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Summary record of the 16th meeting
Held at Headquarters, New York, on Tuesday, 21 October 2014, at 3 p.m.

Chair: Ms. Millicay (Vice-Chair) . . . . . (Argentina)

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14-63078 (E)

In the absence of Mr. Manongi (Tanzania), Ms. Millicay (Argentina), (Vice-Chair), took the Chair.

The meeting was called to order at 3 p.m.

Agenda item 144: Administration of justice at the United Nations (A/69/126) (A/69/205) and (A/69/227)

1. **The Chair** recalled that, at its 2nd meeting, the General Assembly had referred the current agenda item to both the Fifth and the Sixth Committees. In paragraph 44 of its resolution 68/254, the Assembly had invited the Sixth Committee to consider the legal aspects of the comprehensive report to be submitted by the Secretary-General, without prejudice to the role of the Fifth Committee as the Main Committee entrusted with responsibility for administrative and budgetary matters.

2. **Mr. Norman** (Canada), speaking also on behalf of Australia and New Zealand, said that the three countries had been long-standing advocates for a fair and effective system of internal justice at the United Nations, and called on Member States to ensure that the system remained independent, transparent and professional. They welcomed the apparent stabilization in the number of incoming cases in the formal system and thanked the Secretary-General for presenting a proposed code of conduct for external legal representatives in his report (A/69/227), while also remaining mindful that the Internal Justice Council had recommended a single common code of conduct for all counsel who appeared before the United Nations Dispute Tribunal or the United Nations Appeals Tribunal. They also welcomed the recognition in General Assembly resolution 68/254 of the need to ensure that all individuals acting as legal representatives, whether they are staff members representing other staff members, staff members representing themselves or external counsel representing staff members, are subject to the same standards of professional conduct applicable in the United Nations system. That need was all the more important as the number of self-represented staff members had continued to rise in 2013.

3. Based on their belief that all parties to a dispute should be equal, the three delegations recommended that the Secretary-General should consider the feasibility of extending the proposed code of conduct to cover all counsel, not just external representatives. The Office of Staff Legal Assistance played a positive role in the internal justice system, but faced ongoing challenges in responding to the high volume of requests. In that regard, Australia, Canada and New Zealand remained committed to finding an efficient and effective way for staff members to contribute to the funding of the Office, including through an automatic payroll deduction with an opt-out provision, which had been introduced in April 2014. They would follow reporting on the experimental period with interest.

4. The three delegations encouraged continued efforts to enable the settlement of disputes through informal means, in order to avoid unnecessary litigation and the associated costs and resources. They also took note of the other recommendations and proposals contained in the report by the Secretary-General and looked forward to engaging constructively on those issues, including with colleagues in the Fifth Committee, to ensure that the administration of justice was fair, effective and efficient.

5. **Ms. Guillen-Grillo** (Costa Rica), speaking on behalf of the Community of Latin-American and Caribbean States (CELAC), said that CELAC was satisfied with the progress made by the new system of administration of justice at the United Nations, which had helped to improve labour relations and work performance in the Organization. CELAC continued to support measures to protect the basic rights of United Nations personnel in conformity with internationally agreed standards, as well as all measures designed to help the United Nations to become the best employer and to attract and retain the best employees. CELAC was mindful of the important role that the Committee had played in making the system of administration of justice fully operational by drafting the statutes of both the Dispute Tribunal and the Appeals Tribunal, and would continue contributing with its legal expertise to the resolution of all outstanding issues, such as those relating to the independent evaluation of the system, access to the justice system for persons with disabilities and dispute-resolution measures.

6. CELAC took note of the conclusions of the Secretary-General's report (A/69/227) and invited Committee members to review the recommendations and proposals contained therein, bearing in mind the basic principles of independence, transparency, professionalism, decentralization, legality and due process. It welcomed the proposals presented in the report, in particular the revised proposal to conduct an

independent interim evaluation on all aspects of the justice system. The Office of Staff Legal Assistance had been performing a vital task by supporting personnel with counsel, representation, guidance and other legal services. Further proposals for a staff-funded scheme within the Organization should continue to be explored. Those proposals should be complementary and should take into account fully the views of all relevant stakeholders.

