Summary

This document presents the observations and recommendations of the Advisory Committee on Administrative and Budgetary Questions (ACABQ) and is based on a letter dated 5 May 2022, reference number AC/2202, addressed to the Executive Director of UNICEF, copying the United Nations Controller, the Executive Secretary of the Fifth Committee and the Secretary, Chief Executives Board, from the Chairman, ACABQ, on the note requesting authorization from the United Nations Economic and Social Council/General Assembly for UNICEF to utilize financing instruments in support of its operations (E/ICEF/2022/AB/L.7).
1. Below please find the observations and recommendations of the Advisory Committee on Administrative and Budgetary Questions on the Note requesting authorization from the United Nations Economic and Social Council/General Assembly for UNICEF to utilize financing instruments in support of its operations (E/ICEF/2022/AB/L.7).

2. The Advisory Committee met online with representatives of UNICEF, who provided additional information and clarification, concluding with written responses received on 22 April 2022. I should be grateful if you would place the Advisory Committee’s letter before the UNICEF Executive Board at its forthcoming session from 14 to 17 June 2022.

3. The Note and in its annex indicate that UNICEF requests that authority be granted to its Executive Board to oversee and to approve the utilization of various financing instruments for fundraising and other critical operations of UNICEF on an ongoing basis, including for example unrated bonds, pre-financing mechanism, and concessional and no-interest loans. The ability to utilize new financing instruments for fundraising investments will generate additional resources for UNICEF programmes. Access to no-interest financing will also be attractive and beneficial to UNICEF programme delivery linked to donor grants where resources only become available on a cost-reimbursement basis. No-interest financing will address the need for upfront working capital and mitigate the constraints around upfront funding imposed by using regular resources reserves.

4. Upon enquiry, the Committee was informed that projections can and will be developed once and if authority is given to the Executive Board. The Note also indicates that if authority is granted to the Executive Board, UNICEF will explore the best options and opportunities to respond to the programmatic and operational needs. This can include potential instruments in partnership with sovereign and government entities. **The Advisory Committee is of the view that, in exploring options for financing arrangements, consideration should also be given to public funding, for example, under sovereign funds.**

5. The Note indicates that financing instruments will also leverage the appetite of investors and high net-worth individuals for investment in the Sustainable Development Goals. Several high-net-worth individuals have expressed their interest, through the National Committees, to provide resources through financing mechanisms for UNICEF to reach more children, with repayment of the principal amounts and the possibility of zero interest, or at a concessional rate. Concessional loans have more generous terms than market loans. Concessional loans generally include below-market interest rates, grace periods in which the loan recipient is not required to make debt payments for several years, or a combination of low interest rates and grace periods.

6. It is also indicated that the proposed financing instruments aim to finance the growth of private sector fundraising, including in emerging markets, and other critical operations of UNICEF to achieve the child-related Sustainable Development Goals. The ability to utilize new financing instruments for fundraising investments will generate additional resources for UNICEF programmes. Programme-related investments, for example, are a new, but mostly underused, area of philanthropy that offer non-profit organizations resources at low or no interest. This makes programme-related investments a real opportunity for UNICEF to explore as a potential recipient of such investments.

7. **The Advisory Committee sees merit in further exploring the use of financing instruments to support UNICEF’s operations, leveraging its extensive experience and positive record in private sector fundraising. However, as the**
proposal by UNICEF would entail a departure from current broad legislative
directives governing the financial management of the United Nations, with
possible system-wide implications, the Committee therefore considers that the
decision regarding the envisaged utilization by UNICEF of various financing
instruments should remain under the sole purview of the General Assembly (see
 paras. 22, 28 and 29 below).

8. The Advisory Committee is of the view that clear criteria that determine
when borrowing should be initiated by UNICEF, including financial and
operational benchmarks, should be presented and also include: (i) purpose of use
of borrowed funds (e.g. fundraising, pre-financing for grants on cost
reimbursement, etc.); (ii) maximum duration of the financial vehicles as well as
maximum level of borrowing per year; (iii) impact on UNICEF operational
reserves, including on minimum and maximum amounts.

9. Taking the above observations into consideration, the Advisory Committee
recommends, at this stage, that a pilot project for three years, with a pre-
determined scope, including a clear determination of financing instruments and
corresponding risk mitigation procedures be explored, as well as a ceiling level
of borrowing authorized per year, and exclusive use for supporting private sector
fundraising efforts (see paras. 28 and 29 below).

