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Statement by the Permanent Representative of Somalia to the
United Nations to the Governing Council of UNDP at its
thirty-second session*

The attention of my delegation has been drawn to document DP/1985/7 of 18 June 1985, in which the Administrator has outlined a question which has arisen between UNDP and a Government with respect to the article in the Standard Basic Assistance Agreement (SBAA) which relates to the exchange rate to be used by UNDP in the country. An unfortunate aspect of this matter derives from the fact that while in the English version of that document, UNDP attempts to hide the identity of the Government concerned, the Arabic version has specifically named Somalia as the country involved. Moreover, in a matter which should have been kept at the purely bilateral level, for reasons best known to UNDP, confidential communications which had been exchanged between the Secretary-General and the Head of State of Somalia on this matter were deliberately leaked to the media. An example is the report which appeared in the International Herald Tribune of 18 April 1985.

In matters of this nature, my delegation would have thought that UNDP would have endeavoured to seek a satisfactory resolution through continuing dialogue and negotiations. Indeed, Somalia has been disappointed by the unsympathetic tone and rigid attitude displayed by UNDP in its representations to my Government. We have, on our part, shown our willingness to discuss the problem in depth and to provide UNDP with the facts which pertain to the case. I have met personally with the Administrator and the Associate Administrator of UNDP, the Deputy Director of the United Nations Office of Legal Affairs and the Chief of Treasury of UNDP.

* Issued in accordance with the decision taken at the Budgetary and Finance Committee at its 24th meeting on 25 June 1985.

Since UNDP has put forward its case in detail, my Government would like to be given the same opportunity to clarify its position. This would enable the Governing Council to have a balanced understanding of the situation and to gauge whether the proposals put forward by UNDP are justified, given the exceptional circumstances faced by Somalia and the efforts it is making to remedy the country's urgent economic problems.

Somalia's economic adjustment programme, formulated with the advice of the International Monetary Fund (IMF), was designed to address a serious economic crisis. A combination of factors had led to a crippling situation which called for new and vigorous measures. The stand-by arrangement for 1985, framed with the expert guidance of IMF, was designed to put our country back on the road to economic health and stability.

One of the provisions of the stand-by arrangement was the raising of the official exchange rate of 17 Somali shillings per United States dollar to So.sh. 36 per United States dollar. The Somali Central Bank circular of 30 December 1984 established that the official rate applied to all foreign exchange receipts arising from official transactions. An open-market system of around So.sh. 70 to 80 per United States dollar was also permitted for individuals and domestic private commercial enterprises, in order not only to combat a situation where market prices were widely affected by a black market in currency but also to provide incentives to Somali nationals abroad to transfer their hard currency earnings to Somalia. The temporary and transitional nature of the open market system was emphasized by the Central Bank's provisions for unifying the official rate and the market system by the end of 1985.

UNDP has demanded that it be treated like a "private association", and be granted the open market exchange system. My Government's position is that the implementation of Somalia's adjustment programme for 1985 would be adversely affected if exceptions began to be made with regard to transactions other than those entered into by individuals or local commercial enterprises.

In support of the UNDP claim to be treated as a private association, a memorandum of the United Nations Office of Legal Affairs (FIW 213 SOM) asserts that the United Nations - and, by extension, its agencies - is more like a private association than a State, in view of the Reparations Opinion of 1949 of the International Court of Justice, and argues on these grounds that United Nations agencies operating in Somalia are entitled to the open market system reserved for private enterprises.

In the view of two eminent international lawyers of Yale University Law School with whom we have consulted, it is surprising that the Office of Legal Affairs could have reached such a conclusion partly because of the ambiguities in Article X, paragraph 1 (e) of the Somali/UNDP Agreement of 1977, and partly because the International Court of Justice, in the Reparations Opinion, held that the United Nations had an international personality and many of the competences of States.

It seems clear to my Government that the transactions of United Nations agencies in Somalia are "official transactions" within the definition of article 8 of the Central Bank circular. The intergovernmental status of international organizations with long-term programmes and annual budgets makes such entities, without doubt, materially different from domestic commercial enterprises operating in Somalia.

It is claimed by UNDP that the United Nations has always taken the position that it is entitled to the most favourable legal rate of exchange in a country and that any advantage arising from the existence of multiple exchange rates should accrue to the Organization in the interest of the most efficient use of international funds. However, no principle or provision of international law is cited in support of this controvertible position. In the case of Somalia and of any other developing country, this position could lead to a situation where efforts to address devastating economic problems would be undermined, while the assured resources of agencies would be augmented through foreign exchange manipulations. We believe that in such circumstances, the sympathies of donor countries would lie with developing countries struggling to deal with structural economic difficulties.

The SBAA of 1977 between Somalia and UNDP has of course been central to the dispute between the parties, in particular, Article X, paragraph 1 (e), which provided that UNDP would be granted the most favourable legal rate of exchange. In the view of my Government, the "most favourable legal rate of exchange" referred to in that Article corresponds to the official rate of So.sh. 36 established by article 8 of the Somali Central Bank circular. In any event, we believe that the substantive provisions of the 1977 Agreement must be seen in the context of the purposes of the Agreement. As the Vienna Convention on the Law of Treaties strongly asserts, agreements must be interpreted in the light of their purposes as well as of their content. The purpose of the 1977 Agreement, as stated in its first preambular clause, is "to support and supplement the national efforts of developing countries in solving the most important problems of their economic development".

