP Fund and the UNCPCJP Fund are not subject to the UN Financial Regulations. Rather, the General Assembly has authorized the Secretary-General to provide specific financial rules for the UNDCP Fund and the UNCPCJP Fund in accordance with Financial Regulation 5.8(*a*), which states that the Secretary-General "shall establish detailed financial rules and procedures in order to ensure effective and efficient financial management and the exercise of economy." In addition to the General Assembly, including its Advisory Committee on Administrative and Budgetary Questions, the Commission on Narcotic Drugs, Commission on Crime Prevention and Criminal Justice and the Economic and

Social Council were consulted on the Secretary-General's proposals to establish financial rules for the UNDCP Fund and the UNCPCJP Fund.

6. Based on the foregoing, the proposed revised financial rules that UNODC provided to the Controller's Office are applicable to the two trust funds, the UNDCP Fund and the UNCPCJP Fund. Moreover, such financial rules are subject to and must be read consistently with the UN Financial Regulations and Rules. Such financial rules for the two funds, thus, are merely adjunct to the UN Financial Regulations and Rules and have been established by the Secretary-General, in accordance with Financial Regulation 5.8, for the proper financial administration of the UNDCP Fund and the UNCPCJP Fund. UNODC is not subject to such financial rules other than in connection with its administration of the UNDCP Fund and the UNCPCJP Fund and, when doing so, subject to the overriding authority of the UN Financial Regulations and Rules.

Revisions to the Financial Rules of the Two Funds

[omitted] … .

Annex

Background and comments concerning the basis of the promulgation of the so-called "Financial Rules of the United Nations Office on Drugs and Crime"

A. Legislative background to the financial Rules of the Fund/or the United Nations International Drug Control Programme ("UNDCP Fund")

1. By its resolution 45/179 dated 21 December 1990, the General Assembly *"[r]equeste[d]* the Secretary-General to create a single drug control programme, to be called the United Nations International Drug Control Programme ['UNDCP'], based at Vienna, and to integrate fully therein the structures and the functions of the Division of Narcotic Drugs of the Secretariat, the secretariat of the International Narcotics Control Board and the United Nations Fund for Drug Abuse Control ['UNFDAC']", *"[i]nvite[d]* the Secretary-General to take the necessary steps in order to appoint a senior official at the level of Under-Secretary-General, who will execute the integration process and head the new integrated Programme starting from 1 January 1991", and *"[e]ndorse[d]* the proposal of the Secretary-General to place the financial resources of the existing [UNFDAC] under the direct responsibility of the head of the [UNDCP] as a fund for financial operational activities, mainly in developing countries" *(see* operative paragraphs 3, 4 and 6).

2. By his report A/46/480 of 25 October 1991, the Secretary-General informed the General Assembly that the United Nations International Drug Control Programme ("UNDCP") had been established and the Executive Director of UNDCP had been appointed on 1 March 1991, and proposed that "a new fund, to be called the 'Fund of the United Nations International Drug Control Programme' [UNDCP Fund], be established and the assets and liabilities of the current UNFDAC be transferred to this new Fund" *(see* paragraph 3 below). In his report A/C.5/46/23 dated also 25 October 1991, the Secretary-General stated that:

"[g]iven the magnitude of the extrabudgetary resources of the Programme [UNDCP], and the distinct feature of the proposed Fund of the [UNDCP] (see A/46/480, para. 25), the Secretary-General considers that the new [UNDCP] Fund calls for special treatment by way of separate financial rules […]. The proposed distinctive features of the Fund, as compared to the regular budget activities, include a system of continuous programming based on annual funding; a distinction between commitment and obligation; and the establishment of a general reserve and of a programme reserve. Furthermore, the anticipated size of the Fund makes it advisable, in the interest of efficient operation, for the Executive Director of the Programme to be granted a maximum degree of decentralized authority as regards both financial and personnel matters." *(See* paragraph 5 of the report).

In light of the above, subject to the General Assembly's approval of the proposed financial arrangements for the UNDCP Fund set out in the report A/C.5/46/23, the Secretary-General indicated his intention to promulgate, pursuant to the UN Financial Regulations, separate financial rules applicable to the UNDCP Fund, and attached the proposed financial rules in the annex to the report *(see* A/C.5/46/23*,* para 8).

3. Having reviewed the Secretary-General's reports, above, and the report of the ACABQ, the General Assembly, by its resolution 46/185C dated 20 December 1991, Section XVI:

"l. *Decide[d]* to establish, as from 1 January 1992, under the direct responsibility of the Executive Director of the [UNDCP], the Fund of the [UNDCP] as a fund for financing operational activities mainly in developing countries and to transfer to it the financial resources of the former [UNFDAC];

"2. *Authorize[d]* the Commission on Narcotic Drugs as the principal United Nations policy-making body on drug control issues, […] to approve, on the basis of the proposals of the Executive Director of the [UNDCP], both the budget of the programme of the Fund and the administrative and programme support costs budget, other than expenditures borne by the regular budget of the United Nations, […];

"7. *Note[d] also* the intention of the Secretary-General to promulgate financial rules for the Fund, in accordance with the Financial Regulations of the United Nations, it being understood that the references in the said financial rules to the role and functions of the Commission on Narcotic Drugs shall be consistent with the role of the Commission given in paragraph 2 above;

"8. *Decide[d]* that, notwithstanding regulations 11.1 and 11.4 of the Financial Regulations of the United Nations, the Executive Director of the [UNDCP] shall maintain the accounts of the Fund of the [UNDCP] and shall be responsible for submitting the said accounts and related financial statements, no later than 31 March following the end of the financial period, to the Board of Auditors and for submitting financial reports to the Commission on Narcotic Drugs and to the General Assembly."

4. Subsequently, the draft financial rules of the UNDCP Fund, annexed to the Secretary-General's report A/C.5/46/23 dated 25 October 1991, were further amended in order to reflect the recommendations of the ACABQ and the Commission on Narcotic Drugs. In 1998, the Commission on Narcotic Drugs "took note with approval of the intention of the Secretary-General to promulgate the revised draft financial rules of the Fund", and the Economic and Social Council, in its decision 1998/20 dated 30 July 1998, also "took note of the report of the Commission on Narcotic Drugs on its forty-first session".

Thereafter, almost seven years after the initial draft rules were prepared, the financial rules of the UNDCP Fund were promulgated in 1998.

B. Legislative background to the financial rules of the Fund of the United Nations Crime Prevention and Criminal Justice Programme ("UNCPCJP Fund")

5. By its resolution 46/152 of 18 December 1991, the General Assembly *"[a]pprove[d]* the statement of principles and programme of action, annexed to the present resolution, recommending the establishment of a United Nations crime prevention and criminal justice programme ['UNCPCJP']" and *"[r]equeste[d]* the Secretary-General to take the necessary action within the overall existing United Nations resources in accordance with the financial rules and regulations of the United Nations and to provide appropriate resources for the effective functioning of the [UNCPCJP] in accordance with the principles outlined in the statement of principles and programme of action" *(see* paragraphs 2 and 7 of the resolution).

6. The statement of principles and programme of action of the UNCPCJP provides m section G, "Funding of the Programme", paragraph 44, that:

> "[t]he [UNCPCJP] shall be funded from the regular budget of the United Nations. Funds allocated for technical assistance may be supplemented by direct voluntary contributions from Member States and interested funding agencies. Member States are encouraged to make contributions to the United Nations Trust Fund for Social Defence [established pursuant to ECOSOC resolution 1086B (XXXIX) of 30 July 1965], to be renamed the United Nations Crime Prevention and Criminal Justice Fund. […]"

7. By its resolution 61/252 of 22 December 2006, Part XI, the General Assembly:

> *"Considering* that it would be opportune to grant the Commission on Crime Prevention and Criminal Justice the same powers with respect to the [UNCPCJP] Fund as the Commission on Narcotic Drugs has with respect to the Fund of the [UNDCP],
>
> […]
>
> "1. *Authorize[d]* the Commission on Crime Prevention and Criminal Justice, as the principal United Nations policymaking body on crime prevention and criminal justice issues, to approve, on the basis of the proposals of the Executive Director of the [UNODC], bearing in mind the comments and recommendations of the [ACABQ], the budget of the [UNCPCJP] Fund, including its administrative and programme support costs budget, other than expenditures borne by the regular budget of the United Nations
>
> […]
>
> "4. *Requeste[d]* the Secretary-General to promulgate financial rules for the [UNCPCJP] Fund, in accordance with the Financial Regulations and Rules of the United Nations, [footnote 32 herein is omitted] it being understood that the reference in the said financial rules to the role and functions of the Commission on Crime Prevention and Criminal Justice shall be consistent with the role of the Commission given in paragraph 1 above;
>
> "5. *Decide[d]* that, notwithstanding regulations 6.1 and 6.5 of the Financial Regulations of the United Nations, the Executive Director of [UNODC] shall maintain the accounts of the Fund and shall be responsible for submitting the said accounts and related financial statements […] to the Board of Auditors and for submitting

financial reports to the Commission on Crime Prevention and Criminal Justice and to the General Assembly."

8. We understand that subsequently, it was determined by the Administration that the financial rules of the UNDCP Fund, promulgated in 1998, could also be made applicable to the UNCPCJP Fund by making necessary adjustments to the 1998 financial rules of the UNDCP Fund. Such adjustments were made and in 2008, the Secretary-General promulgated, effective as of 1 May 2008, the financial rules of the UNDCP Fund and the UNCPCJP Fund, also referred to as the "Financial Rules of the United Nations Office on Drugs and Crime" and the "Financial Rules of the Voluntary Funds of United Nations Office on Drugs and Crime", and abolished the financial rules of the UNDCP Fund promulgated in 1998 *(see* the cover page, Preface and heading to the "Financial Rules of the United Nations Office on Drugs and Crime"). The 2008 version of the "Financial Rules of the United Nations Office on Drugs and Crime" is currently in force and this is the version that will be revised, mainly in order to make the rules compliant with IPSAS.

C. OLA comments concerning the basis for the promulgation of the so-called "Financial Rules of the United Nations Office on Drugs and Crime"

9. There can be no question that UNODC, as a unit of the Secretariat, is subject exclusively to the UN Financial Regulations and Rules. Financial Regulation 1.1 provides that the Financial "Regulations shall govern the financial administration of the United Nations, including the International Court of Justice." Financial Rule 101.1 further provides, in pertinent part, that the Financial Rules of the United Nations "govern all the financial management activities of the United Nations except as may otherwise expressly be provided by the Assembly or unless specifically exempted by the Secretary-General" (emphasis added). To OLA's knowledge, neither the General Assembly nor the Secretary-General has exempted or otherwise provided that UNODC is not subject to the UN Financial Regulations and Rules.

10. With respect to the UNDCP Fund, the General Assembly noted the Secretary-General's intention to promulgate separate financial rules for the Fund and, with respect to the UNCPCJP Fund, the General Assembly requested the Secretary-General to promulgate separate financial rules for the Fund *(see* General Assembly resolutions 46/185C and 61/252). In addition to the General Assembly, the ACABQ, the Commission on Narcotic Drugs, Commission on Crime Prevention and Criminal Justice and ECOSOC were also consulted on the proposals for the promulgation of separate financial rules for the two funds *(see, e.g.,* paragraph 4 above).

11. The General Assembly also decided that the Executive Director of UNODC shall maintain the accounts of the UNDCP Fund and the UNCPCJP Fund, that the Executive Director shall be responsible for submitting the said accounts and related financial statements to the Board of Auditors and for submitting financial reports on the UNDCP Fund to the Commission on Narcotic Drugs and the General Assembly, and financial reports on the UNCPCJP Fund to the Commission on Crime Prevention and Criminal Justice and the General Assembly *(see* paragraphs 3 and 7 above). The General Assembly's decisions, above, are reflected in Rules 3.3 and 7.1 of the "Financial Rules of the United Nations Office on Drugs and Crime" which, together with Rule 1.3, stipulate as follows:

"Rule 1.3

"The authority and responsibility for the implementation of these Financial Rules is delegated to the Executive Director of the United Nations Office on Drugs and Crime (UNODC). […]"

"Rule 3.3

"The biennial budget outline and the biennial budget [of the "UNODC Funds", *i.e.*, the UNDCP Fund and UNCPCJ Fund] shall be submitted to the [ACABQ] for examination. The biennial budget outline and the biennial budget and the related reports of the [ACABQ] shall be submitted to the Commission on Narcotic drugs and the Commission on Crime Prevention and Criminal Justice."

"Rule 7.1

"The Executive Director [of UNODC] is responsible for maintaining the UNODC Funds accounts and for reporting thereon to the Board of Auditors, the Commission on Narcotic Drugs, the Commission on Crime Prevention and Criminal justice and the General Assembly."

Since Rules 3.3 and 7.1 reflect the decisions of the General Assembly, we consider that any proposal to substantively revise or abolish those rules would require the General Assembly's approval.

12. The General Assembly has plenary authority over the finances of the Organization pursuant to Article 17 of the Charter of the United Nations. Pursuant to Rule 152 of the Rules of Procedure of the General Assembly, "the General Assembly shall establish regulations for the financial administration of the United Nations." Financial Regulation 5.8(*a*) provides that the Secretary-General shall "establish detailed financial rules and procedures in order to ensure effective and efficient financial management and the exercise of economy". Financial Regulation 5.8(*a*), adopted by the General Assembly, provides the legal basis and authority for the Secretary-General to promulgate Financial Rules.

