EXPLANATORY MEMORANDUM TO

THE AFRICAN LEGAL SUPPORT FACILITY (LEGAL CAPACITIES) ORDER 2014

2014 No. 1891

1. This Explanatory Memorandum has been prepared by the Foreign and Commonwealth Office.

2. Purpose of the instrument

2.1 The African Legal Support Facility (Legal Capacities) Order 2014 ("the Order") confers the legal capacities of a body corporate on the African Legal Support Facility ("ALSF"). ALSF is an international organisation established by the Agreement for the Establishment of the African Legal Support Facility ("the ALSF Agreement"). It has the aim of ensuring fair and balanced negotiations between African countries and their investors and creditors by providing legal assistance to strengthen legal expertise and negotiating capacity in debt management and litigation; natural resources and extractive industries management and contracting; investment agreements; and related commercial and business transactions.

2.2 The United Kingdom signed the ALSF Agreement on 17 December 2009. Article III of the ALSF Agreement requires that ALSF have legal capacity in order that ALSF can enter into contracts and conclude agreements, acquire and dispose of movable and immovable property, and be a party to judicial and other legal or administrative proceedings. In order for Her Majesty's Government to give effect to this obligation under the ALSF Agreement, it is necessary to make the Order.

2.3 The Order will come into force on the date that the ALSF Agreement enters into force in respect of the UK.

3. Matters of special interest to the Joint Committee on Statutory Instruments

None.

4. Legislative Context

Section 1(2)(a) of the International Organisations Act 1968 ("the 1968 Act") allows Her Majesty by Order in Council to confer on an international organisation of which the United Kingdom is a member the legal capacities of a body corporate.

Section 10(1) of the 1968 Act provides that no recommendation shall be made to Her Majesty in Council to make the Order unless a draft of the Order has been laid before Parliament and approved by a resolution of each House of Parliament.

5. Territorial Extent and Application

This instrument applies to all of the United Kingdom.

6. European Convention on Human Rights

The Parliamentary Under Secretary of State at the Foreign and Commonwealth Office has made the following statement regarding Human Rights:

In my view the provisions of the African Legal Support Facility (Legal Capacities) Order 2014 are compatible with the Convention rights.

7. Policy background

The ALSF Agreement was drawn up by the African Development Bank (AfDB) and to date has been signed by 50 countries and 6 international organisations and is currently in force for 19 countries. The ALSF Agreement entered into force on 15 December 2008 and the ALSF was officially inaugurated on 29 June 2009.

The ALSF Agreement has previously been laid before Parliament under Part 2 of the Constitutional Reform and Governance Act 2010 (Cm 8427) and will be ratified by the UK once this Order has been made.

The lengthy ratification process has had no direct implications for the operations of the ALSF and UK engagement with the ALSF. Ratification of an international treaty can take a long time as many official entities need to be involved, both in the UK and elsewhere. DFID officials only became aware of the fact that the the ALSF Agreement would need to be approved in Parliament before ratification after the FCO contacted DFID in 2010 about ratifying the ALSF Agreement. As soon as DFID became aware, actions were taken. There were a number of processes which took more time than expected. In order to ensure inclusion and transparency, this necessarily included lengthy consultation with Overseas Territories and Crown Dependencies (through the Ministry of Justice), regarding their inclusion in the ratification of the ALSF Agreement (9 Overseas Territories and 3 Crown Dependencies will be included).

The ALSF responds to calls from African Finance Ministers to:

(i) create an avenue for regional members of the AfDB to access legal advice when engaging in complex commercial negotiations (especially in the area of natural resources);
(ii) provide technical assistance to strengthen legal expertise and negotiating capacity when dealing with vulture funds, natural resources and the extractive industries in the contracting of commercial and business agreements; and
(iii) assist the AfDB's regional members to address litigation brought against them by vulture funds (and other such entities) which create obstacles to obtaining the full benefits of debt relief available.

Vulture funds are commercial entities that purchase sovereign debt at discounted prices from other creditors (often when the debt is about to be written off) and then try to pursue its full value, together with interest and costs. Typically, vulture funds also refrain, or 'hold-out', from participating in any debt restructuring exercise alongside other creditors. When they pursue settlement for their claims, one of their strategies is

to seek court orders to attach to or seize physical or financial assets belonging to the sovereign debtor.

