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Ethics Office of the United Nations Secretariat

**Review of the External Independent Review Panel's Report:
*United Nations Development Programme Activities in the Democratic People's
Republic of Korea, 1999-2007***

Conducted by the Director of the United Nations Ethics Office

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Ethics Office of the United Nations Secretariat

Headquarters – S-3001

New York, NY 10017

Tel. 1 (917) 367-9859

Fax. 1 (917) 367-9861

Email: ethicsoffice@un.org

Introduction

1. The External Independent Investigative Review Panel (EIIRP) was formed by the United Nations Development Programme (UNDP) in September 2007 in order to conduct a “comprehensive and detailed investigative review of the UNDP Democratic People’s Republic of Korea (DPRK) country office operations during the period 1 January 1999 to 1 March 2007.”

2. On 2 June 2008, a copy of the Confidential Report on United Nations Development Programme Activities in the Democratic People’s Republic of Korea, 1999-2007, dated 31 May 2008 was provided to the Director, UN Ethics Office. On this same day, a copy of the entire EIIRP Report was posted on UNDP’s internet website.

3. The Terms of Reference of the EIIRP, as they specifically relate to the UN Ethics Office, provide:

“A complaint has been lodged that UNDP retaliated against an individual for “blowing the whistle” on irregularities in its operations in DPRK. In this respect, [the EIIRP shall] review the complainant’s allegations related to these operations and the alleged retaliation, make every effort to establish the facts, including about the specific events in DPRK and regarding application of relevant protection policies. After completing the review, the Independent Review Team shall share its findings on this aspect of the Independent Investigative Review with the Director, UN Ethics Office. The Director, UN Ethics Office, could then provide an opinion and formulate recommendations, as may be appropriate, on the retaliation allegations in light of these findings. If the UN Ethics Office requires further investigation of this specific issue, after having reviewed the findings of the investigative review, it can arrange for such follow-up before providing its recommendations, with the full cooperation of UNDP.”

Background

4. Prior to the release of the EIIRP Report, UNDP’s activities and operations in the DPRK had been subjected to review and comment by two other ‘independent’ entities. The UN Board of Auditors made observations, and the US Permanent Subcommittee on Investigations (Committee on Homeland Security and Government Affairs) was investigating UNDP’s operations in the DPRK prior to UNDP suspending its operations in DPRK on 1 March 2007. UNDP’s suspension of operations followed the failure of DPRK to agree to certain conditions that had been mandated by the Executive Board of UNDP on 25 January 2007.

5. In relation to some of the irregularities in UNDP’s operations in the DPRK, the following observations have been made by the independent entities reviewing the matter.

6. The EIIRP in its findings noted that:

“Since 2005, Shkurtaj has consistently expressed concerns about hard currency payments to the DPRK and the national staff. Similarly, Shkurtaj repeatedly raised concerns about the degree to which DPRK impeded UNDP’s access to the Foreign Trade Bank, where UNDP’s local bank accounts were held, by requiring Li Kum Sun [National staff] to handle all transactions with the bank...[and]...At various points, Shkurtaj flagged concerns about issues such as the international staff’s lack of access to the DPRK’s Foreign Trade Bank, insufficient project monitoring, and the degree to which the DPRK government monitored and controlled UNDP’s operations.”

7. The Board of Auditors 31 May 2007 Report indicated that the Advisory Committee on Administrative and Budgetary Questions (ACABQ) requested the Board to conduct its audit of the United Nations organizations in the Democratic Republic of North Korea, focusing on three (3) areas:

- (a) foreign currency transactions
- (b) staff hiring
- (c) access to reviewing local projects, including direct payments for National Execution (NEX) projects.

8. The Board of Auditors findings indicate that, in relation to:

- (a) foreign currency transactions - local payments made in foreign currencies were without requisite authority;
- (b) staff hiring - local staff were hired through a government agency of DPRK, contrary to relevant instructions and procedures; and
- (c) access to reviewing local projects, including direct payments for National Execution (NEX) projects - project visits had taken place, but were done under supervision of the DPRK authorities except for one reported project in UNICEF.

9. The Staff Report of the *US Permanent Subcommittee on Investigations (Committee on Homeland Security and Government Affairs)* in making its recommendations specifically noted:

“The facts presented in this Report might not have come to light absent the actions of Artjon Shkurtaj, who raised repeatedly concerns about UNDP’s practices in North Korea.”

10. And, later in the Report when commenting upon the concerns that Mr. Shkurtaj had been raising, it indicates:

“In particular, he identified problems with the manner in which payments were made, the use of foreign currency for certain payments, insufficient

project monitoring, counterfeit US currency, and the lack of secure communications in the UNDP Office in Pyongyang.”