Risk management and mitigation

10. According to the Note, the first identified risk is the risk of default related to the
potential lack of return on investment, with investments not generating enough
resources to repay principal amounts and interest due, with UNICEF ultimately
having to utilize the regular resources reserves. This risk will be managed through a
rigorous review of each proposal, sound business planning and cash flow analysis
based on historical data and financial analysis. Upon enquiry, the Committee was
informed that UNICEF would preserve, and not waive its privileges and immunities
in any contracts and agreements and would aim to structure financing agreements and
contracts with no legal obligation to repay in the event of a default. However, the
actual terms and conditions of future agreements will depend on the specific
circumstances, including the type of instrument, the institution that UNICEF partners
with and the investors, similar to the conditions used in financing arrangements with
the World Bank bonds issuance, or use guarantees provided by traditional donors
(similar to those provided for the Vaccine Independence Initiative) as an extra
protection for UNICEF.

11. A second risk indicated in the Note is the potential currency volatility in markets
whose cash flows are the source of repayment of these financing instruments. The
monetary value of the instruments utilized will be closely monitored to ensure cash
flows are more than sufficient to cover currency volatility against the United States
dollar. UNICEF has demonstrated the capacity to adequately mitigate foreign
exchange impact in past years.

12. A third potential risk is related to the capacity of UNICEF to demonstrate the
impact of the private sector fundraising income generated from the proceeds of these
financing instruments in a manner that appeals to a new audience. Because potential
investors will be new or non-traditional donors, UNICEF will adapt existing reports
to make them appropriate for and accessible to this new audience.

13. A final area of risk includes the potential exposure of UNICEF to criticism for
using donations to repay principal and interest on a financing instrument. The
deployment of resources from the financing instruments in private sector fundraising
is expected to generate sufficient resources to cover repayment of the principal and
related interest, as well as significant resources for UNICEF programmes. UNICEF plans to convey this to the public transparently and to explain the value and use of these donations.

14. The Advisory Committee trusts that a detailed description of the specific financing arrangements to be used would be provided, as well as a detailed risk analysis and risk management parameters for each investment vehicle; and overarching mandatory risk management parameters, such as the maintenance of UNICEF’s privileges and immunities under international law and ensuring that there are no liabilities to the Fund’s regular resources (see para. 9 above).

Oversight and reporting

15. The Note indicates that the UNICEF Executive Director will operate within parameters to be established by the Executive Board, upon advice from the UNICEF Comptroller, to ensure that a proper governance and oversight mechanism is in place. The Executive Director shall, in respect of borrowing transactions completed by UNICEF, submit to the Board a report in such form, frequency and content as the Executive Board may determine. The Advisory Committee trusts that the implementation and results of the pilot will be reviewed: (i) during the annual reporting to the UNICEF Executive Board and investment committee (see para. 17 below); (ii) during periodic audit reviews by the Board of Auditors in the context of its annual review of the financial statements of UNICEF; (iii) by an external, outside, audit firm with specialized expertise in the use of financing instruments for the purposes of borrowing; (iv) and during the periodic reporting to the Advisory Committee in the context of the proposed programme budget, and its midterm review.

Establishment of an Advisory Committee

16. The Note also indicates that the Executive Director shall during first regular session of each year, submit to the Executive Board an indicative borrowing programme for that year, which the Board shall approve for the year, with all borrowing activities to be consistent with the borrowing programme as approved by the Board. Interest, charges, expenses and amortization payments made in respect of a borrowing transaction shall be borne by the resources generated by the fundraising investments.

17. Taking into consideration that the UNICEF Executive Board currently does not have an expert subsidiary body like the Investment Committee of the United Nations Joint Staff Pension Fund and its rules of procedure allow it to create such committees as and when deemed necessary, the Advisory Committee is of the view that there is a need to establish, for the duration of the pilot, an Advisory Committee under the UNICEF Executive Board to advise on financial aspects of specific funding agreements considered for approval.

UNICEF private sector mobilization efforts

18. Upon enquiry, the Advisory Committee was informed that private sector revenue totaled $1.61 billion in 2020 compared to $1.42 billion in 2019, an increase of $189.8 million (13.4 per cent). Within total private sector revenue, regular resources revenue totaled $719.9 million, an increase of $64.9 million (9.9 per cent) compared to 2019; other resources revenue totaled $889.2 million, an increase of $124.9 million (16.3 per cent) compared to 2019. Within other resources revenue, other resources (regular) revenue was $598.3 million, a decrease of $22.3 million (3.6 per cent) compared to
2019; other resources (emergency) revenue was $290.9 million, an increase of $147.2 million (102.4 per cent) compared to 2019.