13. We understand that the distinct features of the UNDCP Fund and of the UNCPCJP Fund were deemed to justify the promulgation of financial rules for the two funds. Should circumstances significantly change requiring their substantial revision or abolishment, we consider that the General Assembly's express approval would be necessary given that the General Assembly was consulted in respect of the promulgation of the original financial rules for the two funds and that certain provisions of the current financial rules reflect its decisions, *e.g.,* Rules 3.3 and 7.2 *(see* General Assembly resolutions 46/185C and 61/252). Moreover, since the ACABQ, the Commission on Narcotic Drugs, Commission on Crime Prevention and Criminal Justice and the ECOSOC were also consulted, in addition to the General Assembly, with respect to the proposals to promulgate financial rules for the two funds, we would recommend that they be also consulted on any proposal to abolish or substantially revise those financial rules

27 March 2015

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)

(*a*) Legal opinion rendered during the 104th session of the International Labour Conference (June 2015) concerning the application by the Cook Islands for admission to membership of the International Labour Organization[1]

Admission to membership—Sovereign status of self-governing entity—Capacity to conduct an independent foreign policy—Responsibility at international law

Following the presentation of the Subcommittee's report concerning the application by the Cook Islands for admission to membership of the International Labour Organization to the Selection Committee, a question was raised by a Government representative of [State] who indicated, while offering his Government's support to the resolution concerning the admission of the Cook Islands to membership of the ILO, that there had been some discussion within the [grouping of States] as to the sovereignty of the Cook Islands, and its Government's capacity to conduct an independent external foreign policy. Clarification from the Office was requested.

The Legal Adviser of the ILO responded by pointing out that the Cook Islands was a self-governing entity in free association with New Zealand. This association was defined most recently in clauses 4 and 5 of the 2001 Joint Centenary Declaration of the Principles of the Relationship between New Zealand and the Cook Islands as follows: "in the conduct of its foreign affairs the Cook Islands interacts with the international community as a sovereign and independent state. Responsibility at international law rests with the Cook Islands in terms of its actions and the exercise of the international rights and fulfilment of its international obligations. Any action taken by New Zealand in respect of its constitutional responsibilities for the foreign affairs of the Cook Islands will be taken on the delegated authority, and as an agent or facilitator at the specific request of, the Cook Islands." Section 5 of the Cook Islands Constitution Act, 1964, thus records a "responsibility to assist the Cook Islands and not a qualification of Cook Islands' statehood".

It was further highlighted that the Cook Islands had established diplomatic relations with 43 States, was a member of tens of international organizations, including Specialized Agencies of the United Nations (such as WHO, FAO, UNESCO), and had signed over 100 multilateral treaties and a comparable number of bilateral treaties, including the United Nations Convention on the Law of the Sea[2]and the Rome Statute of the International Criminal Court.[3] It had also concluded maritime boundary agreements with a number of countries.

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[1] See Provisional Record of the International Labour Conference, 104th session, no. 3–3, Second report of the Selection Committee, paras. 13–17, pp. 3–4.

[2] United Nations, *Treaty Series*, vol. 1833, p. 396.

[3] *Ibid*., vol. 2187, p. 3.

(*b*) Legal opinion rendered during the 325th Session (October–November 2015) of the Governing Body of the International Labour Office concerning the scope of the principle *nemo judex in causa sua*[1]

Complainants' participation in debate on non—Observance of certain labour conventions—Principle that no one should be judge and party in the same case—Procedure under article 26(4) of the ILO Constitution—Members of governing body do not have to recuse themselves from debates on complaints brought by them

The Legal Adviser rendered an opinion during the debates held by the Governing Body, at its 325th Session, regarding the complaint concerning the non-observance by [State] of the Minimum Wage-Fixing Machinery Convention, 1928 (No. 26), the Freedom of Association and Protection of the Right to Organize Convention, 1948 (No. 87), and the Tripartite Consultation (International Labour Standards) Convention, 1976 (No. 144), submitted under article 26 of the Constitution by several delegates to the 104th Session (2015) of the International Labour Conference.

The Government representative of [State] argued that the abovementioned item on the agenda should not be debated and no decision should be taken on it as, among other reasons, 14 of the 35 employers who had signed the complaint were members of the Governing Body. Therefore, they could not participate in the debate or take a decision without infringing upon the universal principle that no one could be judge and party in the same case, as stated by the ILO's own Legal Adviser in relation to an article 26 complaint in 2005.

The Legal Adviser stressed that the legal opinion of 2005 had been given in the context of the possible referral of a complaint under article 26 to the Committee on Freedom of Association. Most of the signatories of the complaint were members of that Committee. In those circumstances, the Legal Adviser had recommended that those Committee members should recuse themselves. Conversely, in the case debated at the 325th Session, no action proposed encompassed referral to that Committee. Further, the current complaint was being filed under article 26(4) of the Constitution, according to which the Governing Body could act of its own motion to initiate the article 26 procedure. If a party initiating a procedure was debarred in all cases from participating in the procedure, then it would not be possible for the Governing Body to take any action under article 26(4) as it should recuse itself as a whole, which was evidently not the intention of the drafters of the Constitution.

2. Universal Postal Union

(submitted by the Director of Legal Affairs of the Universal Postal Union)

(*a*) Letter dated [date] from the Deputy Director General of the Universal Postal Union (UPU) to the Director General of the [State's] designated postal operator concerning a request by [State] concerning the use of postal financial services

Request to rehabilitate postal financial services—Application of sanctions—Specialized agency bound by Security Council resolutions adopted under Chapter VII of the Charter of the United Nations

[1] See the Provisional Records of the 325th session of the Governing Body, no. GB.235/PV, pp. 75–80.

I refer to your letter dated [date] and discussions with the [State] delegation during the last session of the Council of Administration. The Director General informs me that he carefully considered and evaluated your request concerning the rehabilitation of Postal Financial Services for [State] through operational assistance by the Universal Postal Union (UPU). The experts of the UPU's international Bureau have thoroughly examined the matter with due respect to applicable international laws and decisions. Based on their analyses and recommendations, I regret to inform you that the UPU is currently not in a position to assist your country in the aforementioned undertaking.

As you may know, the UPU is a specialized agency of the United Nations responsible for international postal service matters. It is thus bound to apply and comply with the relevant resolutions adopted by the United Nations Security Council. Accordingly, it needs to be noted that the Security Council in its [resolutions] reaffirmed its commitment concerning the [Treaty] and expressed the need for all States party to that [Treaty] to comply fully with all their obligations. In this regard, the aforementioned resolutions instruct that all addressees "[…] shall prevent the provision to [State] by their nationals or from or through their territories of technical training, financial resources or services, advice, other services or assistance […]." In addition, all of the concerned resolutions, including [resolution], were adopted under Chapter VII of the Charter of the United Nations, making them legally binding towards all members of the United Nations, its organs and organizations. As explained above, this necessarily also applies to the UPU as specialized agency of the United Nations.

In light of the political decisions by the Security Council of the United Nations, the UPU is therefore unable to take any action that may be interpreted as providing any assistance concerning a rehabilitation of financial services towards [State] until the restrictions contained within the respective resolutions are lifted.

(*b*) Reply dated 1 May 2015 from the Director of Legal Affairs concerning [General Assembly resolution]

Implementation of a General Assembly resolution—Specialized agencies not bound by resolutions of the United Nations General Assembly

In response to your note concerning [resolution] adopted by the General Assembly on [date], I have the pleasure in providing you with the following information concerning the relationship between the Universal Postal Union (UPU) and [State]:

As a specialized agency of the United Nations, the UPU is not directly involved in implementing [resolution] of the United Nations General Assembly, which only affects Member States.

The UPU has always regarded [State] as a fully-fledged member of the organization. As such, [State] enjoys the same rights and obligations as other UPU members.

…

(*c*) Legal Affairs Directorate note dated 5 August 2015 concerning a request for temporary exemption from contribution class payments by [State]

Request for temporary exemption from contribution class payment due to exceptional circumstances—Article 21 of the Constitution of the Universal Postal Union (UPU)—Article 150 of the UPU regulations—Possibility of temporary reduction for maximum period of two years—Lowest possible contribution class for least-developed countries—Impossibility of authorizing reduction of contribution class to zero—Literal interpretation in accordance with international law

A. *Background information*

1. On [date], the General Management asked the Legal Affairs Directorate to undertake a legal analysis on whether it would be possible for [State] to request a temporary exemption from its contribution class payments, in view of the exceptional circumstances faced by that country since late [year].

B. *Legal considerations pertaining to the issue of contribution classes (UPU Constitution and General Regulations)*

2. Article 21 of the UPU Constitution ("Expenditure of the Union. Contributions of member countries") states in its § 3 that "[t]he expenses of the Union, including where applicable the expenditure envisaged in paragraph 2, shall be jointly borne by the member countries of the Union for this purpose, *each member country shall choose the contribution class in which it intends to be included*. The contribution classes *shall be laid down in the General Regulations*." The same principle also applies in the case of accession or admission to the Union under article 11 of the UPU Constitution, whereby "[t]he country concerned shall *freely choose* the contribution class into which wishes to be placed for the purpose of apportioning the expenses of the Union." (emphasis is ours)[1]

3. The provision above is complemented by article 150 of the UPU General Regulations, which not only defines the different contribution classes (currently from 0.5 to 50 units, as contained in paragraph 1) but also establishes a specific procedure under paragraphs 6 and 7 whereby member countries facing "exceptional circumstances"[2] (such as natural disasters necessitating international aid programmes) may be authorized by the Council of Administration (hereinafter CA) to have a temporary reduction in contribution class once between two Congresses, when so requested by a member country, if the said member establishes that it can no longer maintain its contribution at the class originally chosen.

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[1] As noted in the UPU international Bureau commentary to article 21 of the UPU Constitution, the principle of "free choice of contribution class" stems from the relevant decisions adopted by the 1974 (Lausanne) and 1989 (Washington) Congresses, which abolished the power previously held by Congresses to classify member countries in the different contribution classes.

[2] Whether or not a certain "exceptional circumstance" merits the temporary reduction referred to in article 150 § 6 is a decision taken at the sole discretion of the CA.

4. It may be noted in any case that such a temporary reduction may be authorized for a maximum period of two years or up to the next Congress, whichever is earlier (after which the country concerned shall automatically revert to its original contribution class).

C. *The specific situation of [State]*

5. As can be confirmed by the United Nations Office of the High Representative for the Least Developed Countries, Landlocked Developing Countries and Small Island Developing States, [State] has been a least-developed country since [year], therefore, it already benefits from the possibility afforded under article 150 § 1 of the UPU General Regulations to choose the lowest possible contribution class, *i.e.* the class of 0.5 unit, which is legally reserved for the "least advanced countries as listed by the United Nations and for other countries designated by the Council of Administration."[3]

6. However, due to the difficult and rapidly deteriorating situation faced by that member country since late [year] (particularly in terms of domestic strife, political demonstrations and military clashes), the UPU International Bureau received on [date] a specific request from the [Government] (through its General Authority for Post and Postal Savings) to be completely exempted from payment of its contribution class for the year 2015, which in practice would mean a reduction to a "zero unit" contribution class.

7. Notwithstanding the exceptional situation mentioned above, the understanding of the Legal Affairs Directorate is that there is no possibility, under the UPU General Regulations, for any member country to request a reduction to "zero" in its contribution units, especially bearing in mind that, as can be more clearly seen in the French version of the above treaty, "le Conseil d'administration peut autoriser *un déclassement temporaire d'une class*, un seule fois entre deux Congrès" (emphasis is ours). In other words, any such authorization would be in contradiction with the letter and the spirit of articles 21 of the UPU Constitution and 150 of the UPU General Regulations, by which a class no lower than 0.5 unit can be identified.

8. It must be emphasized that, as an intergovernmental organization and a specialized agency of the United Nations, the UPU is bound by international law and the treaties that constitute the organization. This is reflected in the Acts of the Union, whose provisions must be interpreted consistently with the fundamental public international law tenet of literal interpretation of treaties (article 31 of the Vienna Convention on the Law of Treaties),[4] by which "[a] treaty shall be interpreted in good faith and 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."

9. Therefore, in case [State] still decides not to pay its annual contribution to the Union's annual expenditure for the year 2015, the relevant procedures contained in articles 146 (and potentially 149) of the UPU General Regulations would have to apply.

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[3] The latter situation only occurs when the CA authorizes an exceptional, temporary reduction for non-least developed countries already in the class of 1 unit by placing them in the class of 0.5 unit.

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

D. *Conclusions*

10. In summary, the following conclusions may be drawn from the brief considerations contained herein:

— Under the current provisions contained in the Acts of the Union, there is no possibility for the CA to authorize an exemption from payment of contribution classes for any member country;

— The exceptional authorization to temporarily reduce a member country's contribution class (by one contribution class and only once between two Congresses) is evidently limited by the lowest possible threshold, *i.e.* the class of 0.5 unit as defined in article 150 § 1 of the UPU General Regulations;

— As a result, and notwithstanding the difficult circumstances faced by [State], the request made by that member country should not be entertained by legal reasons provided herein.