7. The Internal Justice Council had played an important role in helping to ensure independence, professionalism and accountability in the system of administration of justice, and it should continue to provide its views on the implementation of that system, within the purview of its mandate established in paragraph 37 of General Assembly resolution 62/228. CELAC was concerned about the proliferation of cases in which persons hired by the United Nations system did not qualify as officials of the United Nations or any of its specialized bodies. Those persons were excluded from the United Nations formal system of administration of justice and from the labour process of every country and were thus subject to an arbitration process not covered by the established labour legal system.

8. CELAC acknowledged the substantial amount of work performed by the Dispute and Appeals Tribunals and was ready to explore new ways to improve the use of the informal system. Incentives should be developed to encourage recourse to the informal resolution of conflicts, which was a crucial element of the internal system of administration of justice. More should be done to promote a culture of trust and conflict prevention throughout the Organization. Accordingly, the Secretary-General should ensure that the structure of the Office of the Ombudsman and Mediation Services not only reflected its responsibility for the oversight of the entire integrated office, but also had the support needed to perform its job, thus strengthening due process within the Organization and guaranteeing accountability and transparency in the decision-making process.

9. Lastly, the Sixth and Fifth Committees should continue to cooperate closely to ensure an appropriate division of labour and avoid encroachment of mandates.

10. **Mr. Marhic** (Observer for the European Union), speaking also on behalf of the candidate countries Albania, Montenegro, Serbia, Turkey and the former Yugoslav Republic of Macedonia; the stabilization and association process countries and potential candidate Bosnia and Herzegovina; and, in addition, Armenia, Georgia, the Republic of Moldova and Ukraine, said that the progress made in the administration of justice at the United Nations since 2009 represented a commendable collective achievement. The handling of cases through all phases of both the informal and the formal systems had improved markedly in terms of efficiency and fairness of procedure. However, a number of challenges remained. The Internal Justice Council had a key role to play in promoting independence, professionalism and accountability in the system of administration of justice. In that regard, the independent review panel set up to assess the system would be well placed to consider the issues at stake and to recommend to the General Assembly whether the statutes of the Tribunals needed changing.

11. The European Union supported the role played by the Office of the Ombudsman and Mediation Services in advancing the use of informal conflict resolution, a crucial element of the system of administration of justice which helped to avoid expensive and time-consuming litigation and mitigated the negative impact of disputes. It commended the Management Evaluation Unit for its work and noted with appreciation the high number of complaints disposed of every year. The fact that most of the Unit's decisions which had been appealed before the United Nations Dispute Tribunal had been upheld in whole or in part was a good indicator of its effective approach. The European Union was also pleased that the Unit systematically sought to identify and, wherever appropriate, settle requests with potential for informal resolution, and that it used a variety of measures to directly or indirectly avert litigation, including the institutionalization of good practices and the use of the jurisprudence of the Tribunals to shape its administrative and management practices.

12. The number of new cases before the Dispute Tribunal appeared to be stabilizing. Nonetheless, the European Union was somewhat concerned about the relatively high number of decisions and judgements by the Dispute Tribunal that were appealed before the Appeals Tribunal, with markedly different success rates, and hoped that the backlog of appeals which had plagued the old system would be avoided. It was also concerned by the high number of interlocutory motions

presented in 2014 and by the fact that the Tribunals had not yet amended their rules of procedure to provide that judgements imposing financial obligations on the United Nations were not executable until expiry of the deadline for appeal or conclusion of an appeal.

13. With regard to the interim independent assessment of the formal system of administration of justice, the European Union welcomed the information contained in the report of the Secretary-General (A/69/227) and the proposed revised terms of reference of the assessment. It continued to call for a thorough analysis of both the managerial functioning of the Tribunals and their jurisprudence and working methods. The interim assessment should provide an opportunity to evaluate the impact of the jurisprudence of the Tribunals on the work of United Nations managers, in order to verify whether and to what extent the principles enshrined in that jurisprudence were implemented in keeping with United Nations standards. That was a demanding task for which legal expertise and sufficient time would be needed. On the whole, though, the European Union welcomed any measures that would strengthen the system of administration of justice and improve its effectiveness, and believed that the proposed terms of reference adequately reflected the relevant operational aspects to be examined.