19. The Advisory Committee was also informed that private sector fundraising requires investment to maintain current income and to grow future income. Total investment in UNICEF private sector fundraising is financed in part by the National Committees for UNICEF and Country Offices with established private sector fundraising operations (PSFR COs) using up to 25 per cent of funds raised in their markets, and in part by the investment funds approved by the Executive Board for strategic deployment across all UNICEF fundraising markets. In the period 2016 to 2020, the Private Fundraising and Partnerships Division allocated investment funds totaling $440 million for use in some 50 fundraising markets in National Committee countries and PSFR COs fundraising markets. While these investments have not yet fully matured, they have already generated revenue totaling more than $1 billion and, cumulatively, are expected to have generated projected revenue totaling more than $2 billion by 2025. The required rate of return, of 3:1 over 36 months, has been consistently met or exceeded for investment fund allocations made in the period 2016 to 2020. The Advisory Committee acknowledges the results achieved by UNICEF on the development and implementation of a successful and well-established private sector fundraising operation.

Current pilot project and opinion of the United Nations Office of Legal Affairs

20. In the presentation of its business rationale on the use of financing instruments, UNICEF recalls that during its first regular session of 2021, the Executive Board authorized UNICEF to execute a financing instrument in partnership with the International Bank for Reconstruction and Development (World Bank) to raise additional financing for investment in private sector fundraising, as a pilot project (so-called forward flow arrangement) limited to an amount of $50 million. Upon enquiry, the Committee was informed that following a risk-informed approach to planning for and allocating the funds received from the World Bank, UNICEF has fully allocated the $50 million to emerging market countries through two rounds of allocations (30.8 per cent in June and 69.2 percent in December 2021). Preliminary results reported to the World Bank indicate revenue of $177.1 million generated by emerging markets for the period from March to December 2021, what has triggered UNICEF’s obligation to repay the borrowed funds as per the agreement with the World Bank, thus eliminating the risk of default for the investors.

21. As described in paragraphs 18–19 of the Note, in its approval of the pilot effort in 2021, the Board requested that the United Nations Office of Legal Affairs assess this financial arrangement and determine whether an update to UNICEF Financial Regulations and Rules would be required to enable future transactions of this type to occur beyond the pilot. The Advisory Committee was provided with the opinion of the Office of Legal Affairs stating that the Office has consistently advised that, pursuant to the Charter of the United Nations and the United Nations Financial Regulations, borrowing cannot be carried out without the prior approval of the General Assembly, and that any such borrowing must be effected under the terms and conditions established by the Assembly, and has always been carried out pursuant to the express authorization of the General Assembly (see para. 20/ annex to the present letter). In its opinion, the Office of Legal Affairs concluded that if UNICEF desires to engage in further transactions in the nature of the forward flow arrangement with the International Bank for Reconstruction and Development, UNICEF should first seek the approval of the Assembly. Furthermore, if the Assembly were to authorize such transactions on an ongoing basis, UNICEF would then have to appropriately
amend the UNICEF Financial Regulations and Rules to provide for such transactions (see para. 22/ annex to the present letter).

22. **The Advisory Committee concurs with the Office of Legal Affairs and considers that any borrowing, including on a pilot basis, must be effected under the terms and conditions established by the General Assembly.** The Committee notes the preliminary positive results already reported to the World Bank and looks forward to detailed updates, including lessons learned, on the pilot project (see also paras. 28 and 29 below).

### Other experience from the United Nations system

23. Upon inquiry, the Advisory Committee was informed that there are no other United Nations organizations that have access to private sector financing. Other United Nations agencies are primarily replicating the UNICEF PSFR model. These include UNHCR, WFP, UN- Women, and UNFPA. However, none of these agencies have access to financing from capital markets or from private capitals and are relying on internal funding. Some of the proposed innovative finance mechanisms cannot and will not become an instrument to be used and replicated as such by other United Nations agencies or used as a precedent. In fact, no other agency has the extensive business case and track record of proceeds and regular income from individuals like UNICEF, which is the fundamental condition for some of the instruments. Even agencies with established PSFR operations, like UNHCR or WFP, do not have the volume to replicate and support a similar financing instrument currently.