(*d*) Legal Affairs Directorate note dated 9 December 2015 concerning possible proposals for the establishment of a permanent Universal Postal Convention

Proposals to establish a permanent Universal Postal Convention—Option to change the lifespan of the current Convention and provide for future amendments in additional protocols—Option to transfer time-dependent articles to additional annex—Option to transfer time-dependent articles to regulations—Amendment procedures dependent on constitutional processes in member countries

A. *Background information and preliminary remarks*

During the latest meeting of the Acts of the Union Project Group (AUPG) on 5 November 2015, two proposals concerning the establishment of a permanent Universal Postal Convention (hereinafter "convention") were discussed.

The International Bureau (hereinafter "IB") presented documents CA C1 AUPG 2015.2-Doc4.Revl and CA C1 AUPG 2015.2-Doc 2.Add1 containing a proposal concerning the establishment of a permanent convention which had been developed by the members of the *ad hoc* working group within the AUPG.

In addition to the presentation by the IB, [State] presented an alternative proposal concerning the establishment of a permanent convention (document CA C1 AUPG 2015.2-Doc4.Add1).

Following the presentation of the two proposals referred to above, the IB's Legal Affairs Directorate presented its view on the tabled proposals, including certain alternatives to the ones presented. The AUPG discussed the respective proposals and expressed a need for further clarity in terms of the setup and legal implications of the proposals. In this regard, the AUPG members requested the IB to take all relevant comments on board, to clarify the possible implications of the two presented proposals and to suggest a third alternative which might, to the extent possible, incorporate the features of both.

The Chair of the AUPG then requested the IB's Legal Affairs Directorate to submit an explanatory document concerning the requirements and legal consequences of each proposal in order to give a general overview for AUPG members.

In the light of the above, on 23 November 2015, the Regulation, Economics and Markets Directorate asked that the Legal Affairs Directorate undertake such a legal analysis with regard to the establishment of a permanent convention and its associated implications.

B. *Legal considerations pertaining to the AUPG* ad hoc *group proposal (Permanent Convention + Additional Protocol)*

As discussed and presented during the latest AUPG meeting, it is possible for the UPU to convert the Convention (in its current form) into a permanent treaty. In order to achieve this goal, some changes need to be done to the Convention itself, the UPU Constitution and the UPU General Regulations (for specific details, please see document CA C 1 AUPG 2015.2-Doc 4.Rev1), particularly in order to modify the relevant articles which currently set the four-year lifespan of the Convention towards a permanent character.

Most importantly, it needs to be noted that this option would not include any transferral or removal of any provisions currently contained within the Convention, as it simply focuses on a change of the lifespan of the Convention, namely from one Congress cycle to permanent. Evidently, adoption of such a permanent convention at the national level would still be subject to a member country's constitutional process (normally through ratification).

In this scenario, further amendments to provisions contained in a permanent convention (for instance, if amendments are proposed during the 2020 UPU Congress) would be subject to an additional protocol, as per the principles and practice already in place within the UPU for other Acts (UPU Constitution and UPU General Regulations). Once more, given such a scenario, member countries would still need to formally implement any additional protocols *via* their respective constitutional process.[1]

For a graphical illustration of this proposal, see Annex 1 to this note.[2]

C. *Legal considerations pertaining to [State's] proposal (Permanent Convention + Additional Protocol + Additional Annex)*

The [State] proposal goes along the lines of the AUPG *ad hoc* group proposal as it suggests the establishment of a permanent convention and the implementation of any future amendments to this permanent text in subsequent additional protocols.

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[1] By way of comparison, it may be stressed that, even in the case of the UPU Constitution, the same article 22 ("Acts of the Union") underwent three successive changes through the 6th, 7th and 8th Additional Protocols adopted respectively in 1999, 2004 and 2008. In other words, the current UPU legal framework for permanent Acts does not impede the adoption of amendments even in articles which are subject to more regular changes.

[2] Not reproduced in the *United Nations Juridical Yearbook 2015*.

However, the key element of this proposal is the transferral of certain articles of the Convention, such as those regarding remuneration aspects, to an additional annex, itself again being subject to change at every Congress.

Depending on a member country's constitutional process, this option might indeed bring the benefit that the permanent portion of the Convention would only need to be ratified once (provided that the additional annex comprises all elements normally subject to more frequent changes).[3] Nevertheless, just as in the AUPG *ad hoc* group proposal, any future changes to the permanent Convention would still be subject to an additional protocol, which in turn would also be subject to domestic constitutional processes (normally through ratification).

In the light of the foregoing, it is worth noting that the treatment of this proposed additional annex will, once more, depend on the each member country's constitutional process, therefore, while few member countries (such as [State]) may benefit from a simplified approval process for such an additional annex, other member countries will most likely need to ratify that annex at every Congress cycle as well (thus actually adding yet another treaty-based layer for adoption of amendments to a permanent convention).[4]

For a graphical illustration of this proposal, see Annex 2 to this note.[5]

D. *Legal considerations pertaining to a possible "combined" proposal (Permanent Convention + Additional Protocol + transferral of certain provisions to the Regulations)*

In line with documents previously presented to the AUPG *ad hoc* group and in accordance with the aforementioned request for presentation of a combined proposal, the IB's Legal Affairs Directorate elaborated a third possible option aimed at establishing a permanent convention.

This proposal closely relates to the original [State] proposal and suggests the establishment of a permanent convention as well as the adoption of additional protocols in case member countries wish to introduce changes to the permanent text (whereas the approval of additional protocols would be subject to the same constitutional processes currently required for approval of a non-permanent convention, due to the binding force of such additional protocols).

The main difference from [State's] proposal would be that all time-dependent articles defined by member countries as being subject to more frequent changes (such as rules

[3] Since the articles concerning remuneration in the Convention have undergone the most frequent changes in the treaty's recent history, the [State's] proposal seeks to avoid frequent changes to the permanent part of the Convention by the transferral of these articles to the aforementioned Annex. In this regard, it needs to be noted that the individual articles which should be transferred to such Annex still need to be identified—even though one may anticipate difficulties in ascertaining which Convention provisions are regularly adopted to cover only a four-year Congress cycle.

[4] Moreover, it remains questionable whether member countries' parliaments would not need to examine the entire treaty text (permanent part of the Convention as well as Additional Annex) when ratifying changes to the Additional Annex on future Congress occasions.

[5] Not reproduced in the *United Nations Juridical Yearbook 2015*.

dealing with remuneration between designated operators of member countries) would be transferred to the relevant Regulations for decision by the Postal Operations Council.

It may be noted, however, that the transferral of certain technical provisions to the Regulations would not preclude that certain fundamental principles remain in the text of the permanent convention. Therefore, this option would merely focus on more detailed technical provisions currently contained in the convention.

Through this option, the permanent convention would be sheltered from continuous amendments as constantly changing provisions[6] would be transferred to the more easily steerable framework of the Regulations, which can be amended more quickly and efficiently as they normally do not need require ratification by member countries.[7]

In addition, it must be emphasized that approval thresholds in relation to proposed amendments concerning the transferred articles could also be adapted, subject to the relevant decisions taken by member countries.

For a graphical illustration of this proposal, see Annex 3.[8]

E. *Conclusions*

In summary, the following conclusions may be drawn from the brief considerations contained herein:

— The AUPG *ad hoc* group proposal of a permanent convention plus additional protocols follows the same legal principles and practice applied for other permanent Acts of the Union such as the UPU Constitution and the UPU General Regulations;

— [State's] proposal aims at establishing an additional annex which might, at least for some member countries, facilitate the approval of certain, more regularly amended technical provisions which would no longer be included in the main text of the Convention, however, such procedural benefits seem to be limited in nature, particularly considering that, for other member countries, the additional annex would ultimately have the same or similar binding status and legal treatment as an additional protocol;

— The combined proposal presented by the IB's Legal Affairs Directorate reflects the overall legal framework already applied in other permanent Acts of the Union (and replicated by the AUPG *ad hoc* group) while allowing for more frequent amendments to detailed or technical provisions in the Regulations.

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[6] Similarly to the [State's] proposal, the articles which would be transferred to the Regulations would still need to be identified by member countries.

[7] In that regard, the relatively simpler amendment process for the Letter Post and Parcel Post Regulations could potentially be subject to higher approval thresholds or perhaps limitations on the frequency of possible amendments ("Subject to approval by the Council of Administration … ", "amendments allowed only once every six months" *etc.*) as far as some of those transferred provisions are concerned.

[8] Not reproduced in the *United Nations Juridical Yearbook 2015*.

3. International Maritime Organization

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

Interpretation of the London Convention and Protocol

Legal framework governing sub—Sea disposal of wastes from mining operations—Relationship between the London Convention and London Protocol (LC/LP), the United Nations Convention on the Law of the Sea (UNCLOS) and the Convention for the Prevention of Pollution from Ships (MARPOL)—Distinction between dumping, pollution from vessels and pollution from land-based sources—Definition of dumping draws distinction between MARPOL and LC/LP—Whether sub-sea disposal of wastes from mining operations is included in the definition of dumping under LC/LP to be interpreted by the States parties to LC/LP

1. With regard to the scope of the London Convention and the London Protocol (LC/LP)[1] and its relationship with other international organizations and bodies, one should first consider the relationship of the LC/LP to the United Nations Convention on the Law of the Sea (UNCLOS).[2] Article 194(3)(*a*) of UNCLOS provides that measures to prevent, reduce and control pollution of the marine environment shall include, *inter alia*, those designed to minimize to the fullest possible extent the release of toxic, harmful or noxious substances, especially those which are persistent, from land-based sources, from or through the atmosphere or by dumping. The obligation on States to adopt laws and regulations and to take other measures that may be needed to prevent, reduce and control pollution of the marine environment by dumping is contained in article 210 of UNCLOS. The definition of "dumping" as provided in article 1(5) of UNCLOS is identical to the definition in LC/LP. 2. Furthermore, article 210(4) of UNCLOS imposes upon States the obligation to endeavour to establish global and regional rules and standards and recommended practices and procedures to prevent, reduce and control pollution by dumping, acting through "competent international organizations or diplomatic conference". Thus, there is a very strong legal connection between LC/LP and UNCLOS. Notably, the reference in the plural to "international organizations" indicates that in this case the task of International Maritime Organization (IMO) at the global level can be complemented by regulatory activities undertaken under the auspices of other organizations. Cooperation between IMO and other organizations has been implemented, especially in connection with the adoption of regional agreements.

3. Article 211 of UNCLOS addresses pollution from ships, and forms the jurisdictional basis in UNCLOS for the International Convention for the Prevention of Pollution from Ships (MARPOL).[3] Importantly, the definition of "dumping" in article 1(5) of UNCLOS, in particular what is dumping and what is not dumping, provides the jurisdictional line between MARPOL and the LC/LP. This definition largely prevents one

[1] Convention on the prevention of marine pollution by dumping of wastes and other matter, United Nations, *Treaty Series*, vol. 1046, p. 138 and Protocol to the Convention on the prevention of marine pollution by dumping of wastes and other matter, 1972, concluded 7 November 1996.

[2] United Nations, *Treaty Series*, vol. 1833, p. 396.

[3] *Ibid*., vol. 1340, p. 61 and 184.

convention from overlapping the other. With regard to land-based pollution, article 207(4) of UNCLOS imposes upon States the obligation to endeavour to establish global and regional rules and standards and recommended practices and procedures to prevent, reduce and control pollution of the marine environment from land-based sources, taking into account characteristic regional features, the economic capacity of developing States and their need for economic development, through "competent international organizations or diplomatic conference".

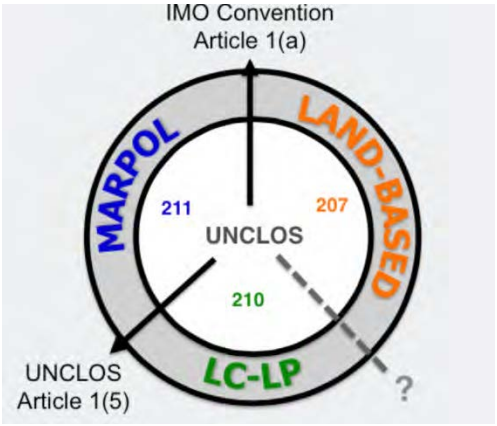
According to article 207(1) of UNCLOS[4] land-based sources include rivers, estuaries, pipelines and outfall structures. Again, the reference in the plural to "international organizations" indicates that at the global level this includes IMO to complement regulatory activities undertaken under the auspices of other organizations, provided those activities are within the remit of the IMO or LC/LP. This is also recognized in the Law of the Sea Bulletin No.31 as published by the Division for Oceans Affairs and the Law of the Sea of the Office of Legal Affairs of the United Nations (DOALOS).