The UK is committed to enabling African countries to obtain a fair share of the income generated from the use of their natural and mineral resources and to ensuring that these are used in ways that benefit poor people. ALSF will also assist African countries by providing in-country capacity-building in the negotiation of complex commercial contracts in sectors such as the extractive industries and commercial infrastructure. This will ensure better terms and economic returns for African countries that are members of the ALSF, will lead to greater revenues and the potential for increased investment and development.

The UK is committed to addressing the issue of vulture funds whose activities threaten to undermine the positive impacts of debt relief on poverty reduction. The Debt Relief (Developing Countries) Act 2010 ("the 2010 Act") addresses this by preventing creditors from recovering from developing countries, through litigation in the UK, an amount in excess of that consistent with the Highly Indebted Poor Countries Initiative ("HIPC"). It also promotes the negotiated settlement of debt terms compatible with the HIPC. The ALSF complements the 2010 Act by providing legal support to African countries facing litigation from vulture funds in other jurisdictions. It does this by:

(i) offering services such as the provision of technical and legal advice to its regional members in creditor litigation;
(ii) providing technical legal assistance to members to strengthen their expertise; and
(iii) strengthening negotiating capacity in matters pertaining to debt management, natural resources and extractive industries management and contracting.

It is a requirement of membership of the ALSF (under Article III of the ALSF Agreement) that the ALSF is given legal capacity. The UK will be entering a number of reservations on ratification of the ALSF Agreement, as follows:

Article XVI	Immunities, Exemptions, Privileges and Concessions
Article XVII	Judicial proceedings
Article XVIII	Immunity from Property and Assets
Article XIX	Freedom of property, Assets and Operations from Restriction
Article XX	Immunity of Archives
Article XXI	Privileges of Communications
Article XXII	Personal Immunities, Privileges and Exemptions
Article XXIV	Exemption from Taxation
Article XXV	Fiscal Exemptions, financial Facilities, Privileges and Concessions

The proposed reservations relate to immunities and privileges for ALSF offices, assets and officials. The ALSF's offices and assets are currently located outside the UK. UK policy is to grant immunities and privileges to international organisations on the basis of "functional need". The proposed reservations were decided on the basis of the ALSF's response to a DFID questionnaire to determine functional need for immunities and privileges. The ALSF has acknowledged these reservations, attaching

them to the UK's signed agreement. These reservations will be formally entered by the UK on ratification of the ALSF Agreement.

The ALSF is an international initiative. Contributors to the ALSF include international organisations such as: The World Bank, The Islamic Development Bank, West African Development Bank, and the Economic Community of West African States (ECOWAS) Bank for Investment and Development. The Belgian, Canadian, Indian, French, Norwegian, Netherlands, US and UK governments are also contributors. All contributions to the ALSF are voluntary; members are not required to support the ALSF financially and non-members are able to pledge funds.

The UK's commitment is twofold. In signing the ALSF Agreement, the UK has formalised its support for the establishment and work of the ALSF. The UK has also recently approved a grant of £7 million over three years to enable African countries to negotiate oil, gas, mining and related infrastructure deals with greater financial and non-financial benefits to governments and citizens, by providing African governments with high quality legal support for negotiation of contracts. As well as legal assistance, the ALSF also provides training for African lawyers so that they can take the lead for future negotiations.

UK based law firms are the main service providers, contracted through the ALSF. Approximately 50% of contracts tendered by the ALSF have been awarded to UK firms, reflecting the legal expertise in the UK.

The Parliamentary Under Secretary of State for International Development has policy responsibility for the ALSF.

8. Consultation outcome

8.1 No specific consultations have been carried out with respect to this Order. However, in the wider context of negotiations of the ALSF Agreement generally, relevant Government departments were consulted during the negotiations and gave their approval to the final draft of the ALSF Agreement.

9. Guidance

The instrument is not complex and provides only for ALSF to have legal capacity in the UK. Neither the Department for International Development nor the Foreign and Commonwealth Office is intending to issue guidance. Guidance may be sought from the contact below.

10. Impact

10.1 There is no impact on business, charities or the voluntary sector in the United Kingdom.

10.2 There is no impact on the public sector in the United Kingdom.

10.3 An Impact Assessment has therefore not been prepared for this Order.

11. Regulating small business

The legislation does not apply to small business in the United Kingdom.

12. Monitoring & review

The Order confers the legal capacities of a body corporate on the ALSF. No monitoring or review is required.

13. Contact

Philip Dixon at the Foreign and Commonwealth Office, Tel: 020 7008 3055 or E-mail: Philip.Dixon@fco.gov.uk can answer any queries regarding the Order.

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