### Process

24. According to the Note, UNICEF seeks the agreement of the Executive Board on the presentation of a request to General Assembly, through the Economic and Social Council, for the Assembly to grant the Executive Board the authority to oversee the use of such financing instruments on an ongoing basis within parameters to be established by the Board.

25. Upon enquiry, the Advisory Committee was informed that the process sought by UNICEF for obtaining the authorization by the General Assembly would be done via the endorsement from the Executive Board on the business rationale presented in the Note, which would then forward the proposal for the Assembly through the Economic and Social Council. According to UNICEF, the Assembly may request advice from the Fifth Committee before passing a resolution on the issue, if deemed necessary. If the General Assembly grants the authority as requested, UNICEF would then need to appropriately amend the UNICEF Financial Regulations and Rules to provide for such transactions.

26. **The Advisory Committee recalls that, through its Financial Regulations, the General Assembly issues the broad legislative directives governing the financial management of the United Nations (see also ST/SGB/2013/4, para. 2).** The Committee is of the view that the proposal presented by UNICEF would constitute a significant change to the current legislative directives governing financial management of the United Nations, not only in terms of exploring new financing instruments for borrowing, but also in terms of the level of authority granted to other entities for the definition of parameters on the use of borrowing instruments.

27. **In order to allow for appropriate consideration by the General Assembly of the matter, the Advisory Committee is of the view that any related proposal should be presented by the UNICEF Administration in accordance with the following established procedure:** (a) to the UNICEF Executive Board for its
consideration and decision on the request to the General Assembly; (b) to the Committee for its consideration, and for presenting its observations and recommendations to the Assembly through the Fifth Committee; (c) to the Assembly for its consideration and decision; (d) to the Economic and Social Council for information; and (e) to the UNICEF Executive Board for a final consideration and approval of UNICEF’s Financial Regulations and Rules, in accordance with the authorization given by the General Assembly.

Conclusion

28. Taking into consideration its observations above, the Advisory Committee recommends to the Executive Board the consideration of a pilot project for a duration of three years and with limited scope to supporting private sector fundraising efforts. The Committee trusts that the pilot project and related parameters, including pertaining to its duration, scope, the modalities of financial instruments to be explored, and the maximum amount to be borrowed, will be presented to the General Assembly for its consideration and approval (see paras. 9 and 22 above).

29. The Committee recommends that any forthcoming proposal after the pilot project, on an ongoing basis with the implications on financial rules and regulations will be based on lessons learned and follow the established procedure indicated in paragraph 27 and provide detailed information on the elements highlighted above (see paras. 8, 9 and 14 above) in order to ensure a transparent and comprehensive consideration of the proposal by the General Assembly.
Annex

United Nations

INTERGOVERNMENTALarbeitet

TO: Mr. Peter Mason, Senior Advisor
to the Executive Director, UNICEF

DATE: 18 May 2021

FROM: Jay Pozenel, Director
DE: General Legal Division
DE: Office of Legal Affairs

SUBJECT: Forward Flow Agreement concluded on 25 February 2021 between the IBRD and UNICEF

1. I refer to your email messages of 24 March 2021, by which OLA’s views were requested on the Forward Flow Agreement that had been concluded on 25 February 2021 between the IBRD and UNICEF, and by which certain background documentation relevant to the conclusion of that agreement was provided to this Office.

Background

2. By a report of 6 January 2021, the Administration of UNICEF notified the UNICEF Executive Board that UNICEF was “developing a financial instrument to generate resources to facilitate the necessary level of investment in private sector fundraising for an impactful income that [could] help finance the organization’s country programmes of cooperation.” 1 The report to the Executive Board described such financial instrument as follows:

“The financial instrument consists of an issuance of notes by the World Bank under its Capital at Risk Notes programme and a forward flow arrangement between UNICEF and the World Bank, under which UNICEF will make payments to the World Bank in respect of such issuance, for an amount expected to be approximately $50 million. The payments will be calculated based on future donations to UNICEF from unearmarked private sector fundraising monthly pledge donors in 18 emerging-market countries. The financial instrument proceeds will be utilized strategically in these 18 countries to retain existing donors, to attract new donors to replace those lost through natural attrition and to widen the donor base.”