14. The European Union was prepared to discuss a code of conduct for legal representatives suggested by the Secretary-General in his report, as well as the proposed mechanism for addressing potential complaints made against Tribunal judges. In that context, consideration could also be given to the scope of the code of conduct, which could also apply to in-house counsel. The European Union called for caution with regard to the proposals to amend the statutes of the Tribunals and for consideration of the possible systemic consequences of such amendment. In particular, it was open to considering the proposed amendment concerning the qualifications of judges of the Appeals Tribunal that had been made in 2012.

15. Although there was merit in the proposal that judges should be accorded full diplomatic immunities as provided in section 19 of the General Convention on Privileges and Immunities, it was equally important to examine the possibility of upgrading the rank of judges in order to secure such privileges and immunities. The European Union noted that there were still some outstanding legal aspects in that regard and that not all problems in the system could be addressed through technical or administrative measures. It urged the Secretary-General to submit proposals for ensuring accountability in cases where violations of rules and procedures had led to financial loss. It also commended the Office of Staff Legal Assistance, whose counsel helped staff members to avoid mistakes, misunderstandings and, ultimately, unnecessary work. It strongly supported the call for the Office to continue to represent staff members in proceedings before the Tribunals.

16. Lastly, the European Union encouraged recourse to informal dispute settlement, which would be facilitated by the incorporation of best practices and the mainstreaming of principled approaches deriving from the case law of the Tribunals. As for the legal protection of non-staff personnel, a differentiated system that provided an adequate, effective and appropriate remedy was preferable. In that regard, the Organization should always provide answers and, where appropriate, should propose possible remedies to non-staff personnel.

17. **Ms. Rodríguez Pineda** (Guatemala) said that while significant progress had been made in the administration of justice at the United Nations, much remained to be done to ensure that the system met the expectations of all stakeholders. The increase in the number of cases filed under the formal process was cause for concern. The informal system of dispute settlement should be used as much as possible, to avoid unnecessary litigation. The Office of the Ombudsman and Mediation Services should be commended for its efforts in encouraging staff to use the informal system. The interaction between the formal and informal systems should continue to be examined, given the low number of cases submitted by the Tribunals to the Office of the Ombudsman. The Secretariat should continue to disseminate information on the system and to inform staff members of its benefits.

18. The increase in the number of staff members representing themselves before the Tribunals in 2013 was proof that the new system was practical and user-friendly. However, that same fact had been identified as a systemic issue that affected the functioning of the system, generating hidden costs and delays and reducing the likelihood of resolution of many disputes. The modern and updated search engine that was launched recently would alleviate some of those concerns by facilitating access to the case law of the

Tribunals. The Office of Staff Legal Assistance would also be instrumental in that regard by refusing to provide representational assistance in cases that did not stand a reasonable chance of succeeding.

19. The system of administration of justice should be decentralized to ensure that all staff members had access to it regardless of their duty station. In that regard, the request to extend to the end of 2015 the posts of three ad litem judges and their support staff was commendable. Given the volume of work which the Dispute Tribunal had to perform, consideration should also be given to increasing the number of permanent judges, rather than complementing the current permanent judges with part-time or ad litem judges. Her delegation welcomed the proposed reform of the Office of the Ombudsman before the end of 2014, but hoped that the necessary consultations would be carried out before the final report was issued. It also welcomed the systemic and cross-cutting issues raised in the report of the Secretary-General on the activities of the Office of the United Nations Ombudsman and Mediation Services (A/69/126).

20. Lastly, the Sixth Committee should continue to make substantive contributions on the legal aspects of the administration of justice, including in such areas as the draft amendment to article 3 on the statute of the Appeals Tribunal, the prerogatives and immunities of judges, the draft code of conduct for external legal representatives, and the proposed mechanism for resolving complaints against judges of both Tribunals.

21. **Mr. Musikhin** (Russian Federation) said that his delegation attached particular importance to the pretrial component of the system of administration of justice at the United Nations, which made it possible to resolve disputes without having to refer them to the Dispute Tribunal. The informal dispute resolution process also helped to avoid unnecessary and costly litigation. In that regard, the increase in the number of cases resolved by the Office of the Ombudsman and Mediation Services reflected a level of confidence in the effectiveness of the informal dispute settlement process. It was therefore important to bolster the work of that Office and to provide staff members with more information on the avenues for resolving disputes informally. The responses in the report of the Secretary-General (A/69/227) to questions formulated in General Assembly resolution 68/254 confirmed the need for more informal dispute settlement.

