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**Agenda item 10
Assessment of the Global Mechanism by the Joint Inspection Unit**

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Addendum

**Legal opinion from Parties concerning the recommendations of the
Joint Inspection Unit to the Conference of the Parties to the
United Nations Convention to Combat Desertification
regarding the Global Mechanism:
Response from the United Nations Office of Legal Affairs**

1. In a letter dated 23 September 2009, the Presidency of the European Union requested the secretariat to seek advice from the United Nations Legal Office on different options for the construction and role of the Global Mechanism and relationship between the Global Mechanism, the secretariat and other bodies of the Convention. The Presidency of the European Union further requested that in order to ensure that discussions on this issue can proceed effectively during the Conference of the Parties (COP), it would expect such advice to be made available to the secretariat and therefore the COP as soon as possible, and, in any event, before the conclusion of the work of the Contact Group on the report of the Joint Inspection Unit.

2. As requested by the European Union, the Executive Secretary sought advice from the Legal Counsel of the United Nations on 23 September 2009. On 29 September 2009, the United Nations Office of Legal Affairs sent a response to the Executive Secretary. As requested by the Presidency of the European Union, the response from the United Nations Office of Legal Affairs is being made available to the COP and is contained in annex I of this document. The response from the United Nations Office of Legal Affairs is made available without editing.

Annex I

Extract from a memorandum dated 29 September 2009 from the United Nations Office of Legal Affairs transmitting the response to the request for a legal opinion from Parties concerning the recommendation of the Joint Inspection Unit to the Conference of the Parties regarding the Global Mechanism

[...]

3. It has been a long-standing policy of the Office of Legal Affairs to only provide formal legal opinions when requested by a competent organ of the UN and not to individual members or to a group of members of that organ. In such cases, the precise question is formulated in writing by that organ. We note in this case that the question comes from a member representing a group of states in the COP and that the COP itself is a treaty body and not a UN organ. Accordingly, we are not in a position to provide the opinion requested by the Swedish Presidency on behalf of the EU. However, we would be pleased to offer our comments to the UNCCD Secretariat on any paper that the Secretariat may prepare on the question posed.

4. I would also note that in my memorandum of 16 September 2009 to you, we provided our views on the various questions posed by the JIU with regard to the Global Mechanism, including with respect to mandate, status and legal capacity that may be relevant to the foregoing request. You may therefore wish to share the relevant contents of that memorandum, should you concur with them, with the COP. [The relevant contents of the memorandum of 16 September 2009 are contained in annex II.]

Annex II

Extract from a memorandum dated 16 September 2009 from the Office of Legal Affairs, transmitting the response to the request for legal opinion from the Joint Inspection Unit concerning the mandate, status and legal capacity of the Global Mechanism

[...]

I. Mandate of the Convention

2. In response to your question regarding the mandate of the Convention and decisions rendered by the Conference of the Parties (hereinafter the “COP”), and possible overlaps, it should be recalled that the mandate as specified in a treaty or a convention may only be modified by the amendment procedures contained in the treaty. In this regard, Article 30 of the Convention outlines the procedure for adopting amendments to the Convention. Furthermore, Part IV of the 1969 Vienna Convention on the Law of Treaties provides the rules on amendment and modification of treaties.

3. We also note that it is a matter for the States Parties to a treaty to interpret the text, including the scope of the mandate. Accordingly, the COP would be the authoritative body to interpret the mandate and decide on the scope of the mandate as well as to determine the effect of its decisions, including Decision 3/COP.8 on “The 10-year strategic plan and framework to enhance the implementation of the Convention”. In this regard, we are not aware of any dissenting view by a State Party that this Decision was not in accordance with the original mandate as specified in the Convention.

II. Status of the Global Mechanism

4. Article 21, paragraph 4 of the Convention provides for the establishment of the Global Mechanism and Article 23 provides for the establishment of the Permanent Secretariat. Accordingly, both the Global Mechanism and Secretariat are subsidiary bodies (or “treaty bodies”) properly established by the Convention.

III. Article 21 of the Convention

5. With regard to your query as to whether the words “*inter alia*” in Article 21, paragraph 5, of the Convention allows the possibility of additional functions to be assigned to the Global Mechanism, we are of the view that it does. In this regard, we note that this paragraph provides that the COP and “the organization it has identified shall agree upon modalities for this Global Mechanism to ensure *inter alia* that such Mechanism...” This paragraph continues by listing the responsibilities of the Global Mechanism. Thus, it is for the COP and the International Fund for Agricultural Development (IFAD), which was chosen to house the Global Mechanism in Decision 24/COP.1 to agree on the modalities for the Global Mechanism. We also note that in accordance with Article 21, paragraph 4, the Global Mechanism is to function under the authority and guidance of the COP. Therefore, COP has the authority to add to the functions of

the Global Mechanism pursuant to Article 21, paragraph 5. In this regard, please also refer to our comments in paragraph 3 above.

IV. The capacity of the Global Mechanism to enter into legally-binding agreements

6. An international entity has legal personality if, in accordance with its constituent instrument, it is established as an international organization subject to international law. Under subparagraph (i) of Article I of the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (hereinafter the 1986 Vienna Convention”),¹ the term “international organization” is defined as an “intergovernmental organization”. The legal personality of an international entity/organization and the scope of that personality are determined by the constituent instrument creating the organization. Through its constituent instrument, an international entity/organization has implied powers to carry out its purposes and duties and, thus, may have the legal capacity to enter into treaties, contracts, acquire and dispose property, be a party to judicial proceedings. The International Court of Justice (ICJ) in the 1949 advisory opinion “Repatriation for Injuries Suffered in the Service of the United Nations” reaffirmed that international entities/organizations would not be able to carry out the intentions of their founders if such organizations were devoid of international personality.