3. As described in section III of the Report, under the IBRD’s Capital at Risk Notes programme, 2 the IBRD would issue credit notes in the capital markets in the

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2 Id.
3 See id., n.3, describing the IBRD’s Capital at Risk notes programme as one that “facilitates risk transfer solutions for the World Bank and its clients using capital markets. Capital at Risk Notes are issued under the Global Debt Issuance Facility of the World Bank and receive the same tax and securities law exemptions, but may be assigned a lower security rating than the Facility, or may not be assigned any security rating.” Notably, Article I of the Articles of Agreement of the IBRD provides that one of the purposes of the World Bank is to “assist in the reconstruction and development of territories
aggregate amount of $100 million with a five-year maturity. The proceeds from the IBRD’s issuance of such notes would be apportioned equally between UNICEF and the World Bank “pursuant to a forward flow arrangement between the World Bank and UNICEF.” Under such forward flow arrangement, UNICEF would repay its share of the proceeds plus interest to the IBRD with a predetermined amount of future pledged contributions “from private sector fundraising monthly donors in 18 emerging market countries” provided that UNICEF had actually received sufficient donations during the five-year maturation period to cover such repayments. The UNICEF report further averred that the notes issued by the IBRD would be “expected to be sold through private placement” so that there would be no need for an external credit rating of UNICEF. The report submitted that the historical performance of revenue from pledged donations from the 18 target countries was sufficient to meet UNICEF’s repayment obligations, even assuming a potential for the volatility of their local currencies.

4. The report maintained that the proposed financial instrument would provide various advantages to UNICEF, particularly in facilitating the growth of “income generated by existing and newly acquired pledge donors in emerging markets in the 18 countries,” some of whose pledged donations would fund UNICEF’s repayment of the proceeds to the IBRD. It was further reported that such financial instrument would “pave the way for a unique partnership with the World Bank to use financial instruments to support financing of the growth and operations of UNICEF” and would, most importantly, impact additional financing of UNICEF’s programmes in the 18 target countries. The report noted that this would be the “first time that a financial instrument of this type will be offered by the World Bank to a United Nations organization” making “UNICEF a pacesetter for other United Nations organizations” and creating “alternative modalities for the United Nations to leverage the capital markets.”

5. Consequently, the Administration of UNICEF sought “approval from the Executive Board to move forward this innovative financial instrument as an efficient and effective response to the reduction in [grants and contributions] and resulting reductions in investments for private sector fundraising, and as a tool to support long-term growth.”

6. By its decision 2021/5 of 11 February 2021, the UNICEF Executive Board took note of “the World Bank instrument to facilitate sustained investment in private sector fundraising,” as set forth in the above-mentioned report, and authorized,

“the Executive Director, with the advice of the Comptroller, to execute the financial instrument in partnership with the World Bank to raise additional financing for investment in private sector fundraising, as a pilot project limited to an amount of $50 million, leveraging the World Bank’s expertise in financial markets, provided that no regular resources will be used towards the repayment of the principal amount or interest owed to the World Bank, as per the payment conditions, and request[ed] UNICEF to report to the Executive Board on the financial performance and the

by facilitating the investment of capital for productive purposes . . . , to promote private foreign investment by means of guarantees or participating in loans and . . . to arrange those loans.”

4 Id., para. 10.
5 Id.
6 Id., paras. 18-20.
7 Id., para. 16.
8 Id., para. 17.
9 Id., para. 26.
attainment of goals and corresponding costs and capacities annually at the first regular session."^{10}

7. Thus, the UNICEF Executive Board authorized the Executive Director of UNICEF to enter into the forward flow arrangement with the IBRD only on the basis of a pilot project, limited to the principal amount of $50 million, and “provided that no regular resources will be used towards the repayment of the principal amount or interest owed to the World Bank.”^{11} By that same decision, the UNICEF Executive Board also requested that the UNICEF Administration provide it with “information on the opinion of the Office of Legal Affairs on the agreement with the World Bank instrument, principal amount, interest costs and other associated fees and a written assessment of the need to update the UNICEF Financial Regulations and Rules.”^{12}

8. The Forward Flow Agreement between UNICEF and the IBRD was concluded on 25 February 2021, having been signed by the UNICEF Comptroller and by an “authorized signatory” for the IBRD. By the email of 24 March 2021, OLA’s views on the Forward Flow Agreement were sought, drawing attention to the Executive Board’s request.

**Analysis**

9. Based on the decision of the UNICEF Executive Board and its requests for OLA’s views, two issues are presented by this matter: (i) whether the forward flow agreement concluded between UNICEF and the IBRD adequately protects the legal and financial interests of UNICEF, and (ii) whether the UNICEF Executive Board could alone authorize the Executive Director of UNICEF to engage in such a transaction.