22. **Ms. Carnal** (Switzerland) said that while the new system of administration of justice was a major improvement over the old system, it still had many shortcomings. It was the understanding of her delegation that the Committee would be sending a letter to the Fifth Committee concerning the system of administration of justice at the United Nations. That letter should recall the importance of the political independence of the United Nations Dispute Tribunal and the United Nations Appeals Tribunal and should note the concern that the legal remedies created by the recent reforms were not available to a large number of United Nations non-staff personnel, even though the United Nations had a responsibility to find appropriate avenues for the resolution of disputes involving non-staff personnel, regardless of the type of contract they had concluded with the Organization.

23. Switzerland, as host State of the European headquarters of the United Nations, was very concerned by that issue. It had a duty to ensure that the privileges and immunities that had been agreed in the headquarters agreement concluded with the United Nations and in the Convention on the Privileges and Immunities of the United Nations were respected. It also had to respect the right to an effective remedy of all individuals within its jurisdiction, in accordance with various international and regional human rights instruments. It was concerned that failure by the system of administration of justice at the United Nations to meet universal human rights standards risked undermining the acceptance and support for current immunities regime, a risk exemplified by the case of *Stichting Mothers of Srebrenica v. The Netherlands*, brought before the European Court of Human Rights.

24. Switzerland welcomed the Secretary-General's revised proposal for conducting an interim independent assessment of the system of administration of justice. In order to assess whether the current system allowed for the effective resolution of internal labour disputes, both the case law of the Dispute Tribunal and the Appeals Tribunal and controversial questions such as the possible suspensory effect of appeals against interim judgments should be considered. While the revised proposal did not set out the required qualifications for members of the assessment panel, the quality of the assessment would benefit greatly from the presence of legal experts familiar with internal labour dispute mechanisms, as requested by General

Assembly resolution A/68/254 and recommended by the Advisory Committee on Administrative and Budgetary Questions in its report to the sixty-eighth session of the General Assembly (A/68/530).

25. The Swiss delegation supported the Secretary-General's proposal to amend the statutes of the Dispute Tribunal and the Appeals Tribunal with a view to clearly specifying the privileges and immunities enjoyed by the judges of both Tribunals. The proposed changes were necessary to clarify the legal situation of the judges and should be adopted by the General Assembly. The delegation also took note of the Secretary-General's proposed code of professional conduct for external legal representatives. While supporting the content of the proposed code, it nonetheless subscribed to the Internal Justice Council's view that there should be one code of conduct for both internal and external legal representatives.

26. Lastly, five years since the inception of the current system of administration of justice, the question should be asked whether it was still necessary to produce reports on that agenda item on an annual basis. Her delegation was of the view that, in the light of the considerable workload involved, it would be appropriate to submit reports at two-year intervals. However, the question of the administration of justice should remain on the agenda of the Sixth Committee.

27. **Mr. Mangisi** (Tonga) said that his delegation attached great importance to the development of a fair, transparent and efficient system of administration of justice at the United Nations and commended the Secretary-General on the progress made in that regard since 2009. The United Nations was the embodiment of collective aspirations for a peaceful, fair and just global society, and it was fitting that it should put those internationally espoused values into practice. The reports before the Committee were evidence of an increasingly efficient and effective system of administration of justice at the United Nations; but they also highlighted continuing challenges. All elements of the system of administration of justice must be implemented in accordance with the Charter of the United Nations and the legal and regulatory framework approved by the General Assembly. An ongoing commitment to informal dispute resolution was crucial to the system's success.

28. His delegation emphasized the importance of the principle of judicial independence in the system of administration of justice and supported the view that all staff members should have access to the system regardless of their duty station. It commended the Secretary-General for the work undertaken to ensure the existence of an independent, transparent, professionalized, adequately resourced and decentralized system of administration of justice consistent with the relevant rules of international law and the principles of the rule of law and due process. In particular, it supported the proposed code of professional conduct for external legal representatives as well as the proposed mechanism for addressing complaints under the code of conduct for judges of the Dispute Tribunal and the Appeals Tribunal contained in the Secretary-General's report (A/69/227).