4. As described above, the definition of "dumping" provided the jurisdictional "wall" between MARPOL and the LC/LP. Further, the IMO Convention at article 1(*a*), which limits the IMO remit to "the prevention and control of marine pollution from ships" limits MARPOL from overlapping in any significant way with the control of pollution from land-based sources; the regulation of reception facilities for ship's waste being the one slight exception to that jurisdictional "wall". However, the jurisdictional "wall" between the LC/LP and land-based sources is less clear, because UNCLOS offers no similar guidance like that for dumping and ship pollution in article 1(5). Thus, although this issue is one to be decided by the States parties to LC/LP, from a legal point of view there seems no direct borderline between the scope of the definition of dumping as in UNCLOS and LC/LP and the scope of article 207 of UNCLOS. In other words, there is no indication that the scope of articles 207 and 210 of UNCLOS are mutually exclusive. Therefore, the parties to LC/LP could decide that outfall pipes are "other man-made structures at sea" within the meaning of the definition of "dumping" in the LC/LP and take action accordingly, either by amending the Convention to make such a distinction clear, or by a resolution.

Conclusions

5. LC/LP or IMO may in the framework of UNCLOS complement regulatory activities undertaken under the auspices of other organizations that are involved in the issue of sub-sea disposal of wastes from mining operations. In this respect each and every organization has to assess its own competence. The issue whether sub-sea disposal of wastes from mining operations is included in the definition of dumping under LC/LP has to be interpreted by the States parties to LC/LP. From a legal point of view there seems no direct borderline between the scope of the definition of dumping as in UNCLOS and LC/LP and the scope of article 207 of UNCLOS and therefore there is no indication that the scope of articles 207 and 210 of UNCLOS are mutually exclusive. In case merely guidance is requested this could be feasible by way of a non-binding resolution or similar instrument.

[4] Article 207(1), Pollution from land-based sources: "1. States shall adopt laws and regulations to prevent, reduce and control pollution of the marine environment from land-based sources, including rivers, estuaries, pipelines and outfall structures, taking into account internationally agreed rules, standards and recommended practices and procedures."



4. 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 UNIDO consultant concerning disclosure of a UNIDO-[national entity] project in [State A]

Application of the Convention on privileges and immunities of the specialized agencies to email attachments—Disclosure provisions in other legal instruments—Reputational risk—Request for comment in case of disclosure

Kindly refer to your email of [date] concerning the disclosure of information relating to a [national entity]-funded project in [State A]. … I wish to comment as follows.

The Convention on the Privileges and Immunities of the Specialized Agencies, 1947,[1] which [State B] has undertaken to apply to UNIDO, provides in section 6, article III, that "[t]he archives of the specialized agencies, *and in general all documents belonging to them or held by them, shall be inviolable, wherever located*" [emphasis supplied]. I would say that all the attachments in your email fall under this provision. In other words, the freedom of information request, which I assume is made pursuant to the laws of [State B], may not be applied in such a way as to result in [State B]'s breach of its international obligations in respect of UNIDO.

In any event, UNIDO is within its rights to disclose its documents when considered appropriate. Moreover, UNIDO can commit to the disclosure of certain information in agreements or similar instruments.

For example, the legal instruments relating to the project, whether with the donor or the recipient country (*i.e.*, the trust fund agreement with [national entity] and the project document between UNIDO and [State A]), may contain clauses relating to the disclosure of information. I would therefore advise the project manager to review these documents

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

for any guidance that they may contain. For your information, I have not seen such clauses in our standard forms of funding agreements or prodoc templates.

Apart from the above legal considerations, the project manager should review the four attachments to your email to see whether they contain information the disclosure of which to a journalist may pose a reputational risk to UNIDO, [State A], or [State B]. As an example, I have noted that one of the attachments contains a communication between the UNIDO office and the [State B] Embassy in the country. Normally, such communications should not be shared with external parties, including journalists, without consulting the parties who authored the communications.

Should the project manager decide to allow the disclosure of the documents in question to the journalist, the latter should also be requested to provide his/her report to UNIDO for comment.

…

6 January 2015

(*b*) Interoffice memorandum to the UNIDO Director General concerning his membership in an alumni network

Membership of the UNIDO Director General in alumni network for former trustees of a foundation—No formal role in decision-making organs of the foundation—Non-remunerated participation unproblematic from a legal perspective

1. Kindly refer to an email dated [date] from [Name], Executive Assistant to the Executive Director and Chair of Trustees, [Foundation], received in the Legal Office for review on [date].

2. The email informs you of an alumni network that is being set up for former Trustees of the [Foundation]. The purpose of the network is "to encourage informal dialogue between the Foundation and former trustees that want to remain involved in its activities, for example, by attending stakeholder events in home or regional jurisdictions, supporting engagement with home jurisdiction or regional stakeholders or facilitating any other activities that alumni may think would support the [Foundation]." At this stage, [Foundation] proposes to issue business cards for those who wish to be actively involved in the network identifying them as an [Foundation] alumnus. It also proposes to add your contact details to its distribution list to receive the [Foundation] Monthly Update. You have the option to decline these offers.

3. The question that has been presented to me for advice appears to be whether your membership in the future alumni network poses a conflict of interest with your responsibilities as the Director General of UNIDO. Based on the limited information thus far made available concerning the alumni network's future activities, it seems that alumni network members will not play a formal role in the decision-making organs of the Foundation and will not be remunerated. If my understanding is correct, then your association with the [Foundation] Trustees Alumni Network is unproblematic from the legal perspective.

15 January 2015

(*c*) Internal email message to the UNIDO Director of the Policymaking Organs concerning possible shortening of the duration of the General Conference in 2015

Shortening of the duration of the General Conference of UNIDO—Duration to be set at the beginning of the session—General Conference not bound by earlier decisions on the expected duration of the session

I refer to your email of [date] requesting my legal advice on whether the duration of the sixteenth session of the General Conference (GC) of UNIDO could be shortened. You added that the Conference, at its last session, decided to hold the sixteenth session in Vienna from 30 November to 4 December 2015 (decision GC.15/Dec.20). There is otherwise no provision of the Constitution or the rules of procedure stipulating that the Conference needs to take place over five days.

I wish to inform you that rule 10 of the rules of procedure of the GC[1] provides that on the recommendation of the General Committee, the GC must set the closing date for each session at the beginning of the session. In setting the closing date under rule 10, the GC is not bound by earlier decisions on the expected duration of the session. The Policymaking Organs' proposed course of action is therefore consistent with the rules of procedure and fine from a legal perspective, on the assumption that the requirements of other rules such as rule 12(2), rule 13(1)(*s*) and rule 42(3)(*c*) will be met.

27 January 2015

(*d*) Internal email message to the UNIDO Industrial Development Officer concerning the review of the Memorandum of Understanding with [company]

Reference to general principles of law in Memorandum of understanding with corporate party—Examples of general principles of law—Application of general principles of law to international disputes—UNITDROIT Principles 2004—United Nations Juridical Yearbook

I refer to your email of [date] enclosing version [date] of the draft MOU with [company], [State]. The company has proposed some changes to the latest draft.

I wish to inform you that the proposed changes to article 3, article 4, article 5 and article 8(6) are acceptable. I assume that changes proposed to article 8 (9) have been checked with the Evaluation Branch. As to the proposed language for article 9 (1) dealing with the governing law and settlement of disputes, the idea is generally acceptable; however, I would recommend revising the wording of para. 9.1 as follows:

> "The present Memorandum will be construed in accordance with general principles of law, to the exclusion of any single national system of law. *Without prejudice to the generality of the foregoing, the Partners may designate the applicable rules of law to the substance of any dispute, controversy or claim arising out of or relating to this Memorandum.*"

[1] Rule 10. Closing dates of sessions: "On the recommendation of the General Committee, the Conference shall, at the beginning of each session, fix a closing date for the session."

The highlighted wording is based on article 35, paragraph 1, of the UNCITRAL Rules (2010).[1]

The [Company] is of the view that "general principles of law" is too vague. As to what is meant by general principle of law, I can offer the following. The starting point for answering this question is Article 38(1)(*c*) of the Statute of the International Court of Justice.

General principles of law are one of the sources of international law. Based on leading cases from the Permanent Court of International Justice, the International Court of Justice and international arbitrations, general principles of law may include the following: *pacta sunt servanda*; good faith; estoppel; *res judicata*; respect for acquired rights; right to compensation for actual loss (*damnum emergens*) and lost profits (*lucrum cessans*).[2]

To the extent that the reference to 'general principles of law' may invite indeterminacy, this can be addressed through a more specific reference to, *e.g.*, the UNIDROIT Principles, 2004,[3] which, even in the absence of an express reference, some legal commentators (and international arbitral panels) have concluded do represent general principles of law applicable to international disputes.[4]

The Preamble to the UNIDROIT Principles, 2004, also provide that the Principles may be applied when the parties have agreed that their contract shall be governed by general principles of law. The United Nations Judicial Yearbooks also contain some opinions on "general principles of law".[5]

11 February 2015

(*e*) Internal email message to the UNIDO Director of the Programme Development and Technical Cooperation Branch concerning a sponsorship framework for the Vienna Energy Forum

Voluntary contributions to the Organization—Requirements as set out in the UNIDO Constitution and Financial Regulations—Funding agreement—Contributions to be consistent with the objectives, policies and activities of UNIDO and not to entail a financial liability to the Organization—Use of the United Nations and UNIDO logo

1. I refer to your memorandum of [date], received in LEG on [date], concerning the above-mentioned subject. You informed me that your service wishes to seize the opportunity of the fourth edition of the global Vienna Energy Forum (VEF) "to explore possibilities to receive funds from other potential donors, *i.e.* private sector and other nongovernmental entities". The text of the relevant decision of the Executive Board on [date] reads:

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[1] See *Official Records of the General Assembly, Sixty-fifth Session, Supplement No. 17* (A/65/17), annex I.

[2] See generally Malcom N. Shaw, *International Law* (Cambridge University Press, 5th ed. 2003), pp. 92–99.

[3] See *UNIDROIT Principles of International Commercial Contracts 2004* (UNIDROIT, 2004).

[4] See generally Michael Joachim Bonell, "The UNIDROIT Principles and Transnational Law", *Uniform Law Review/Revue de droit uniforme*, 2 (2000) pp. 199–218.

[5] See http://legal.un.org/unjuridicalyearbook.

"In view of the limited UNIDO resources available, and also noting that UNIDO's share has been progressively increasing, the EB approved €250,000 from [budget]-resources. The remaining funds should be explored from all potential donors (private sector and other non-Governmental entities in Austria, including [global initiative]), *in close cooperation with the Strategic Donor Relations Unit*." (Emphasis added)

2. You added that "since UNIDO does not yet dispose of a sponsorship policy, we would like to obtain your approval on the attached proposal that outlines possible sponsorship packages, and the way forward to handle subsequently related agreements."

3. As far as the legal aspects of the fund-raising activity are concerned, I wish to inform you that voluntary contributions to UNIDO are governed in the first place by the following basic rule contained in the Constitution of UNIDO:

"Article 16. *Voluntary contributions to the Organization*

Subject to the financial regulations of the Organization, the Director-General, on behalf of the Organization, may accept voluntary contributions to the Organization, including gifts, bequests and subventions, made to the Organization by governments, intergovernmental or non-governmental organizations or other non-governmental sources, provided that the conditions attached to such voluntary contributions are consistent with the objectives and policies of the Organization."

4. In addition, Financial Regulation 6.1 states:

"Regulation 6.1: Voluntary contributions, whether or not in cash, may be accepted by the Director-General on behalf of the Organization, provided that the purposes for which the contributions are made are consistent with the policies of the Organization. The acceptance of such contributions, which directly or indirectly involve additional financial liability for the Organization, shall require the consent of the appropriate governing bodies of the Organization."

5. Similarly, Financial Rules 106.1.1 to 106.1.9 regulate voluntary contributions requiring also that they can be accepted only if the conditions attached thereto are consistent with the objectives and policies of the Organization and do not involve additional financial liabilities for the Organization that would exceed the contribution accepted. Finally, the Director-General's Bulletin UNIDO/DGB(E).74 of 25 September 1997 contains the Guidelines on Voluntary Contributions, implementing the above-mentioned rules.

6. Consequently, the Director-General may accept a voluntary contribution from the potential donors subject to the requirements established by the Constitution. UNIDO should propose the conclusion of a Trust Fund Agreement following the model of the agreement provided in DGB(E).54 (ex DGB.18/Rev.1) of 15 May 1992 also available in the Intranet Legal Resources pages.

7. As you will note in two relevant administrative issuances[1] on procedures to conclude funding agreements and on voluntary contributions, the Legal Office—a legal advisory service—is not mandated to approve in principle requests for fund-raising. The service that manages UNIDO's fund-raising activities at UNIDO is the Strategic Donor Relations Unit and the Executive Board has rightly directed your service to engage in this

[1] See DGB(E).54 (ex DGB.18/Rev.1) of 15 May 1992 (Model agreements and related guidelines for projects financed from trust funds, special purpose contributions to the Industrial Development Fund, the general pool of the Industrial Development Fund, or the regular budget); and UNIDO/DGB(E).74 of 27 September 1997 (Guidelines on voluntary contributions).

particular fund-raising in "close cooperation with the Strategic Donor Relations Unit". In the case under discussion, your service in coordination with Strategic Donor Relations Unit, should ensure that the purpose of each contribution is consistent with the objectives, policies and activities of UNIDO and that it would not entail a financial liability to the Organization.

8. I also refer to a subsequent email dated [date] from [UNIDO staff] in your Office suggesting the logo of a sponsoring partner may be used in combination with the UNIDO logo.