(i) **The Terms of the Forward Flow Agreement**

10. Insofar as the Forward Flow Agreement was concluded on 25 February 2021 between UNICEF and the IBRD pursuant to the authorization to do so given by the UNICEF Executive Board, the following is limited only to an analysis of the terms and conditions of the Forward Flow Agreement itself. This Office is not in a position to evaluate the appropriateness of the costs and fees, interest rates, or other financial aspects of the transaction, regarding which we defer to UNICEF’s Comptroller.

11. Generally, a forward flow arrangement involves a commitment to invest a set of pre-agreed underlying loans or payment streams, often at a predetermined interest rate, for a set period. For the duration of the typical forward flow arrangement, investors receive periodic interest payments based on the performance of the underlying loans or payment streams, often without recourse to the investors if such loans or payment streams fail to resolve. Principal is typically repaid when the forward flow arrangement matures. Structurally, a forward flow arrangement often involves an outright purchase by the funder of loans or other payment streams that are advanced by an originator thereof in accordance with eligibility criteria. Beneficial and economic interests in the loans are immediately transferred to the funder with legal interest only tending to pass following triggering events linked to the originator or servicer’s payment performance and creditworthiness.

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^{10} Decision 2021/5, Compendium of decisions adopted by the Executive Board at its first regular session of 2021, E/ICEF/2021/8, para. 7 (Emphasis added).

^{11} Id.

^{12} Id., para. 8.
12. The IBRD issued a general prospectus on 28 May 2008 ("Prospectus") for its Global Credit Issuance Facility, which was generally supplemented in March 2014. With respect to the issuance of Notes for the forward flow arrangement with UNICEF, the IBRD issued a supplement to the general prospectus on 26 February 2021 ("Prospectus Supplement"). That Prospectus Supplement lists the IBRD as issuer of the $100 million in Notes, Citigroup Global Markets Limited, in the United Kingdom, as the Lead Manager that would initially purchase such Notes, and UNICEF as servicer for $50 million of the Notes. The Prospectus Supplement also provides investors with a summary of the Forward Flow Agreement concluded between IBRD and UNICEF and with information on UNICEF’s anticipated ability to repay the $50 million in proceeds derived from the sale of the Notes by the IBRD.

13. In broad terms, under the Forward Flow Agreement, UNICEF and the IBRD have agreed that the IBRD will pay to UNICEF US $50 million from the proceeds from sales of the Notes, less costs and expenses. In turn, and subject to having derived sufficient revenue from pledged donations, UNICEF will pay interest on that amount semi-annually. Before the IBRD Notes mature, and likewise subject to having derived sufficient revenue from pledged donations, UNICEF will ultimately be responsible for repaying to the IBRD the $50 million from revenues derived from pledged donations actually received from private-sector donors in 18 target countries.

14. The Forward Flow Agreement effectively limits UNICEF’s responsibility to repay to the IBRD the principal of $50 million and interest thereon over the five-year period before maturation of the IBRD issued Notes to the extent that, as a condition precedent to any such payment, UNICEF has secured sufficient revenue from pledged donations from donors in the specified 18 countries. Both the Forward Flow Agreement and the Prospectus Supplement make clear that if such condition precedent is not satisfied in respect of any payment, UNICEF’s payment obligations will be reduced by such amount necessary for that condition precedent to be satisfied in respect of any relevant payment. Then, once the condition precedent is satisfied, i.e., that UNICEF has raised revenue from the specified donors, UNICEF shall make the relevant payments to IBRD in respect of the various scheduled payments on the respective due dates for such payments. The Forward Flow Agreement, thus, makes clear that if UNICEF is unable to raise sufficient revenues to meet its various scheduled repayment obligations, UNICEF’s payment obligation would...

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11 According to the IBRD’s term sheet for the Notes, interest accrues at the rate of 1.291 per cent per annum, payable semi-annually in arrears. Both the Forward Flow Agreement and the Supplemental Prospectus make clear that UNICEF’s obligation to pay interest is contingent on UNICEF’s generating sufficient revenue from donations at each interest payment date.