The critical issue before us now is whether the application of the ambiguous provision regarding the most favourable legal rate of exchange corresponds with the purpose expressed in the first preambular clause, in the light of the totally changed circumstances of the present time. It is a firmly established legal principle that a fundamental change of circumstances affects the content and application of an agreement. Neither Somalia's crushing economic crisis nor the measures necessary for overcoming that crisis could have been foreseen in 1977. Today, Somalia's state of chronic underdevelopment has been further complicated by recurring drought, energy problems, refugee flows of disastrous proportions and the adverse effects of the world economic situation. Under these conditions, the rigid insistence on the letter of the provisions of the Agreement seriously violates its major purpose as illustrated by the principle of teleological interpretation: ut res magis valeat quam pereat.

UNDP also cites, in support of its case, a statement attributed to IMF, to the effect that it is the responsibility of members to decide the manner in which the exchange rate system is applied with respect to existing contracts. However, here

again the central issue of the purpose of the 1977 Agreement is not addressed, nor did IMF expressly or impliedly state that Somalia had violated the 1977 Agreement as a result of the implementation of the economic adjustment programme.

The legal position may be summarized as follows: first, Article X, paragraph 1 (e) of the 1977 UNDP/Somalia Agreement is an ambiguous provision. The Somali Government takes the stand that the "favourable legal rate" referred to in the provision means the official rate applicable to international organizations, including UNDP. On the other hand, the Office of Legal Affairs is insisting that the open market system (applicable to individuals and commercial entities) is the lawful rate to which UNDP is entitled.

Secondly, according to the requirement of the Vienna Convention on the Law of Treaties, agreements should be interpreted in the light of their purpose and content. The central purpose of the Agreement is explicitly stated in its preambular paragraph, that is "to support and supplement national efforts of the country in solving the most important problems of economic development and to promote social progress and better standards of life". This same purpose is also stated in Somalia's stand-by arrangement with IMF. The context of this controversy is that of a developing country struggling with the aid of IMF to achieve economic stability that would lead to future economic progress and development. The appropriate interpretation of the word "legal" in the light of this purpose and in this context can only be the same as "official" as defined in the Central Bank circular.

Thirdly, the functions that UNDP and other United Nations agencies are performing in Somalia are clearly governmental and not commercial. The purpose of these governmental acts are the same as the acts of the Somali Government in seeking to regulate its currency. The treatment that UNDP is here seeking is clearly that accorded by the Somali Central Bank to private agencies engaged in commercial transactions. It is a little incredible that UNDP could be authorized or could seek to be authorized to enjoy special monetary privileges that would seriously interfere with the major purposes of the agreement between Somalia and UNDP, with the Somalia/IMF stand-by arrangement and with the present efforts of the Somali Government to achieve stability in future development. Any interpretation of the word "legal" that would lead to such an outcome must be considered to be highly questionable.

It is surprising that the Office of Legal Affairs should seek to support such a result by a faulty interpretation of the Reparations for Injuries case. The International Court of Justice in fact held that international organizations had a separate legal personality and all the competences of States. It is difficult to understand how this can be construed as holding that international organizations should be given all the privileges of private associations.

Let me now touch briefly on some other aspects of the case in order to clarify the Somali Government's position.

In the course of the interchange between Somalia and UNDP, mention has been made of Article VIII of the 1977 Agreement in which the Government of Somalia undertook "to extend its best efforts to make the most effective use of the

assistance provided by UNDP". We believe that we will be in a better position to benefit from UNDP assistance if we adhere faithfully to the economic adjustment programme carefully planned to deal with our particular economic problems. Indeed, it has become apparent that the prices of imported goods have stabilized and are likely to go down as a result of the stand-by arrangement. This development will of course be beneficial to international agencies operating in Somalia as well as to the Somali Government and people.

Another point at issue arises from Article X, paragraph 1 of the Agreement, in which the Somali Government agreed "to take any measures which may be necessary to exempt UNDP and its executing agencies ... from regulations and other legal provisions which may interfere with operations under this Agreement".

My Government strongly contests the claim that its exchange rate policy has interfered with the operations of UNDP. The argument that less will be done if UNDP continues to operate under the official rather than under the open market system ignores the fact that when UNDP programmes were planned in 1984, the expectation was for an exchange rate of So.sh. 17 per United States dollar. Indeed, rather than being prejudiced by the new exchange régime, UNDP has actually enjoyed a small unexpected windfall. Furthermore, there has been no acknowledgement of the transitional nature of the present monetary arrangements or of the fact that the official rate is applied to all donor States and organizations without any discrimination. Moreover, it is significant that UNDP has omitted any reference to the fact that apart from the Government's raising the system of exchange of the Somali shilling from So.sh. 17 to So.sh. 36 to the United States dollar, that rate has now been further increased to So.sh. 40 to the dollar. In accordance with the advice given by IMF, there will be a progressive rise in the exchange rate until an optimum level is reached.

My Government places a high value on the programmes of UNDP and the other international organizations, whose services to our country have been considerable. However, we cannot agree with the assumption which seems to underlie the UNDP position that the contribution of UNDP programmes to Somalia's national economy is greater than that of the Government's carefully planned, national economic policy.

In conclusion, I wish to express regret once again over an anomalous situation where agencies whose purpose it is to assist developing countries in overcoming problems of underdevelopment should have taken inflexible and adversary positions which are harmful to the development process. Somalia reiterates its desire to settle the question at issue through a process of dialogue and negotiation rather than through confrontation. We hope that with good will and with the consciousness of common goals, the two parties can reach a mutually acceptable agreement.