9. For your reference, the authorization regarding the use of the name and logo of the United Nations or UNIDO is based on several principles:

(*a*) The use of the name and emblem must be expressly approved in advance in writing and upon such terms and conditions as may be specified.

(*b*) The principal purpose of the use of name and the logo is to show support for the activities and objectives of UNIDO.

(*c*) The use of the name and logo for commercial purposes, including fund-raising for a business entity, will not be authorized. The name and logo may not be used on any product or its packaging, or in any manner that could imply or suggest the endorsement or promotion by the UNIDO of the commercial entities concerned, their products or services.

(*d*) The use of name and the emblem cannot be authorized if it may create the misleading impression that the activity in question is supported or sponsored by UNIDO, if this is not in fact the case.

(*e*) The use of the name and logo in connection with conferences, festivals and related events, UNIDO's input or support must be clear and substantial.

(*f*) The authorization to use the name and logo does not permit the user of the name and logo to sub-license or to further authorize the use of the name and logo to any other entities.

(*g*) Assurances should be obtained that misuse of UNIDO's emblem will be prevented.

(*h*) The use of name and logo for educational and informational purposes by UNIDO Offices, United Nations departments and offices, United Nations Funds and Programmes, United Nations agencies, and Member States is uniformly encouraged.

(*i*) The use of the name and logo for educational and informational purposes by NGOs other than United Nations agencies and national committees is subject to prior written authorization of UNIDO.

(*j*) When the use of name and logo in publications and/or any other forms of presentation are authorized, the following guidelines apply:

- The UNIDO's name and logo should be properly displayed and given equal typographical prominence if employed in conjunction with other emblems/logos of other cooperating (United Nations) organizations and institutions.
- A way should be found to clearly separate the UNIDO's name and emblem from emblems and names of commercial companies.
- The UNIDO logo is reproduced in blue, black or gold.

(*k*) In connection with an event organized by several intergovernmental organizations, should any other co-sponsoring organization refuse permission to use its name and/or emblem in the event announcement, UNIDO reserves the right to reconsider its position.

10. Any document containing the logos of UNIDO and a partner should be reviewed/approved in advance by Advocacy and Communications Unit in accordance with the UNIDO visual identity guidelines.

19 February 2015

(*f*) Internal email message to the UNIDO Director of the Programme Development and Technical Cooperation Branch concerning the compliance with the European Commission (EC) sanctions on the [company] Group in [State A]

Application of European Commission sanction regulations to UNIDO—UNIDO not bound by non-United Nations sanctions as long as there is no mandate from the General Conference—Possible exceptions in light of donor terms and conditions

1. I refer to your memorandum of [date], which was received in the Office of Legal Affairs on [date]. You informed me that UNIDO is implementing a regional project on green industry for low carbon growth in [State B], [State C] and [State A]. The project is funded by the Government of [State D]. At the suggestion of the [State A] Rice Association, [Name] Company has expressed strong interest in participating in the project as demonstration enterprise. [Name B] is a fully owned subsidiary of the [company] Group, which is one of the largest business conglomerates in [State A] with interest in construction, agro/food, trading/retail and hotels. It has since been brought to your attention that the [company] Group appears on the list of sanctioned commercial entities in [State A], as per the European Commission (EC) [regulation] which took effect on [date]. You requested my opinion on whether UNIDO should comply with the above-referenced EC regulation.

2. I wish to inform you that UNIDO is bound by the sanctions regime that is established in accordance with United Nations Security Council decisions, as such sanctions take their authority from the relevant provisions of the Charter of the United Nations. The UNIDO Secretariat is not, however, bound automatically by non-United Nations sanctions, such as those imposed on individuals, entities, *etc*. by a State, a regional and an international organization.

3. The Secretariat of UNIDO cannot take instructions from any member State, a regional or an international organization, as all the activities of the Secretariat should be in accordance with the legal framework of the Organization. In this regard, the "guiding principles and policies of the Organization" are determined by the General Conference of UNIDO, in accordance with article 8, paragraph 3(*a*), of the Constitution of UNIDO. If a member State sees a gap in a certain policy/practice of the Organization, such as non-compliance with non-United Nations sanctions, that Member State may address a concrete proposal to the General Conference of UNIDO for consideration.

4. The only exception to the above is when UNIDO is expected to use the funding of a certain State, a regional or an international organization to procure goods/services

from an individual or company that is under the sanctions of that State or regional or international organization. In such cases, we may negotiate the donor's terms and conditions, decline the voluntary contribution, or, in critical cases, seek the guidance of the Policymaking Organ of the Organization.

5. In the case that you brought to my attention, I note that the donor is the Government of [State D] and not the European Commission. So the Secretariat is not bound by the terms of the EC regulation. Having said that, as the Secretariat has every interest to maintain transparent and smooth relations with the Member States of the Organization, you may bring the EC regulation to the attention of the donor ([State D]) for information/consideration along with all business considerations that you indicated in your memorandum to me, such as the importance of re-engaging [State A] in UNIDO's activities. At the same time, you should unequivocally inform [State D] that UNIDO is not bound by non-United Nations sanctions as long as there is no mandate from the principal Policymaking Organ of the Organization, *i.e.*, the General Conference. As to compliance with the EC Regulation in respect of the [company] Group in [State A], the UNIDO Secretariat could have potentially complied with it if the EC provided funding to the regional project in [State B], [State C] and [State A].

23 February 2015

(*g*) Internal email message to a UNIDO Programme Officer concerning reservations of [State] to 1947 Convention on the Privileges and Immunities of Specialized Agencies

Reservation to the Convention on Privileges and Immunities of the Specialized Agencies, 1947—Reservation not to take effect as long as any agency objects to it—Procedure for objection to reservation—Convention on the Privileges and Immunities of the United Nations, 1946, applies until State accedes to Convention on the Privileges and Immunities of the Specialized Agencies, 1947

1. I refer to your email of [date] and the enclosed background information concerning the above-mentioned subject. You asked me to advise you on the UNIDO position regarding a draft law on accession of the [State] to the Convention on the Privileges and Immunities of the Specialized Agencies, 1947. It is my understanding that, pursuant to this law, the [State]'s accession would include certain reservations to the 1947 Convention, namely, to paragraph (*b*) of section 19 (exemption from taxation of United Nations staff members of the [State] nationality) and to section 20 (exemption of United Nations staff members of the [State] nationality from national service obligations). You also asked me to advise you on an email dated [date] from [Name], Senior Legal Officer, Office of the Legal Counsel, United Nations, which addresses a few relevant questions from the United Nations Resident Coordinator in that country.

2. I wish to inform you that [Name] has summarized clearly the position of the United Nations and the Specialized Agencies on reservations filed by acceding States to the 1947 Convention. Such reservations, once filed with the Secretary-General, in his capacity as depositary, will not take effect as long as a single Agency objects to them. This has been a long-standing practice of the United Nations Secretary-General with respect to the 1947 Convention, which is fully endorsed by UNIDO.

3. I note that United Nations Funds, Programmes and Agencies represented in the [State] have already made their point and communicated it officially through the United Nations Resident Coordinator. Continuous protestations and communications, however, are not advisable from a diplomatic perspective as it may disrupt the internal law-making of a sovereign State.

4. The reason for my reservation is that once the [State] finalizes the law and deposits an instrument of accession with the United Nations Secretary-General, in his capacity as depositary, then, at that point, the Legal Advisers of the Specialized Agencies will be invited by the Chief of the Treaty Section, the Office of Legal Affairs, United Nations, to react to the instrument of accession. As I indicated earlier, an instrument of accession will not take effect as long as all the United Nations Specialized Agencies have not agreed to it. Often a reserving State ends up modifying its reservation(s) in response to formal objections by Specialized Agencies.

5. In so far as the substance of the [State]'s proposed reservations is concerned, I do not consider it necessary or appropriate at this stage to express my views on the matter. I do not wish to pre-empt the valuable process of inter-agency dialogue and discussion which may follow the deposit of an instrument of accession with reservations to the 1947 Convention.

6. Further, UNIDO should not be overly concerned by the possibility of such reservations, because the Government of the [State] has acceded without reservation to the 1946 Convention on the Privileges and Immunities of the United Nations, 1946.[1] Pursuant to article 21 of the Constitution of UNIDO, the provisions of the 1946 Convention shall apply to UNIDO in the territory of the [State] until such time as the [State] has acceded to the 1947 Convention in respect of UNIDO. As noted earlier, the [State]'s accession to the 1947 Convention, including accession in respect of UNIDO, may run into trouble if the Government maintains the reservations in question.

7. Further to my email of 16 May 2014, the Head of UNIDO Operations in the [State] may use this email and the email of [date] from [Name] as his guide and, if necessary, support the position of the United Nations on the matter.

26 February 2015

(*h*) Internal email message to the Officer-in-Charge of Human Resource Management Branch concerning [Bureau] (State)'s request for personal details of all project staff

Request by state for personal details of all project staff—Privileges and immunities under relevant conventions apply to UNIDO officials but not to national and international consultants—Cooperation in providing information is without prejudice to the privileges and immunities of the Organization

1. I refer to your email of [date] concerning the above-mentioned subject. You were informed by the UNIDO Country Office in [city] that the [Bureau] of the Government of [State] had requested the UNIDO Office "to provide personal details of all project staff

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

working on the Sustainable Livelihood Programme for [nationality] Refugees in [State]". [Bureau] has provided a Personal Details template (two pages in [language]) which refers to personal identification, nationality, family details, contact details, educational and professional background, previous employers and language skills (not very different from a CV). [Bureau] is UNIDO's counterpart in the above-mentioned project.

2. You asked me to advise you on "whether UNIDO may be obliged, under any of the existing bilateral or multilateral agreements, to provide information about its international and national personnel in [State] to the host country authorities and, if so, what information."

3. I wish to inform you that both the Convention on the Privileges and Immunities of the United Nations (1946) and the Convention on the Privileges and Immunities of the Specialized Agencies (1947) are applicable to UNIDO, its officials and experts in [State A]. Under section 18(*d*) of the 1946 Convention, officials of UNIDO "shall be immune, together with their spouses and relatives dependent on them, from immigration restrictions and alien registration". Section 19(*c*) of 1947 Convention has an identical provision.

4. [State] has yet to formally undertake to apply the provisions of the 1947 Convention to UNIDO except as set out in article 2(2) of the Memorandum of Understanding of 1 December 1999 regulating the establishment of the UNIDO Country Office in [State]:

> 2. The Government shall apply to UNIDO, including its property, funds, assets and its officials and experts during official missions, the privileges and immunities in accordance with the Convention on the Privileges and Immunities of the Specialized Agencies adopted by the General Assembly of the United Nations in 1947.

5. The legal context clause of the project provides for *mutatis mutandis* application of the provisions of the Revised Standard Technical Assistance Agreement concluded between the United Nations and the Specialized Agencies and the Government of [State] on [date].

> 6. Under Article V of this Agreement,
>
> > 1. The Government, insofar as it is not already bound to do so, shall apply to the Organizations, their property, funds and assets, and to their officials including technical assistance experts, the provisions of the Convention of the Privileges and immunities of the United Nations and the Convention on the Privileges and Immunities of the Specialized Agencies.
> >
> > 2. The Government shall take all practicable measures to facilitate the activities of the Organizations under this Agreement and to assist experts and other officials of the Organizations in obtaining such services and facilities as may be required to carry on these activities. When carrying out their responsibilities under this Agreement, the Organizations, their experts and other officials shall have the benefit of the most favourable legal rate of conversion of currency.

Conclusions

7. As can be seen from the above, the national and international consultants associated with the project do not enjoy explicit immunity from immigration restrictions and alien registration, which is reserved for officials under the 1946 and 1947 Conventions. Nor can a convincing case be made for such an exemption pursuant to the bilateral agreements

between UNIDO and [State]. The UNIDO Country Office should therefore ask the national and international consultants to fill out the [Bureau] forms to the extent possible. Subsequently, the Country Office should send the forms to [Bureau] under cover of a note verbale, which should include a statement to the effect that UNIDO is proving the information without prejudice to any privileges, immunities, courtesies and facilities that the Organization, its officials and experts may enjoy under the relevant legal instruments.

13 March 2015

(*i*) Internal email message to the Director of Partnerships and Results Monitoring Branch concerning the draft Memorandum of Understanding with the [national bank] of [State]

Privileges and immunities applicable on the basis of article 21 of the Constitution of UNIDO—All agreements concluded by UNIDO to be registered in accordance with Article 102 of the Charter of the United Nations

I refer to your emails of 27 February and 16 March 2015 concerning the above-mentioned subject. The [national bank] of [State] has amended articles VI and VII of the draft MOU and you requested me to advise you if the proposed changes may be accepted.

Article VI (Privileges and Immunities)

The [national bank] of [State] asks: do the privileges and immunities of UNIDO only refer to those stipulated by Convention on the Privileges and Immunities of the Specialized Agencies?

I wish to inform you that [State] has yet to apply the Convention on the Privileges and Immunities of the Specialized Agencies, 1947, to UNIDO. According to article 21 of the Constitution of UNIDO, the privileges and immunities of UNIDO, its officials and experts in [State] are regulated by the Convention on the Privileges and Immunities of the United Nations, 1946, and such other bilateral legal instruments which may contain provisions on privileges and immunities.