12 The revenue will be derived from donations pledged and received by UNICEF from private-sector donors from 18 countries: Argentina, Brazil, Bulgaria, Chile, China, Colombia, Croatia, Ecuador, India, Indonesia, Malaysia, Mexico, Peru, Philippines, Romania, Serbia, Thailand and Uruguay. For the purpose of calculation UNICEF’s payment obligations under the Forward Flow Agreement, such donations will be converted by UNICEF from local currency equivalents into US dollars, using the UN Operational Rates of Exchange.

13 As set forth under Clause 2.3 of the Forward Flow Agreement and in the "Counterparty B Payments" Clause under the Forward Flow Agreement Schedule, each of UNICEF’s payment obligations in respect of each principal payment date in the schedule of repayments (i.e., each "Ongoing Payment," "Catch-Up Payment" or "Final Payment" as those terms are defined in the Agreement) is subject to the condition precedent that the UNICEF has a balance of revenues received from donors in the 18 countries ("Donation Balance") equal to or greater than the amount of UNICEF’s then current payment obligation.

14 As defined in the Forward Flow Agreement and the Supplement Prospectus, the "Ongoing Payment," "Catch-up Payment" or "Final Payment."
then be reduced to actual revenues on hand from such donor sources. And the Forward Flow Agreement specifically provides that any such reduction of UNICEF's payment obligations shall not give rise to any additional claim by the IBRD for the amount of any such shortfall and that no interest shall accrue on such shortfall.

15. The foregoing limitations on UNICEF's liability under the Forward Flow Agreement are mirrored in the Final Terms of the Notes, dated 26 February 2021, issued by the IBRD ("Final Terms"). Specifically, the Final Terms state that IBRD's obligations to pay holders of the Notes any amounts in respect of any proceeds paid to UNICEF are conditioned on the IBRD's having received equivalent amounts from UNICEF under the Forward Flow Agreement. In the event that, as a result of its inability to raise sufficient revenue from the target donors, UNICEF is unable to make periodic or final payments of principal or interest in full, the shortfalls are cancelled, and UNICEF is relieved of further liability with respect to such shortfall amounts. Moreover, the Final Terms make clear to the holders of the IBRD Notes not only that the cancellation of UNICEF's liability and the resulting non-payment by the IBRD of interest or principal shall not constitute a default event of default by IBRD for any purposes, but also that they shall not be entitled to compel IBRD to exercise any of its rights against UNICEF under the Forward Flow Agreement.

16. Read together, the Forward Flow Agreement, the Prospectus, the Prospectus Supplement, and the Final Terms, make clear that UNICEF has no direct or indirect contractual liability to holders of the IBRD Notes. The documentation further establishes that the holder of the Notes will have no right to enforce or take action against UNICEF in respect of the Notes or the Forward Flow Agreement, including, but not limited to, in the event that UNICEF fails to make a payment of principal or interest, in whole or in part, to IBRD when due under the Forward Flow Agreement. Finally, holders of the IBRD Notes will have no right to require IBRD to exercise any of its rights against UNICEF under the Forward Flow Agreement, nor will IBRD or UNICEF have any obligation to Noteholders to do so.

17. Finally, the Forward Flow Agreement states that it, and any non-contractual obligation arising out of or in connection with it, is governed by English law, but without giving effect to any procedural laws or rules governing or concerning the resolution of any dispute, controversy, or claim, and without giving effect to conflict of laws principles. Further, the Forward Flow Agreement makes clear that both the IBRD and UNICEF maintain their respective privileges and immunities under international or other law, and it

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17 Final Terms, dated 26 February 2021, IBRD, Issue of $100,000,000 Capital at Risk Notes due 4 March 2026.
18 Id., Section 23(viii) of the Final Terms provides that in the event that IBRD were not to receive from UNICEF an amount equivalent to the "UNICEF Redemption Amount" or the "UNICEF Catch-Up Payment" (as defined in the Forward Flow Agreement), then the amounts not paid by IBRD as a result of such shortfall would constitute a "UNICEF Unpaid Amount" and would be cancelled in full. Likewise, that provision also specifies that if UNICEF were unable to pay to the IBRD the "UNICEF Interest Amount," then the amount of interest not paid by IBRD to the holders of the Notes as a result of such shortfall would constitute a "UNICEF Deferred Amount" or, in respect of a payment which would otherwise be due on the Maturity Date, a "UNICEF Unpaid Amount" and would be cancelled in full. For both cases, the cancellation or non-payment shall not constitute a default or event of default by IBRD for any purposes.
19 Id. For avoidance of doubt, Section 23(ix) of the Final Terms establishes that any UNICEF "Unpaid Amounts" shall be cancelled in full immediately following the Maturity Date of the Notes (or, if earlier, the date of any early redemption payments) and shall not accumulate or ever be payable.
provides that the IBRD and UNICEF will use their best efforts towards resolving any dispute, controversy or claim arising out of, or relating to, the Forward Flow Agreement.