11. And finally, when commenting upon UNDP’s Executive Board decision to withdrawal from the DPRK, the report indicates:

“In March 2007, in an unprecedented action, UNDP suspended its operations in North Korea and informed DPRK government that it would be unable to continue operating in the country unless, among other steps, the DPRK Government agreed to: accept all UNDP payments using North Korean local currency; permitted UNDP to select local staff who would work in its offices; and ensured on-site project inspections would take place without delays.”

12. In summarizing the findings of each of these independent reviews, it is readily evident from the above, that the issues raised by Mr. Shkurtaj which related to: the use of hard currency; local staff hiring; and project monitoring, were confirmed by all three independent entities to be either:

- (a) actions taken without requisite authority or contrary to relevant instructions or procedures (*Board of Auditors*)
- (b) management and operational deficiencies *US Permanent Subcommittee on Investigations (Committee on Homeland Security and Government Affairs)*
- (c) legitimate concerns about UNDP’s operations (*EIIRP*)

Ethics Office Opinion

13. The mandate of the EIIRP, as it specifically relates to the Ethics Office, provides:

“The Director, UN Ethics Office, could then provide an opinion and formulate recommendations, as may be appropriate, on the retaliation allegations in light of these findings.”

14. In providing that opinion, a review of the Panel’s findings must obviously be undertaken; however, in the conduct of such a review one must be careful not substitute his or her views of the evidence for those of the EIIRP’s and ensure that some degree of deference is given to the findings of credibility made by the EIIRP.

15. The EIIRP, at page 339 of their Report, has indicated that it:

“...has employed the principles set forth in the Secretary-General’s Bulletin dated December 19, 2005 (i.e. *ST/SGB/2005/21* – “*Protection against retaliation for reporting misconduct and for cooperating with duly authorized audits or investigations.*”) regardless of applicability to UNDP. The Panel has undertaken such an analysis to afford Shkurtaj every benefit of the doubt and to ensure substantive review of his claim.”

16. Although the EIIRP did not articulate the principles set forth in *ST/SGB/2005/21*, “*Protection against retaliation for reporting misconduct and for cooperating with duly authorized audits or investigation*”, the relevant principles to this case are:

- (a) the complainant must have engaged in a protected activity, that is:
 - (i) the complainant reports, in good faith and provides information or evidence to support a reasonable belief that misconduct (i.e. failure of one or more staff members to comply with his or her obligations under the Charter of the United Nations, the Staff Regulations and Staff Rules or other relevant administrative issuances, the Financial Regulations and Rules, or the Standards of Conduct of the International Civil Service) has occurred; or
 - (ii) the complainant has cooperated in good faith with a duly authorized investigation or audit;
- (b) the alleged retaliation (that is, any direct or indirect detrimental action recommended, threatened or taken) occurred because the individual engaged in a protected activity; and
- (c) the burden of proof shall rest with the Administration, which must prove by clear and convincing evidence that it would have taken the same action absent the protected activity [Section 1.4, 2.1, and 2.2 refers].

17. In relation to the first principle that is, the complainant should have engaged in a protected activity, the EIIRP concludes, at page 314:

“In short, the Panel concludes that Shkurtaĵ raised legitimate concerns about UNDP’s operations in the DPRK particularly with respect to hard currency payments being made to the DPRK. To be sure, Shkurtaĵ was not revealing problems that were unknown to UNDP officials. Nevertheless, by confronting his superiors and bringing his concerns to UNDP Headquarters, Shkurtaĵ was shining a spotlight on serious issues that required UNDP to act in a meaningful way. At a minimum, Shkurtaĵ was reporting potential violations of policy and procedure. As such, *he can fairly be described as someone who has reported compliance concerns and who thus is entitled to protection from retaliation. For the purposes of the discussion that follows, the Panel has treated him accordingly.*” (emphasis added)

18. Following the EIIRP’s determination that Mr. Shkurtaĵ is an individual entitled to protection from retaliation, the report then provides that the “...question then distils to whether the UNDP responded appropriately to Shkurtaĵ’s complaints...”

19. Unfortunately, the issue following a finding that Mr. Shkurtaĵ is an individual “...entitled to protection from retaliation...” is not whether the Organization was addressing his concerns, but whether the Administration (UNDP) has been able to

discharge the burden of proving by clear and convincing evidence that it would have taken the action(s) absent the protected activity.

20. Before commenting generally upon whether or not UNDP has discharged this burden of proof, a comment is warranted in relation to one particular finding made by the EIIRP. That particular finding is in relation to what the Panel describes as the 'flawed' hiring process associated with the UNDP-DPRK ALD Operations Manager position, a position that Mr. Shkurtaĵ had applied for and been selected as the successful candidate. The EIIRP indicates:

"The Panel is troubled by several facts it has been able to establish. First, between March 17, 2006 and April 13, 2006, the DPRK government complained to Pakkala about Shkurtaĵ's interpersonal skills and his treatment of the national staff. In fact, when Pakkala sent Ri Hung Sik a letter on March 20, 2006, requesting NCC-UNDP's concurrence with Shkurtaĵ's continued role as Operations Manager, Ri Hung Sik expressed hesitation in a responsive letter dated April 12, 2006. Second, Domingo did not determine that the process was flawed until nearly four weeks after Pakkala's initial selection of Shkurtaĵ. Circumstantially, this sequence of events is consistent with the idea that in response to concerns raised by the DPRK government, Pakkala changed his mind about hiring Shkurtaĵ, after which Domingo invalidated the selection process."