Article VIII (Confidentiality)

The [national bank] of [State] has reinserted the problematic paragraphs 8.02 and 8.03. I should reiterate again that it is against the policy of UNIDO as a public intergovernmental organization and a specialized agency of the United Nations to conclude "secret" legal instruments. Every agreement we conclude must be registered with the United Nations and made available to the public pursuant to Article 102 of the Charter of the United Nations. Whatever information is exchanged pursuant to the MOU, it should be assumed to be free of confidentiality restrictions. If information is deemed confidential, it should not be shared with the other party. The proposed paragraphs 8.02 and 8.03 cannot therefore be accepted by UNIDO.

18 March 2015

(*j*) Internal email message to the UNIDO Representative and Regional Director concerning dispute settlement with private/local staff in [State]

Resolution of disputes arising out of contracts or disputes of a private law character to which UNIDO is a party—Immunity from jurisdiction—Amicable settlement—Arbitration—Resolution of labour disputes with UNIDO staff and locally recruited employees—Labour disputes subject to employment contract of staff member—Application of staff regulations and rules—Resolution of disputes relating to pensions—Locally recruited personnel considered staff members—Individual service agreements—Individual service providers considered contractors, not staff members—UNIDO code of ethical conduct—Whistle-blower protection—Fraud awareness and protection

Kindly refer to your email, dated [date], which forwarded a note verbale from the Legal Section of the [State] Ministry for Foreign Affairs. In its note, the Government wishes to be informed of the established procedures in UNIDO for the resolution of disputes arising out of contracts or other disputes of a private law character to which UNIDO is a party. In addition, the Government requests to be informed of the established procedures in UNIDO for handling and resolving labour disputes between UNIDO and its officials or locally recruited employees. You request the support of this Office to enable you to draft a reply to the Government. I wish to comment as follows.

Please refer to the attached note, which replies to the Government's queries. It is suggested that the attached note be officially translated into [language] and forwarded by your Office to the Legal Section of the Ministry for Foreign Affairs under cover of a note verbale.

…

Attached note

The present note has been prepared in response to the request from the Legal Section of the Ministry for Foreign Affairs of [State] (hereinafter, the "Government"), which wishes to be informed of the established procedures in UNIDO for the resolution of disputes arising out of contracts or other disputes of a private law character to which UNIDO is a party. In addition, the Government requests to be informed of the established procedures in UNIDO for handling and resolving labour disputes between UNIDO and its officials or locally recruited employees.

I. *Disputes arising out of contracts or other disputes of a private law character to which UNIDO is a party*

The Government should be informed that disputes arising out of contracts to which UNIDO is a party are normally subject to arbitration. The *clause compromissoire* in UNIDO's standard contract documents refers the parties, in the event that a dispute cannot be settled amicably, to binding arbitration pursuant to the UNCITRAL Arbitration Rules. Another standard term in UNIDO's contracts provides that nothing contained in the contract shall be deemed a waiver, express or implied, of UNIDO's privileges and immunities.

As concerns other disputes of a private law character to which UNIDO is a party, the Government should be informed that it is the established policy and practice of UNIDO

to (*a*) preserve and maintain its immunity from jurisdiction; (*b*) seek amicable settlement; and (*c*) failing amicable settlement, refer the dispute to binding arbitration or some other mode of dispute settlement as may be agreed by the parties to the dispute.

II. *Labour disputes between UNIDO and its officials*

The Government should be informed that labour disputes between UNIDO and its officials are subject to the terms and conditions of the official's employment contract. In accordance with the employment contract, such contract shall be subject to the Staff Regulations and Rules of UNIDO. Such an official is hereinafter referred to as a "staff member".

Pursuant to the Staff Regulations and Rules of UNIDO, a staff member's grievance is first referred to the Director General for decision. If the staff member is not satisfied with the decision, he has the right to submit his grievance to an internal review body, which is established pursuant to the Staff Regulations and Rules of UNIDO, for consideration of the merits of his grievance. The internal review body is mandated to prepare a report with recommendations for final decision by the Director General. If the staff member is dissatisfied with the Director General's final decision, he has the right to further appeal the matter to the Administrative Tribunal of the International Labour Organization for final resolution of the dispute.

Unless participation in the United Nations Joint Staff Pension Fund is excluded by the terms of the staff member's contract, pension-related matters are further subject to the Regulations and Rules of the United Nations Joint Staff Pension Fund. The United Nations Joint Staff Pension Fund is a subsidiary body of the General Assembly of the United Nations in accordance with Article 22 of the Charter of the United Nations. It establishes a pension regime that includes disability and survivor benefits. Claims or disputes under this regime are first reviewed by an internal review body, which is established pursuant to the Regulations and Rules of the United Nations Joint Staff Pension Fund. In the event that the staff member is dissatisfied with the decision of said review body, she may further appeal the matter to the United Nations Joint Staff Pension Board and, thereafter, to the United Nations Appeals Tribunal, for final resolution of the dispute.

III. *Disputes between UNIDO and locally recruited employees*

The Government should be informed that disputes between UNIDO and locally recruited employees are subject to the terms and conditions of the employee's contract. Locally recruited employees whose employment contracts are subject to the Staff Regulations and Rules of UNIDO are staff members. Therefore, a dispute between UNIDO and locally recruited staff members will follow the procedures described in point II, above.

The Government should, further, be informed that UNIDO regularly concludes agreements (hereinafter, "individual service agreements") with individuals who provide services to the Organization (hereinafter, "individual service providers"). Individual service providers are engaged by UNIDO for the performance of specific tasks, such as providing expertise, advisory services, skills or knowledge in a substantive or support capacity, during an established period of time. An individual service provider's engagement

shall be strictly limited to the terms and conditions of the individual service agreement. The terms and conditions of the individual service agreement provide that the individual service provider shall have the legal status of an individual contractor, and that she shall not, for any purpose, be considered a staff member of UNIDO. As a result, the established procedures for resolving disputes between UNIDO and staff members, as summarized in point II, above, are not applicable to individual service providers. However, in accordance with the standard *clause compromissoire* of the individual service agreement, a dispute between the individual service provider and UNIDO shall, if attempts at settlement by negotiation have failed, be submitted to binding arbitration for final resolution of the dispute. Finally, the individual service agreement provides that its provisions shall not constitute or imply a waiver by UNIDO of its privileges and immunities.

IV. *Code of ethical conduct, protection of whistle-blowers and fraud*

The scope of the Government's request for information should also cover established procedures for addressing allegations of wrongdoing on the part of UNIDO personnel. In this regard, the Government should be informed that UNIDO maintains the following policies: (*a*) the UNIDO Code of Ethical Conduct; (*b*) procedures for the protection of whistle-blowers; and (*c*) fraud awareness and prevention. Allegations of wrongdoing in terms of the aforementioned policies may be referred, as the case may be, to the following offices in the UNIDO Secretariat: the Ethics Office; the Human Resource Management Branch; or the Office of Internal Oversight Services. For further information, the Government may wish to consult the following UNIDO web site page http://www.unido.org/wrongdoing.html.

9 April 2015

(*k*) Interoffice memorandum to the Officer-in-Charge of Human Resource Management Branch concerning the possibility of recognizing a staff member's sisters as her dependent children for the purposes of entitlements under the staff regulations and rules

Dependency status of siblings—Staff Rules and administrative circulars—Sibling as "dependent child"—Sibling can be primary dependent/dependent child if legally adopted—Conditions for primary dependency when adoption is not possible—Sibling cannot be considered primary dependent if adoption is not possible

1. I refer to the email from [Name], Senior Human Resource Specialist, [date], requesting advice concerning the request of a staff member at Headquarters to have her sisters, who live with their parents in the [State], recognized as her dependent children.

2. In her initial query to HRM, dated [date], the staff member asked whether one of her sisters, who is currently recognized as a secondary dependent, could "graduate into a primary dependent". By email dated [date], the responsible Human Resource Assistant referred the staff member to staff rule 106.15[1] and Administrative Circular

[1] In relevant parts, staff rule 106.15 (Definition of dependency) stipulates that:

"For the purpose of the Staff Regulations and Staff Rules, dependency shall be defined as follows:

(*a*) …

UNIDO/DA/PS/56 of 3 March 1989.[2] The staff member was advised that the sister in question could only be recognized as her primary dependent if she were legally adopted by the staff member or if a [State] court recognized the customary or *de facto* adoption. On [date], the staff member reiterated her request that the Organization

> … consider my new role being the eldest child, as head of the family, since both my parents have retired and are no longer employed as of [date], and for my minor and

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(*b*) A "dependent child" shall be any of the following children under the age of 18 years or, if the child is in full-time attendance at a school or university (or similar educational institution), under the age of 21 years, for whom the staff member provides main and continuing support, *i.e.* more than one half of the total support:

(i) The staff member's natural or legally adopted child;

(ii) The staff member's stepchild, if residing with the staff member;

(iii) Where adoption is not possible, a child for whom the staff member assumes legal responsibility as a member of the family.

If a child over the age of 18 years is physically or mentally incapacitated for substantial gainful employment, either permanently or for a period expected to be of long duration, the requirements as to age and school attendance shall be waived.

(*c*) A staff member claiming a child as dependent must certify that he or she provides main and continuing support. Such certification must be supported by documentary evidence satisfactory to the Director-General, if the child:

(i) Does not reside with the staff member because of the divorce or legal separation of the staff member;

(ii) Is married; or

(iii) Is recognized as a dependant under subparagraph (*b*)(iii) above.

(*d*) A secondary dependant shall be the father, mother, brother or sister of a staff member for whom the staff member provides one half or more of the total support and in any case at least twice the amount of the dependency allowance, provided that the brother or sister fulfills the same age and school attendance requirements established for a dependent child. If the brother or sister is physically or mentally incapacitated for substantial gainful employment, either permanently or for a period expected to be of long duration, the requirements as to age and school attendance shall be waived."

[2] In relevant parts, paragraph 6 of Administrative Circular UNIDO/DA/PS/56 (Definitions of dependency and benefits), dated 3 March 1989, provides that:

"6. Dependent children. A dependent child is any of the following children under 18 years of age or, if the child is in full-time attendance at a school or university (or similar educational institution), under 21 years of age, for whom the staff member provides main and continuing support, *i.e.* more than one half of the total support:

…

(*d*) Where the adoption of the child is not possible because there is no statutory provision for adoption nor any prescribed court procedure for formal recognition of customary or *de facto* adoption in the staff member's home country or country of permanent residence, then a child in respect of whom the following conditions are met:

(i) The child resides with the staff member;

(ii) The child is not a brother or sister of the staff member;

(iii) The staff member can be regarded as having established a parental relationship with the child;

(iv) The number of children for whom dependency benefits are claimed by the staff member in such cases does not exceed three."

university-attending siblings to be recognized as my primary dependents in respect to the provision of benefits to me as UNIDO staff member.

3. HRM wishes to confirm that the request does not meet the requirements of staff rule 106.15 and the applicable administrative circular. A draft email prepared by HRM states, *inter alia*, that:

– In the definition of dependents in the Staff Rules, siblings fall under the category "secondary dependents" (SR 106.15, para (*d*));

– In addition, in the circular, in para. 6(*d*), where adoption is not possible (as is the issue in your case), the paragraph refers to four conditions:

(i) The child resides with the staff member;

(ii) The child is not a brother or sister of the staff member;

(iii) The staff member can be regarded as having established a parental relationship with a child;

(iv) The number of children for whom dependency benefits are claimed by the staff member in such cases does not exceed three.

You indicated that both your parents are alive and retired; that the child does not reside with you, and the child is your sister. Three out of four conditions are not met. The fourth is not relevant to the case.

4. The questions forwarded to this Office in connection with the staff member's request are whether the provisions of paragraph 6(*d*) of Administrative Circular UNIDO/DA/PS/56 are consistent with staff rule 106.15(*b*)(iii), and whether the staff member's younger sister can be considered her dependent child.

5. A "dependent child" is defined in staff rule 106.15(*b*)(iii) to include, "[w]here adoption is not possible, a child for whom the staff member assumes legal responsibility as a member of the family". As explained in the draft reply quoted above, paragraph 6(*d*) of the administrative circular sets out four conditions for recognition of a child as a dependent child under staff rule 106.15(*b*)(iii). One of these conditions is that "[t]he child is not a brother or a sister of the staff member". The conditions listed in the circular are identical to those found in the relevant administrative instructions of the United Nations.[3]

6. Paragraph 6(*d*) of Administrative Circular UNIDO/DA/PS/56 provides a reasonable interpretation of staff rule 106.15(*b*)(iii) that is consistent with the staff rules. The dependency status of siblings is governed by staff rule 106.15(*d*), which makes express provision for a brother or a sister of a staff member to be recognized as a secondary dependent. In view of the provisions of staff rule 106.15(*d*), dependent siblings are implicitly excluded from the scope of staff rule 106.15(*b*)(iii) and are accordingly precluded from becoming primary dependents pursuant to that rule.