(ii) **Protection of UNICEF’s Legal Interests under the Forward Flow Agreement**

18. Based on the documentation that OLA has reviewed, the Forward Flow Agreement concluded between the IBRD and UNICEF can be characterized as a loan transaction. Pursuant to it, the IBRD has agreed to advance to UNICEF $50 million from the proceeds of a $100 million bond issuance by the IBRD in anticipation that UNICEF will repay that amount with interest from UNICEF’s pledged donations from donors in 18 target countries. Under the Forward Flow Agreement, there is no outright purchase of UNICEF’s pledged donations by the IBRD, but rather, there is only an extension of credit by the IBRD to UNICEF secured and backed by the expectation of receivables arising from UNICEF’s pledged donations from the target countries. UNICEF alone remains entirely responsible for the relationship with its donors. And most importantly, if UNICEF is unable to pay back the loan from the IBRD, in whole or in part, from the pool of pledged donations, neither the IBRD nor any of the holders of its Notes has any recourse against UNICEF or its donors. Nothing in the Forward Flow Agreement would appear to constitute any waiver of the privileges and immunities of the United Nations. Thus, UNICEF’s legal and financial interests appear to be well protected under the forward flow arrangement.

(iii) **Authority of the UNICEF Executive Board to approve the arrangement**

19. The UNICEF Executive Board approved the forward flow arrangement with the IBRD only as a pilot project and sought OLA’s assessment as to whether an update to UNICEF’s Financial Regulations and Rules would be required to enable future transactions of such type to occur. As described above, the forward flow arrangement between the IBRD and UNICEF constitutes a loan by the IBRD to UNICEF secured by UNICEF’s pledged donations. There is no provision currently in the UNICEF Financial Regulations and Rules that authorizes the Executive Director of UNICEF to borrow funds.

20. This Office has consistently advised that, pursuant to the Charter of the United Nations and the United Nations Financial Regulations, borrowing cannot be carried out without the prior approval of the General Assembly, and any such borrowing must be effected under the terms and conditions established by the General Assembly. Indeed, it appears that borrowing has always been carried out pursuant to the express authorization of the General Assembly.

21. One example of this, which involved another Fund and Programme, was the decision of the General Assembly, by its resolution 31/165 of 21 December 1976, in respect of the borrowing authority of the UNDP Administrator. By that resolution, the General Assembly

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21 See id., UNICEF Financial Regulation 2.3 provides that the UNICEF Executive Director shall administer UNICEF’s Financial Regulations “consistently with the applicable resolutions and decisions of the General Assembly, Economic and Social Council and the Executive Board,” and UNICEF Financial Regulation 2.5 provides that the UN Financial Regulations and Rules shall apply, mutatis mutandis, to any matter not specifically covered by UNICEF’s Financial Regulations.

22 See Note to the Secretary-General: The Secretary-General’s Authority to Borrow Funds, 1996 UN Jur. YB 434 (summarizing instances in and conditions upon which the General Assembly has authorized borrowing).
Assembly authorized the UNDP Governing Council to grant to the UNDP Administrator the authority until the end of 1977 to undertake limited borrowing for the purpose of meeting short-term cash requirements for UNDP projects. The General Assembly stipulated that, in order to borrow any money, the UNDP Administrator had to seek the prior approval of the Governing Council in each case, and the sources of the borrowing were limited to "voluntary-funded trust funds of organizations within the United Nations."

22. Accordingly, if for the reasons stated in the report of 6 January 2021,\textsuperscript{25} UNICEF desires to engage in further transactions in the nature of the forward flow arrangement with the IBRD, UNICEF should first seek the approval of the General Assembly. If the General Assembly were to authorize such transactions on an ongoing basis, UNICEF would then have to appropriately amend the UNICEF Financial Regulations and Rules to provide for such transactions. This Office, of course, is prepared to assist UNICEF in any such endeavors once, and if so, authorized.

cc: The Legal Counsel
    Mr. S. Mathias
    Ms. S. Baffoe-Bonnie

\textsuperscript{25} See paragraphs 4 and 5, above.