"The Panel is unable to conclude, however, that the reversal of the initial selection of Shkurtaĵ was retaliatory."

21. This particular finding is troubling, as the EIIRP is essentially saying that the burden of proof on UNDP to establish by clear and convincing evidence that it would have taken the action, absent the protected activity has not been discharged. However, the EIIRP Report, while still commenting upon this 'troubled' matter, provides:

"According to Domingo, no one told her that representatives of the DPRK had complained about Shkurtaĵ, and nothing other than an objectively flawed process motivated her decision. *On these points, she was unequivocal.* Domingo stated further that in her position as Human Resources Business Advisor, she periodically reverses selection decisions and identifies flaws in selection processes. She thus explained that her treatment of Shkurtaĵ's application was not a unique event." (emphasis added)

22. Had it not been for Ms. Domingo's *unequivocal* testimony regarding the DPRK Operations Manager position the Mr. Shkurtaĵ had competed for and was selected, the burden of proof would not have been discharged; however, Ms. Domingo's unequivocal testimony is clear and convincing evidence that her intervention and reversal of the initial selection was not a retaliatory act. Indeed, on this matter the Panel concluded:

“The Panel has struggled with the sequence of events in March and April 2006 and notes clear communication failures between Domingo, Pakkala and Bhatia. Nevertheless, the decision to reverse the initial selection of Shkurtaj was not a retaliatory measure designed to punish Shkurtaj for complaining about UNDP-DPRK.”

23. In relation to the remaining allegations, while the EIIRP pursued its examination of these allegations from the perspective of whether UNDP responded appropriately to Mr. Shkurtaj’s complaints, the record clearly shows that UNDP has demonstrated that each of the alleged retaliatory acts occurred independent of the protected activity. UNDP has therefore, discharged the required burden of proof.

24. Accordingly, even though Mr. Shkurtaj has been officially identified by the EIIRP as an individual entitled to protection from retaliation, the record shows that each of the actions occurred independent of the protected activity and therefore were not retaliatory.

Observations

25. As indicated above, the EIIRP found that Mr. Shkurtaj was an individual “entitled to protection from retaliation” and, the evidence supports the fact that UNDP had discharged the burden of proof that it (UNDP) would have taken the action(s) absent the protected activity.

26. However, the EIIRP in its reporting on this matter, also made specific reference(s) to Mr. Shkurtaj’s credibility as it related to a number of issues, including his Personal History Forms (P.11).

27. While it is certainly within the prerogative of an Independent Inquiring body to assess and make findings as to the credibility of witnesses, in doing so, should an individual against whom adverse findings are to be made, be provided an opportunity to provide a reasonable explanation?

28. Regarding this particular matter, reference is made to the Investigative Guidelines of The *Independent Inquiry Committee into the United Nations Oil-for-Food Programme*, which specifically provide:

“Before the Committee makes adverse findings against any person or entity in a written report, such person or entity shall be informed of the proposed finding(s) and the information upon which it is based, and may make representations thereon personally, or with a legal representative to place before the Committee relevant additional information or written submissions with regard to such finding(s)”

29. Providing an individual with an opportunity to provide a reasonable explanation does not mean he or she must be provided a copy of the Independent Inquiry’s entire report. It does mean, however, that as a minimum, extracts from the report upon which

an Independent Inquiry's adverse findings are based, should be given to an individual in order to provide that individual the opportunity to provide a reasonable explanation.

30. Unfortunately, it does not appear from the record that Mr. Shkurtaj was offered an opportunity to provide a reasonable explanation in relation to the relevant facts upon which the EIIRP based its adverse findings.

31. The EIIRP's failure to provide Mr. Shkurtaj with an opportunity to provide a reasonable explanation is, in my opinion, a due process failure. However, based upon the record, this due process failure did not impact upon the EIIRP's finding that Mr. Shkurtaj was an individual entitled to protection from retaliation and UNDP discharging its obligation (burden of proof) to establish by clear and convincing evidence that it would have taken the action(s) absent the protected activity.

Recommendation

32. Since the Report has been released publicly and the EIIRP, as an entity, is now *functus officio*, there is no means by which to address this matter other than by means of restitution. Accordingly, it is recommended that UNDP pay Mr. Shkurtaj fourteen (14) months net base salary as compensation (at the rate in effect at the time of his separation from service) for the due process failure.