7. It is doubtful that the staff member's claim is assisted by the references to national legislation in her email of [date]. For example, even if the sisters cannot be considered "legally available for adoption" in terms of the [domestic adoption act], this does not satisfy the stipulation in staff rule 106.15(*b*)(iii) that "adoption is not possible": in fact, adoption

[3] The latest United Nations administrative instruction is ST/AI/2011/5 of 2 June 2011. Earlier instructions include ST/AI/278/Rev.1 (quoted in *United Nations Juridical Yearbook 1992* (Sales No. E.97.V.8), p. 452) and ST/IC/1996/40 (quoted in *United Nations Juridical Yearbook 2000* (Sales No. E.04.V.1), p. 336).

is possible in the [State], provided the requirements of the law are fulfilled. Likewise, the staff member fails to show that she has assumed "legal responsibility" for her sisters. In this regard, we do not see how the staff member can be exercising "substitute parental authority" over her sisters in accordance with the provisions of the Family Code, given that the sisters reside with their parents, who are still alive.

8. In conclusion, there is no basis for recognizing the staff member's sisters as her dependent children under staff rule 106.15(*b*)(iii) or for proposing an exception to the staff rule. We agree with HRM that the staff member's request should be denied.

5 June 2015

(*l*) Interoffice memorandum to the Director General concerning his membership at the advisory council of the [University]

Membership of the UNIDO Director General in advisory council of a university—Distinction official and personal capacity—Compatibility with the official functions and status of the Director General—Director General to work solely for benefit of UNIDO and to be solely responsible and accountable to UNIDO's member States—Commercial activities, including fundraising, not appropriate—Policy decision rather than legal matter

1. I refer to the letter dated [date] from [Name], Head of the [University] Department of International Development (the "Department"), to the Director General, which invites the Director General to join the Advisory Council of the Department. The Department is described as the main centre for teaching and research on development at the [University]. Your Office sent the letter to the Legal Office for advice on [date]. The Terms of Reference and Standing Orders (TOR) of the Department were sent to LEG on [date].

2. Under article 2 of the TOR, the Advisory Council is responsible "to support the Department in outreach and fundraising activities, and to give guidance on research directions. The Council is expected to offer advice on the relationship between [University] research and its "users" in government and civil society … ". In addition, "[t]he Council has representation from the University, international agencies, NGOs and government and thus reflects a broad spectrum of authoritative opinion and practical experience … ".

3. I note that the main mandate of the Advisory Council (the relationship between [University] research and its "users" in government and civil society) is somewhat removed from UNIDO's mandate. Further, the functions of the Advisory Council are not international in character and are akin to those of a national committee. Its present membership does not include any Executive Head of the United Nations agencies, funds and programmes. Based on the information that has been provided to me, you will be the only Executive Head of a United Nations agency sitting in the Advisory Council.

4. The members of the Advisory Council do not appear to be serving in an official capacity. Before the Director General decides whether to accept the invitation, the Director General may wish to clarify whether the members of the Advisory Council are expected to serve in their personal or official capacities. If a member is supposed to serve in her official capacity, only the Director General can decide whether the activity falls within the scope of UNIDO's programme of work and his functions as Director General of UNIDO—much

like any decision he might take on, for example, whether to participate at a United Nations conference on climate change as UNIDO's Director General.

5. I suspect, however, that membership in the Advisory Council is expected to be in a personal capacity, *i.e.*, Advisory Council members will be speaking solely on behalf of themselves and not, in the Director General's case, on behalf of UNIDO. If this is, indeed, the case, it is necessary to look at the nature and extent of the outside activity and whether such a role would be compatible with the official functions and status of the Director General. As a legal matter, the Director General should work exclusively for the benefit of UNIDO and be responsible and accountable solely to UNIDO's Member States for his actions. See article 11(4) of the UNIDO Constitution. For example, commercial activities, including fundraising, in support of the Department, would not be appropriate. As another example, activities that are closely affiliated with a political party may also draw undesirable attention and concerns from Member States, who may question the Director General's impartiality or independence.

6. Based on the information at my disposal about the Advisory Council's role, it would seem that membership in the Advisory Council would not require much of the Director General's time (a half-day meeting, once a year). Although the members of the Advisory Council are supposed to "support the Department in outreach and fundraising activities", I understand this primarily in the context of the Advisory Council's role "to give guidance on research directions … ". Some degree of discretion is required, therefore, and it would be up to each Advisory Council member to decide on the level and scope of her support activities.

7. In conclusion, whether or not to accept the invitation is mainly a policy decision for the Director General. I have endeavoured to outline some of the issues that he should take into consideration when making his decision.

3 July 2015

(*m*) External email message to the Legal Adviser of [a United Nations Specialized Agency] concerning policy formulation in a public international organization

No formal distinction between "policies" and "administrative instructions"—Powers of governing bodies and Director General set out in UNIDO's Constitution—General Conference determines guiding principles and policies—Director General overall responsibility for work of the Organizations and staff matters—In practice Director General promulgates policies without explicit approval—Disputes to be resolved by General Conference—Staff members' right to appeal administrative action

I refer to your email of [date] seeking my views on the distinction between "policies" that require the approval of a governing body and "administrative instructions" issued by an executive head that do not require such approval. You also ask for copies of formal guidelines or reference materials, if any, that we have used in this regard.

1. As far as UNIDO is concerned, the respective powers of the governing bodies and the Director General are set out in the Constitution of the Organization.[1] While the General Conference determines the guiding principles and policies of the Organization (article 8(3)(*a*) of the Constitution), the Director General has the overall responsibility and authority to direct the work of the Organization, subject to general or specific directives of the Conference (article 11(3)). Under the authority and subject to the control of the Industrial Development Board (IDB), the Director General is also responsible for the appointment, organization and functioning of the staff (article 11(3)).

2. UNIDO has no formal guidelines extrapolating on the meaning of these provisions. There is likewise no definition of the expression "guiding principles and policies of the Organization".

3. Practice shows that, while the General Conference adopts overarching policies (*e.g.* the staff regulations and the organizational business plan), the Director General also promulgates many policies of his own pursuant to article 11(3) of the Constitution, without seeking the approval of the governing bodies. The policies promulgated by the Director General, which may generally be said to complement or amplify those approved by the General Conference, include—to quote the titles of the bulletins in question—the Field Mobility Policy; the Policy on Learning; the UNIDO Policy for Financial Disclosure and Declaration of Interests; the Policy on Fraud Awareness and Protection; the Enterprise Risk Management Policy; the Official Travel Policy; the UNIDO Policy on Business Partnerships; the Evaluation Policy; and the Policy on Gender Equality and the Empowerment of Women.

4. As far as I am aware, the Director General's constitutional authority to issue such policy bulletins has never been questioned. In the event of a dispute regarding the scope of a particular bulletin, the matter could be resolved by decision of the General Conference or the IDB, as the case may be (*e.g.* by instructing that the bulletin in question be withdrawn or modified). However, if the decision of the General Conference or the IDB resulted in administrative action that breached the rights of a staff member, he or she would naturally still have the right of appeal.

9 July 2015

(*n*) Interoffice memorandum to the Director General concerning his membership on the ambassadorial board of the [NGO]

Membership of the UNIDO Director General in ambassadorial board of an NGO—Distinction official and personal capacity—Staff regulations—Director General to work solely for benefit of UNIDO and to be solely responsible and accountable to UNIDO's member States—Need to guarantee the independence and impartiality of the Director General as an international civil servant—Difficulty to distinguish between official and private capacity

1. I refer to a letter dated [date] from the [NGO] inviting the Director General to become a member of the ambassadorial board of the [NGO]. According to its website, the [NGO] seeks to strengthen cooperation in the area of global security, with the overall

[1] Available at https://www.unido.org/overview/legal-resources/basic-legal-documents-unido.

objective of identifying policy proposals that enhance the ability of the multilateral system to respond to existing and evolving global challenges and to support their implementation.

2. On [date], your Office requested the Legal Office to advise on the appropriateness of accepting the [NGO]'s invitation.

3. First, I note that the governance structure of the [NGO] is as follows:

1. An Advisory Council of Eminent Persons
2. A Ministerial-level Board
3. An Ambassadorial-level Board

4. It is questionable that the Director General is being asked to participate on the ambassadorial-level board when he is a former vice-minister and current executive head of a specialized agency.

5. As a legal matter, the Director General should work exclusively for the benefit of UNIDO and be responsible and accountable solely to UNIDO's Member States for his actions. See article 11(4) of the UNIDO Constitution.

6. Regardless of the terms of reference of the [NGO], it cannot be excluded that the [NGO] will formulate proposals and policies that conflict with the interests of Member States and/or UNIDO. Staff regulations 1.1 and 1.3, which apply to the Director General, provide that:

> Regulation 1.1
>
> Staff are international civil servants. Their responsibilities are not national but exclusively international. By accepting appointment, they pledge themselves to discharge their functions and to regulate their conduct with only the interests of the Organization in view.
>
> Regulation 1.3
>
> Staff shall conduct themselves at all times in a manner befitting their status as international civil servants. They shall not engage in any activity that is incompatible with the proper discharge of their duties with the Organization. They shall avoid any action and in particular any kind of public pronouncement which may adversely reflect on their status, or on the integrity, independence and impartiality which are required by that status. While they are not expected to give up their national sentiments or their political and religious convictions, they shall at all times bear in mind the reserve and tact incumbent upon them by reason of their international status.

7. In view of the provisions of the staff regulations, I think it would not be appropriate or advisable for the Director General to accept the [NGO]'s invitation. Appointment to the governing structures of an NGO such as the [NGO] will risk compromising, or appearing to compromise, the independence and impartiality required of the Director General as an international civil servant. Even if membership of the ambassadorial-level board would theoretically be in a personal capacity, it would be all but impossible to distinguish personal from official capacities in practice. At any rate, no distinction is made between personal and official capacities under staff regulations 1.1 and 1.3.

8. In conclusion, should the Director General decide to decline the invitation, he may thank the [NGO] for its invitation and add that, while the rules of UNIDO prevent him from sitting on the board, he would be interested in exploring other avenues for co-operation, such as the possibility of a speaking engagement.

10 July 2015

(*o*) Internal email message to the Officer-in-Charge of the Human Resource Management Branch concerning Appendix D coverage issue of home-based project staff

Entitlements of home-based office staff—Obligation to provide coverage under Appendix D of the Staff Rules and Regulations (compensation in the event of death, injury or illness attributable to the performance of official duties on behalf of UNIDO)—Staff entitled to coverage under Appendix D regardless of place of work—Coverage as limit on UNIDO's liability—Entitlement to office space—Informal rental agreement inadequate—Written rental agreement required

1. This is with reference to your email of [date] to [Name A] concerning the question of renting office space for [Name B], who has been re-employed under the 200-series of the Staff Rules and authorized to work from the premises of the [University], [State]. You indicate that the next step is for the Programme Development and Technical Cooperation Division to decide whether [Name B] must be provided with a proper office or not. You also indicate that Human Resource Management Branch (HRM) views the renting of office space as a necessary condition for UNIDO to extend Appendix D coverage to [Name B] and that, for now, Appendix D coverage has been excluded from the terms of his appointment.

…

Entitlement to Appendix D coverage

4. In your email of [date], you correctly point out that UNIDO is obliged to provide its staff members with insurance coverage for service-related injuries and illnesses. This obligation exists by virtue of the provisions of staff regulation 8.2[1] and, in the case of project staff such as [Name B], staff rule 208.06.[2] Moreover, Appendix D coverage (in other words, the right to compensation under Appendix D) is not simply a one-way benefit provided to staff. Appendix D also operates so as to protect the financial interests of UNIDO by setting reasonable limits on the liabilities of UNIDO in the event of death, injury or illness attributable to the performance of official duties on behalf of the Organization. In other words, without Appendix D, claims for compensation could be higher.

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[1] Staff Regulation 8.2: "The Director-General shall establish a scheme of social security for the staff, including provisions for health insurance, sick leave and maternity leave, and reasonable compensation in the event of illness, injury or death attributable to the performance of official duties on behalf of the Organization."

[2] Staff Rule 208.06, Compensation for death, injury or illness attributable to service: "Project personnel shall be entitled to compensation in the event of death, injury or illness attributable to the performance of official duties on behalf of the Organization, in accordance with the rules set forth in appendix D to the Staff Rules."

5. In terms of the staff regulations and rules, all staff members are entitled to coverage under Appendix D regardless of where they are assigned or authorized to work. Given the mandatory nature of staff regulation 8.2 and staff rule 206.06, there is a high risk that the special condition in [Name B]'s letter of appointment, which purports to exclude the application of Appendix D, is *ultra vires* and unenforceable. At any rate, even if Appendix D could be excluded as such, the staff member could still institute a claim for reasonable compensation on the basis of staff regulation 8.2, although in that case the limits established by Appendix D would not necessarily apply.

Renting of office space

6. Your email of [date] also states that UNIDO is obliged to provide its staff members with safe and healthy working conditions, which include a proper office, and that if the staff member works from home, UNIDO will not be able to ensure these obligations. As an interpretation of the duty of care, this statement seems to be quite far-reaching. Nonetheless, it is of course possible for the Organization to rent office space on a commercial basis when that space is needed for project purposes.

