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Statement by Stephen Townley, Counselor for Legal Affairs
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Administration of Justice at the United Nations

Agenda Item 144

Thank you, Mr. Chairman.

As we look back over the course of the five years since the inauguration of a new system of administration of justice, there is much of which to be proud – including the impact the new UN Dispute and Appeals Tribunals have had on transparency, fairness, efficiency, and accountability. We are particularly pleased that the caseload of the Tribunals appears to be stabilizing and at the recent successes in settling cases. We also commend the efforts to ensure that the Management Evaluation Unit provides reasoned responses, the salutary effects of which the Secretary General highlights in his report this year.

This five-year mark, however, also affords an opportunity for us to take stock and course correct as necessary. We very much appreciate the Secretary General's revised proposal for an interim independent assessment of the system of administration of justice. For reasons we will describe in greater detail, we fully agree with the Secretary General's proposal that the issue of moral damages be addressed in the interim independent assessment. We also agree with the view of the Internal Justice Council that perhaps the assessment might include consideration of the issue of interlocutory appeals against decisions beyond the authority of the Dispute Tribunal, another issue we will address at greater length in our remarks today. We very much support all efforts in that assessment to identify lessons learned with respect to use of the informal system to settle disputes. And, finally, we found a number of the Secretary General's observations in this most recent report of interest and believe that these facts should be duly considered by the assessment panel.

As foreshadowed, we would like to highlight two issues in particular, while reaffirming our respect for the judicial independence of judges of the Tribunals. First, while we hope that a recent decision by the Appeals Tribunal may have finally put the matter to rest, we remain concerned at the practice in recent years of the Dispute Tribunal ordering suspensions of action after completion of the management evaluation in cases where such suspensions are not authorized by Article 10 of the Dispute Tribunal Statute. And second, we are also concerned that the Tribunals may be awarding moral damages in some cases where it appears that the claimant has not in fact suffered any harm, whether financial, emotional, or otherwise; such awards could, in our view, be considered exemplary or punitive damages, rather than moral damages.

With respect to suspensions of action, the Secretary General in his report noted that "[t]he majority of cases in the formal system continue to relate to non-selection, non-promotion and other appointment-related decisions, and to separation from service." These are precisely the disputes as to which the Dispute Tribunal lacks the authority to order a suspension of action after the management evaluation is complete. Going beyond this authority – in this, the largest class of cases – cannot but have efficiency and resource implications. Indeed, the Secretary General notes that in 2013 the Dispute Tribunal received 109 suspension-of-action applications, which he said, "contributed significantly to the workload of the Dispute Tribunal."

Over the last several years, the Dispute Tribunal has persistently ordered suspensions of action beyond its authority to do so. This – it seems – has been closely related to the long-running debate about whether interlocutory decisions (such as *ultra vires* suspensions of action) should be appealable and whether such decisions should be stayed during the pendency of an appeal (or until the time for appeal has expired).

The Internal Justice Council highlights the Appeals Tribunal's recent decision in the *Igbinedion* case, which holds that the Dispute Tribunal "acted unlawfully" by ordering suspension of action in a case involving non-renewal of appointment. The Internal Justice Council goes on to urge that no change be made to the existing process for handling interlocutory appeals, with appeals permitted under certain circumstances but without an automatic stay of the decision being appealed. While we share the hope of the Internal Justice Council that the *Igbinedion* decision will put the issue of the scope of the authority to order suspension of action to rest, the Internal Justice Council's repeated comment that interlocutory decisions in excess of jurisdiction are a "legal nullity" shines light on the discomfiting position the current rules force the Organization to occupy – that is, to comply, as *Igbinedion* holds, with an interlocutory decision that one knows will be reversed on appeal, with concomitant financial ramifications for the organization. We note that the ACABQ addressed this issue in their recent report, suggesting that the General Assembly may wish to address it. Further, we note that in one recent case, albeit on a different issue, the Dispute Tribunal appears to have decided to proceed with an order that flies in the face of Appeals Tribunal jurisprudence – an order that, because it is classified as an order and not a judgment, will not be stayed pending appeal.

Taking into account the Internal Justice Council's remark that an overbroad authority to take interlocutory appeals, coupled with suspensions of decisions pending appeal, could potentially hamper the timely processing of cases, we would be interested to learn more about whether a duty judge of the Appeals Tribunal could be designated to order stays of interlocutory decisions that are in excess of jurisdiction while appeals of such decisions are pending. Such decisions could also be temporarily stayed pending the decision of the duty judge. We hope we could explore either this or another appropriate adjustment to address the certain kinds of interlocutory orders, such as those that are in excess of jurisdiction.

With respect to moral damages, as the Secretary General's report last year noted, the practice of international organizations and Member States "appears to permit compensation for such injury . . . . [but] applicants must allege moral damages or emotional distress in order to be compensated for them, and such damage must be establish through evidence." Even in those instances where such an allegation is not necessary, the report goes on, tribunals make "finding[s] of non-pecuniary harm." This, in our view, is a key distinction. For damages to be

moral, as opposed to exemplary, there must be a finding of harm. The jurisprudence of the Tribunals, however, does not draw this clear line.

Addressing a few of the other issues raised in the Secretary General's report, the United States supports the proposed amendment to the Statute of the Appeals Tribunal relating to qualifications of judges and agrees that such an amendment might also be considered with respect to the Dispute Tribunal. We also agree with the proposal made by the Secretary General with respect to the immunity of judges of the Dispute and Appeals Tribunals.

With respect to the proposed code of professional conduct for external legal representatives, we would be interested in understanding better the problem this would be meant to address. Counsel who are authorized to practice law in a national jurisdiction would presumably already be covered by applicable national rules of professional conduct, which might or might not be entirely consistent with the proposed code. Further, if the Code is principally meant to address former staff members designated to represent individuals before the Tribunals, it might create false expectations, for instance regarding the extent to which the duty of confidentiality laid out in Article 5 would be respected by national courts. It is also unclear what recourse is contemplated for breach of the Code, in particular for breach of Article 6 – a point also made by the judges of the Dispute Tribunal in their memorandum appended to the Internal Justice Council's report, arguing in favor of a single code of conduct.

With regard to the proposed mechanism for addressing complaints under the code of conduct for judges, we agree with the general principle that complaints relating to a pending case should not be dealt with until the case is disposed of, to avoid the possibility of complaints becoming another avenue of attack against a proceeding, but think that this rule should not be ironclad, for instance where the misconduct of a judge inflects the proceedings themselves. We would also suggest that when the President dismisses a case under proposed Article 11, or following informal resolution under proposed Article 13, the written decision contemplated should redact the name of the complainant and that of the judge, as such decisions run the risk of becoming public. Finally, we would be interested to understand better what kind of informal resolution would be undertaken in cases of alleged judicial misconduct, as, in some sense, cases of alleged judicial misconduct affect more than the rights of the particular individual who alleges that he or she has suffered from that misconduct.

Finally, I would close by highlighting the importance the United States attaches to the protection of whistleblowers. We fully support consideration of additional measures that can be taken, including in the context of administration of justice, to ensure their protection.

Thank you Mr. Chairman.

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