29. His delegation supported the implementation of the voluntary supplemental funding mechanism approved by General Assembly resolution 68/254 as a way of addressing the funding uncertainty and under-resourcing of the Office of Staff Legal Assistance, and looked forward to the final report on the initial stage of its implementation. It also welcomed the Secretary-General's proposal for an independent assessment of the system of administration of justice, as well as the upgraded search engine which facilitated access to the jurisprudence of the Tribunals. It underscored the importance of continuing to disseminate the lessons learned from the administration of justice at the United Nations, to promote best practices by managers and others within the Organization, and to guide Member States in the promotion of good governance and effective dispute resolution at the regional and domestic levels.

30. **Mr. Townley** (United States of America) said that both the Dispute Tribunal and the Appeals Tribunal had had an impact on transparency, efficiency and accountability in the system of administration of justice at the United Nations. His delegation was pleased that the caseload of the Tribunals appeared to have stabilized and that the Tribunals had had a good success rate in settling cases recently. It also commended the Management Evaluation Unit for its efforts to provide reasoned responses to requests. His delegation appreciated the Secretary-General's revised proposal for an interim independent assessment of the system of administration of justice and fully agreed that the issue of moral damages should be addressed in that assessment.

31. However, his delegation was concerned at the Dispute Tribunal's recent practice of ordering suspensions of action upon completion of a management evaluation in cases where such suspensions were not authorized under article 10 of the Tribunal's statute. Such action was 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 had expired. In that regard, the Internal Justice Council had highlighted the case of *Igbinedion v. Secretary-General of the United Nations*, in which the Appeals Tribunal had ruled that the Dispute Tribunal had "acted unlawfully" by ordering suspension of action in a case involving the non-renewal of an appointment, and had urged that no change should 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.

32. While the Council had expressed the hope — which his delegation shared — that the *Igbinedion* decision would once and for all settle the issue of the scope of authority to order suspension of action, its repeated comment that *ultra vires* interlocutory decisions were a "legal nullity" showed that the current rules put the United Nations in a discomfiting position of having to comply with an interlocutory decision that it knew would be reversed on appeal, with the concomitant financial ramifications. Taking into account the 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, his delegation wished to know whether a duty judge of the Appeals Tribunal could be asked to order stays of interlocutory decisions that exceeded jurisdiction while appeals of such decisions were pending. Such decisions could also be temporarily stayed pending the decision of the duty judge.

33. His delegation was also concerned that the Tribunals might be awarding moral damages in some cases where it appeared that the claimant did not suffer any harm, whether financial, emotional or otherwise. Such awards could in fact be considered exemplary or punitive damages, rather than moral damages. It was important to make a clear distinction between moral damages and punitive damages. For damages to be moral, as opposed to exemplary, there must be a finding of harm. The jurisprudence of the United Nations Tribunals, however, did not make that distinction.

34. His delegation supported the proposed amendment to the statute of the Appeals Tribunal on the qualification of judges and agreed that such an amendment might also be considered with respect to the Dispute Tribunal. It also agreed with the Secretary-General's proposal concerning the immunity of judges of the Dispute and Appeals Tribunals. It wished to know what problem the proposed code of professional conduct for external legal representatives was supposed to address, since counsel authorized to practice law in a national jurisdiction would presumably already be covered by the applicable national rules of professional conduct, which might or might not be entirely consistent with the proposed code. Furthermore, if the proposed code was primarily 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 proposed article 5 would be respected by national courts. It was also unclear what recourse was contemplated for breach of the code, in particular for breach of proposed article 6.

35. With regard to the proposed mechanism for addressing complaints made under the code of conduct for judges, his delegation agreed with the general principle that complaints relating to a pending case should not be dealt with until the case was disposed of, in order to avoid the possibility of complaints becoming another avenue of attack against a proceeding. It thought, nonetheless, that the rule should not be ironclad, as the misconduct of a judge might inflect the proceedings themselves. His delegation would suggest that when the President dismissed a case under proposed article 11, or following informal resolution under proposed article 13, the name of the complainant and that of the judge should be redacted from the written decision, as such decisions might ultimately become public. His delegation would like further clarification as to the kind of informal resolution that would be undertaken in cases of alleged judicial misconduct, since such cases might affect more than the rights of the particular individual alleging such misconduct.

36. Lastly, the United States attached great importance to the protection of whistle-blowers and fully supported additional measures that could be taken, including in the context of the administration of justice, to ensure their protection.

The meeting rose at 4.05 p.m.