7. In the present case, [Name B] has already been authorized to work from the university, an authorization that presupposed the consent of the university or some form of agreement with the university regarding office space. In its letter of [date] to [Name B], the university confirmed that the annual rent for the office would be [amount, currency]. In my email of [date] to [Name A], I advised that the letter was inadequate to establish a contractual relationship between UNIDO and the university and that the usual procurement process should be followed if UNIDO wished to rent office space from the university.

8. As concerns the question of continuing to use the office space without a written agreement, it is not advisable for the Organization to occupy and rent, or appear to rent, an office from a third party without a proper contractual basis. It is true that the circumstances of the case are somewhat unusual and that the legal situation has not always been clear. However, if the matter is left unresolved, an undocumented contractual obligation may come into existence, resulting in a clear contravention of the internal control framework of UNIDO as set out in article IX of the Financial Regulations and Rules.

9. Nonetheless, I do not necessarily share your view that, in the absence of a contract, "if [Name B] creates an accident there, [the] University will not be able to hold him or UNIDO liable for it". In such circumstances, the university may still have a claim for damages based on local law.

Conclusions

10. In order to ensure that [Name B] enjoys the required Appendix D coverage, HRM should waive the exclusion of Appendix D in his letter of appointment and/or amend the letter of appointment when the opportunity arises.

11. If [Name B] continues to occupy an office at the university for which rent is to be paid, the project manager should regularize the situation as soon as possible and if need be consult Procurement Services on an appropriate procurement modality and contract.

16 July 2015

(*p*) Internal note for the file prepared by the UNIDO Legal Office concerning Appendix D coverage of home-based project staff

OBLIGATION TO PROVIDE COVERAGE UNDER APPENDIX D OF THE STAFF RULES AND REGULATIONS—ABSENCE OF WRITTEN POLICY ON HOME-BASED STAFF NOT RELEVANT—ANALOGY WITH OFFICIAL TRAVEL IN PRIVATE MOTOR VEHICLE—PRIVATE TRANSPORTATION EXCEPTION EXCLUDES PRESUMPTION OF ATTRIBUTABILITY, NOT COVERAGE—ANALOGY CANNOT BE APPLIED TO COVERAGE UNDER APPENDIX D—EXCLUSION OF APPENDIX D COVERAGE CONTRARY TO UNIDO'S OBLIGATIONS AS EMPLOYER—COVERAGE UNDER APPENDIX D INHERENT TO EMPLOYMENT RELATIONSHIP

1. By email dated [date], the Officer-in Charge of the Human Resource Management Branch (HRM) calls into question the advice provided by the Legal Adviser in his email of the same date to the effect that Appendix D coverage is mandatory regardless of where a staff member is assigned or authorized to work. The purpose of this note is to assess whether there is a need for this Office to reconsider its advice on the matter.

2. HRM again raises the point that UNIDO has no written policy allowing staff to work from home. However, UNIDO also has no written policy allowing staff to be assigned or authorized to work from an office belonging to a third party, as happened in this case. At any rate, it is doubtful that the absence of a written policy on working from home is relevant to the question of Appendix D coverage for a staff member who is assigned or authorized to work from an office.

3. The argument advanced by HRM to justify departing from the staff regulations and rules in this case is an analogy, namely "a precedent of Appendix D exclusion in connection with official travel, when the travel is done by a personal car at the request of and for the convenience of the staff member". The argument is that "the principle is already in the staff rules and we simply extended it now to a different area". This interpretation of Appendix D and of the powers of HRM is mistaken.

4. First, the provisions on which HRM relies do not have the effect of excluding Appendix D coverage. Article 2(*b*) of Appendix D[1] sets out circumstances in which death,

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[1] In relevant part, Article 2 (Principles of award) of Appendix D provides as follows: The following principles and definitions shall govern the operation of these rules:

(*a*) Compensation shall be awarded in the event of death, injury or illness of a staff member which is attributable to the performance of official duties on behalf of the Organization, except that no compensation shall be awarded when such death, injury or illness has been occasioned by:

(i) The wilful misconduct of any such staff member; or

(ii) Any such staff member's wilful intent to bring about the death, injury or illness of himself or another;

(*b*) *Without restricting the generality of paragraph (a), death, injury or illness of a staff member shall be deemed to be attributable to the performance of official duties on behalf of the Organization in the absence of any wilful misconduct or wilful intent when*:

(i) The death, injury or illness resulted as a natural incident of performing official duties on behalf of the Organization; or

(ii) The death, injury or illness was directly due to the presence of the staff member, in accordance with an assignment by the Organization, in an area involving special hazards to the staff member's health or security, and occurred as the result of such hazards; or

(iii) *The death, injury or illness occurred as a direct result of travelling by means of transportation furnished by or at the expense or direction of the Organization in connection with the performance of*

injury or illness will be deemed to be attributable to the performance of official duties on behalf of the Organization. One such circumstance, defined in subparagraph (iii) of article 2(*b*), is travel by means of transportation furnished by or at the expense or direction of the Organization in connection with the performance of official duties. However, pursuant to the proviso in subparagraph (iii), the usual presumption of attributability will not extend to private motor vehicle transportation sanctioned or authorized by the Organization solely on the request and for the convenience of the staff member. What is excluded, therefore, is a presumption of attributability of death, injury or illness to the performance of official duties, not Appendix D coverage per se.

5. Second, the limitation on the presumption of attributability contained in subparagraph (iii) of article 2(*b*) is very narrow and very specific. It applies to private motor vehicle transportation sanctioned or authorized by the Organization solely on the request and for the convenience of the staff member. In interpreting legal texts, the principle is *inclusio unius est exclusio alterius*, not *inclusio unius est inclusio alterius*. Accordingly, subparagraph (iii) cannot be extended to a completely different situation (*i.e.* assignment to an office in the staff member's home country), nor used to justify a completely different result (*i.e.* cancellation of Appendix D coverage for some 50 per cent of work time).

6. Third, the analogy to subparagraph (iii) of article 2(*b*) is, in any event, deeply flawed. In the present case, the staff member has not, upon his request or for his own convenience, chosen to work at home instead of a UNIDO office. Indeed, it is clear that the staff member is prepared to work at such an office; if the office is not established by UNIDO, this can hardly be due to the staff member's convenience.

7. The exclusion of Appendix D coverage is thus unsupported by UNIDO's internal law and devoid of any proper legal basis. The Appendix D exclusion is contrary to UNIDO's obligations as an employer. In a legal opinion to the Under-Secretary-General for Administration, Finance and Management, the Office of Legal Affairs of the United Nations Secretariat described Appendix D as a "social security benefit […] which should be provided routinely as a matter of moral obligation". The opinion also stated that Appendix D "is provided on the theory that such compensation represents a social security benefit which should be made available by all employers".[2] In a more recent legal opinion, this time to the Chief of Personnel of the International Trade Centre, UNCTAD/WTO, the Office of Legal Affairs of the United Nations Secretariat wrote that the responsibility for compensating service incurred injury, illness or death is "inherent" in the employment relationship. The legal opinion also referred to the precedent of the United Nations Administrative Tribunal, according to which "even if an individual consents to the Organization breaking one of its own rules this does not enable the Organization to use that consent to defend a claim by the staff member based on the rule". (relying on Judgment No. 508, Rosetti (1991), para. XV). [3] The same could be said to apply in the case of Appendix D coverage, which is mandated by Staff Regulation 8.2.

8. There is consequently no need to revise the legal advice provided to HRM on [date].

23 July 2015

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official duties; provided that the provisions of this subparagraph shall not extend to private motor vehicle transportation sanctioned or authorized by the Organization solely on the request and for the convenience of the staff member; [Emphasis added]

[2] See *United Nations Juridical Yearbook 1979* (Sales No. E.82.V.1), pp. 187–88.

[3] See *United Nations Juridical Yearbook 1996* (Sales No. E.82.V.1), pp. 461–462.

(*q*) Internal email message to the UNIDO Unit Chief of the Accounts and Payments Unit concerning VAT reimbursement on official purchases of the Staff Council

Official activities of Staff Council to be considered activities of the Organization—Tax status of Staff Council in the host country the same as that of the Organization—VAT reimbursements to be made through UNIDO to the Staff Council

This is with reference to your email of [date] requesting my opinion on the status of the Staff Council for the purposes of claiming reimbursement of VAT on official purchases. My replies to your questions are as follows:

1. Do the activities of the Staff Council fall under the activities of UNIDO?

The Staff Council is established pursuant to the Staff Regulations and Rules of UNIDO and operates under a Statute approved by the Director General. As executive organ of the Staff Union, the Staff Council is entrusted with a number of important official functions, including participation on the Joint Advisory Committee. Broadly speaking, the official activities of the Staff Council should be considered to be activities of the Organization or activities that fall under the auspices of the Organization.

2. Is an invoice indicating "UNIDO Staff Council" equivalent to an invoice indicating "UNIDO"?

As you know, the Headquarters Agreement of UNIDO confers the right to exemption from VAT in [Host country] on UNIDO. Narrowly interpreted, this right suggests that the [Host country] authorities could require that invoices submitted for the purposes of claiming VAT should identify the recipient of the goods or services as the Organization. We are accordingly unsure whether variations such as "UNIDO Staff Council" would be acceptable, particularly if not submitted previously, as your email suggests.

In our view, it is not unreasonable to take the position that, since the Staff Council is part of UNIDO, its tax status should be the same as that of the Organization. Provided the purchases are for official use, you could submit invoices issued to the "UNIDO Staff Council" along with those issued to "UNIDO" when claiming reimbursement of VAT. This naturally implies that any refunded amount would be paid out to UNIDO as well, after which it could be transferred to the Staff Council. If the authorities have any questions regarding the invoices, they could be dealt with as and when they arise.

27 October 2015

(*r*) Internal email message to the UNIDO Unit Chief of the Strategic Donor Relations Unit concerning use of the regular budget to support the attendance of [State] representative to the 16th session of the General Conference

Use of regular budget to cover delegate's travel expenses—UNIDO Constitution articles 12 and 13(3)—Members of the General Conference to bear their own expenses—Expenses only covered if invitation or request explicitly provides for it

1. I refer to your email of last evening asking me whether the regular budget of UNIDO could be used to cover the travel expenses of the [State]'s delegate to the 16th session of UNIDO General Conference. …

2. According to article 13, paragraph 3, of the Constitution, the regular budget "shall provide for expenditures for administration, research, other regular expenses of the Organization and for other activities, as provided for in Annex II". Annex II, part A, states that "[a]dministration, research and other regular expenses of the Organization shall be deemed to include … (*c*) [m]eetings, including technical meetings, provided for in the programme of work financed from the regular budget of the Organization". Meetings of the Governing Bodies, including the Conference, are indeed provided for in the programme of work financed from the regular budget of UNIDO.

3. However, article 12 of the Constitution provides that, "[e]ach Member and observer shall bear the expenses of its own delegation to the Conference, to the Board or to any other organ in which it may participate".

4. Both articles, when read together, would forbid the use of regular budget resources to support the attendance of a Member's delegation to the Conference.

5. A Member has the right to be represented at the Conference (see Constitution, article 8); such Member's attendance, however, is not mandatory. When the Member decides to attend the Conference, article 12 of the Constitution expressly provides that it shall bear the expenses of its own delegation. It matters not that the Member has been invited or requested to attend the Conference to play a "special" role. Unless the invitation expressed otherwise, as a legal matter the invitation was extended with the constitutionally mandated understanding that the Member bear the expenses of its delegation to the Conference.

18 November 2015

(*s*) Internal email message to the UNIDO Senior Human Resource Specialist concerning the interpretation of staff rule on travel expenses to the eligible family members

Official travel for eligible family members—Travel entitlement for a child beyond the age of dependency to his or her home country upon completion of continuous full-time university attendance—Attendance may be completed at a university other than at which attendance had commenced

This is with reference to your email of [date] requesting an interpretation of staff rule 109.03(*b*).

In terms of staff rule 109.03(*b*), the travel expenses of a child may be authorized for one trip to the staff member's duty station or to his or her home country beyond the age when the dependency status of the child would otherwise cease under staff rule 106.15(*b*). Staff rule 109.03(*b*) stipulates that the trip must take place,

> "… either within one year or upon completion of the child's continuous full-time attendance at a university, when the attendance at the university commenced during the period of recognized dependency status."

At issue is the meaning of the phrase of "upon completion of the child's continuous full-time attendance at a university". Your email notes two possibilities: (*a*) that eligibility

for the one-way travel entitlement depends on attendance at the same university for the full four years of post-secondary studies, and (*b*) that full-time attendance at more than one university is allowed.

From a grammatical perspective, the phrase in question leaves open the possibility of a change in university at some point during the child's studies. The formulation "upon *completion* of the child's continuous full-time attendance at a university" suggests that the focus of the rule is the university at which attendance is completed, while use of the indefinite article—as in "*a* university"—implies that attendance may be completed at any university, which may or may not be the university at which attendance commenced.

We have accordingly concluded that staff rule 109.03(*b*) should not be interpreted in a manner that makes the one-way travel entitlement conditional on a dependent child's attendance at the same university throughout his or her studies. Interpreting the rule so as to permit a change in university conforms to the reality that a child may switch universities for any number of legitimate reasons. The latter interpretation will also avoid the unequal treatment of a staff member on the arbitrary basis that his or her dependent child happens to attend more than one university.

23 December 2015