7. The 1986 Vienna Convention provides in Article 6 that the capacity of an international organization to conclude treaties is governed by the rules of that organization. Under Article 2 of the Convention the term “rules of the organization” means, in particular, the constituent instruments, decisions and resolutions adopted in accordance with them, and established practice of the organization.

8. In the light of the foregoing, for an international entity to have the capacity to enter into legally binding agreements/arrangements, that entity should be established either as an international organization, with its own legal personality, or as a subsidiary body of an international organization or organizations. In the latter case a decision on the establishment of a subsidiary body should indicate that this body is entrusted by the parent organization or organizations with the legal capacity to enter into legally binding arrangements within its competence.

9. As noted in paragraph 4 above, the Global Mechanism and Secretariat are subsidiary bodies established by the Convention. Article 21 of the Convention which established the Global Mechanism (or any other provision in the Convention) does not entrust the Global Mechanism with the capacity to enter independently into legally-binding agreements. The COP, which gives guidance and has overall authority over the Global Mechanism has outlined the functions of the Global Mechanism in carrying out its mandate under Article 21, paragraph 4 of the Convention in the Annex of decision 24/COP.1 (hereinafter the “Annex”). The Global Mechanism was established “in order to increase the effectiveness and efficiency of existing financial mechanisms, [...] to promote actions leading to the mobilization and channeling of substantial financial resources” (preambular paragraph of the Annex). Its functions mainly pertain to the identification, collection and dissemination of information; analyzing and advising on requests;

¹ While the 1986 Vienna Convention has not yet entered into force, its provisions are instructive on the position of international law on this question.

the mobilization and channelling of financial resources; and promotion of action for cooperation and coordination. We note however, that one activity under “mobilizing and channelling financial resources” (Section 4 of the Annex) tasks the Global Mechanism to use “its own resources made available to it through trust fund(s) and/or equivalent arrangements established by [IFAD] for the Global Mechanism’s functioning and activities, as defined in [the Annex], from bilateral and multilateral sources through [IFAD] and from the budget of the Convention” (Section 4 (f) of the Annex).

10. Decision 10/COP.3 approved the Memorandum of Understanding between the COP and IFAD regarding the modalities and administrative operation of the Global Mechanism (hereinafter the “MOU”). We note that the MOU has also been approved by the Executive Board of IFAD as well. The MOU provides that IFAD “[a]s the housing institution [...] will support the Global Mechanism in performing these functions in the framework of the mandate and policies of the [IFAD]” (Section I) but shall have a separate identity within IFAD (Section II (A)). Section II C of the MOU further provides that “[w]ith respect to the funds received by IFAD under (a), (b) and (c) [of Section II of the MOU], all these amounts will be received, held and disbursed and the said accounts will be administered by [IFAD] in accordance with the rules and procedures of the [IFAD]”. Section V provides that IFAD “will make appropriate arrangements to obtain supporting services from the United Nations country teams” and Section VI on administrative infrastructure stipulates that the Global Mechanism “shall enjoy full access to all of the administrative infrastructure [...], including [...] personnel, financial, communications and information management services”.

11. Having reviewed the MOU and the COP decisions, we are of the view that the Global Mechanism has not been entrusted with the legal personality to enter into legally-binding agreements. Moreover, pursuant to the MOU, it is IFAD, as the housing institution, which has been tasked to provide services to the Global Mechanism in order to carry out its mandated activities including managing its budget, contracting on its behalf, administering its personnel, for example employment contracts etc. Accordingly, the relevant administrative and financial rules and regulations of IFAD apply to the Global Mechanism.

12. We understand that the Managing Director of the Global Mechanism (hereinafter the “Managing Director”), who in accordance with Section II D of the MOU is nominated by the Administrator of the UNDP and appointed by the President of IFAD, has certain delegated authority by the President on administrative issues. Accordingly, in our view, the Managing Director would be able to enter into a legally-binding agreement if this is within the authority delegated by the President of IFAD to the Managing Director in accordance with IFAD’s rules and regulations.

12. In response to your question as to whether the Global Mechanism, and in particular its Managing Director and staff at a lower level, have a legal basis to enter into memoranda of understandings and aide-mémoires with Governments and other partners, we note that memoranda of understandings and aide-mémoires are not necessarily legally binding documents. We recall that there are a number of terms commonly used in practice for instruments which fall within the definition of a “treaty” in the 1969 Vienna Convention on the Law of Treaties. The crucial question in determining whether an instrument is a treaty is whether the parties intend it to be governed by, and be legally binding under, international law, or whether the parties intend

it not to be legally binding of its own force and only of political and moral weight (and therefore an arrangement of less than treaty status). An instrument which is legally binding of its own force, whatever its designation, is a treaty. Aspects of form and drafting should reflect the intended status of the document. Accordingly, the ability of the Managing Director and other representatives of the Global Mechanism to enter into such agreement depends on the delegated authority given by IFAD as well as the intent of the parties to the memoranda of understandings and aide-mémoires. In this regard, we would note our observations at paragraph 11 above.
