Extract from:

UNITED NATIONS
JURIDICAL YEARBOOK

1988

Part Two. Legal activities of the United Nations and related intergovernmental organizations

Chapter VI. Selected legal opinions of the Secretariats of the United Nations and related intergovernmental organizations

Chapter VI

SELECTED LEGAL OPINIONS OF THE SECRETARIATS OF THE UNITED NATIONS AND RELATED INTERGOVERNMENTAL ORGANIZATIONS

A. Legal opinions of the Secretariat of the United Nations

(Issued or prepared by the Office of Legal Affairs)

Contracts

1. DETERMINATION OF THE APPLICABLE LAW TO CONTRACTS CONCLUDED BETWEEN THE UNITED NATIONS AND PRIVATE PARTIES — "SERVICE CONTRACTS" AND "FUNCTIONAL CONTRACTS" — UNCITRAL ARBITRAL RULES

Letter to the Legal Counsel, Organization for Economic Cooperation and Development

1. Your letter of 2 December 1987, to which this responds, requested our views and the experience of the Organization on the determination of the applicable law to contracts concluded between the United Nations and private parties.

2. The particular questions in that letter to which you requested our response do raise, as you will appreciate, a number of issues which are not only of a fundamental legal nature but also are highly controversial.[1] I am sure, therefore, that you will understand and excuse the delay in replying to your letter.

Issues

3. In the absence of some indication of the facts which have given rise to the dispute under arbitration by the Organization for Economic Cooperation and Development (OECD), and the particular law that you are concerned about, it is difficult to be very specific in response to your questions. We have, therefore, attempted to deal with the issues you raised below in a general way in the light of the United Nations experience in this area.

4. Your letter states that the arbitration against the OECD arises from a contract concluded with a French firm for provision of travel agency services, presumably at OECD headquarters in Paris. The United Nations treats such contracts, which are concluded for provision of services, materials and equipment incidental to performance of its functions, as "service contracts" and distinguishes them from "functional contracts", which are concluded for the fulfilment, directly, of its mandate.[2]

5. Functional contracts include, *inter alia*, contracts for employment of United Nations staff members and contracts for the direct delivery of United Nations assistance. The position of the Organization is that such contracts must be interpreted and applied consistently with the internal law of the Organization and the agreements concluded with Governments and other intergovernmental organizations which may be involved in the delivery of United Nations assistance.

Applicable law in United Nations service contracts

6. The United Nations legal opinion cited in your letter was itself based substantially on a study of the subject conducted in 1967 by the International Law Commission.[3] Since that time, there have been a number of developments in the area of international trade law, and in the contract practices of the Organization.[4] The experience of the Organization is derived, essentially, from negotiations with contractors and in the course of settlement of contract claims through the internal mechanism evolved by this Office for negotiated settlement of claims and, only occasionally, arbitration.[5]

UNCITRAL Arbitration Rules

7. The most significant development was the decision of the Organization some six years ago to propose the UNCITRAL Arbitration Rules for insertion into contractual instruments to govern arbitration of claims with private contractors; these Rules assume that a national law determined to be the proper law of the contract will be applicable in the settlement of disputes.[6] However, while the applicable law would be certain where the parties include a choice-of-law clause in the contract, or do so later in an arbitration agreement, the situation is less clear where no law is chosen by the parties.[7] According to the UNCITRAL Rules, the arbitrators, in absence of a choice of law by the parties, determine the applicable law in accordance with the conflict of laws rules which the arbitrators deem applicable.[8] But, again, since the conflict of laws rules are a part of municipal law, the arbitrators must of necessity select a-national law, normally the proper law of the contract, whose conflict rules are to applied.[9]

Choice-of-law clause

8. It is still true that in the majority of cases, contracts concluded between the United Nations and private parties do not, as a matter of principle, contain a choice-of-law clause.[10] However, this deliberate omission has to do more with our concern that parties or courts seized of the matter could form the mistaken view that, despite its immunity from judicial process, the Organization intended, by the choice-of-law clause, to submit to the jurisdiction of the State of the chosen law.[11] An additional reason might be that it is difficult for an international organization to choose a particular national law to govern its contractual relations, and quite often contractors are reluctant to agree on application, exclusively, of a-national law or general principles of law, the precise nature of which is still uncertain and with which they or their attorneys may not be too familiar.[12]

International law

9. By virtue of the public international law character of the Organization, a contract concluded by the United Nations cannot be subjected exclusively to national law, as the jurisprudence of international commercial arbitration indicates, particularly in the case of contracts between States and foreign private parties.[13] In the event of an arbitration, we consider that the inclusion in United Nations contracts of such provisions as are derived from the internal law of the Organization and general principles derived from general conventions in the commercial law area, uniform rules and international commercial usage, otherwise referred to as *lex mercatoria*, is sufficient expression of the United Nations' intent to rely on international law, in its widest sense.[14]

A-national law

10. Furthermore, it has been argued that an arbitrator may select a-national law as the proper law of the contract, to supplement and even supplant any otherwise applicable national law. Once selected by the arbitrator, such a-national law could be applied for the interpretation and application of the contract, as a whole or certain aspects of it, based on a principle generally referred to as *depecage*.[15] This argument has been advanced by a number of scholars and some arbitrators in the case of international commercial arbitration and can, arguably, be adopted in arbitration proceedings involving an international organization and a private party.[16]

Arbitration based on law

11. In our experience, in the course of negotiations with private contractors, we have found an almost universal desire by contractors for certainty of result in the event of arbitration of a claim, which can only be attained if arbitration is based on law. This does not mean, however, that an arbitrator has to adjudicate the dispute as if it were a dispute of a purely domestic nature. It seems undesirable, on the other hand, that an arbitrator should be entirely free to settle a dispute as if he were a conciliator.[17] There must be in this respect a distinction between arbitration at law and arbitration *ex aequo et bono*.[18]

National law

12. We do, therefore, in the formulation of contracts, consult national law and often attempt to follow the substantive requirements of the national law where the contract is formed or will be executed. At times, we have expressly referred to national legislation in specialized fields such as banking, and have even relied on national legislation or case law where this appeared particularly necessitated by the nature of the contract.[19] We do this because we recognize that a contract cannot exist *in vacuo*. On the other hand, we seek to expressly exclude national law where it is to our disadvantage or where it seems to contradict the terms of the contract or infringe on the privileges and immunities of the Organization.

13. There is a growing opinion for a-national law to govern international arbitration, and there would be even more reason for so doing where one of the parties is an international legal person. It seems, however, that there is as yet no

universal acceptance for the notion, expressed by many scholars and international arbitrators over the last two decades, that a new body of law independent of the national and public international legal systems, generally *lex mercatoria*, has emerged and would be applicable to international arbitration.[20]

Settlement of claims

14. We have not had any arbitration conducted under the UNCITRAL Arbitration Rules although many cases arise which have been settled amicably through negotiations on the basis of a review of the merits of the dispute by this Office. In practice, we review the claims on the basis of the contract terms,[21] which we interpret in the light of the proper law of the contract, the internal legal rules of the Organization, where these have been referred to expressly or by implication in the contract, and by application of the general principles of law and commercial practice and usage applicable to the transaction.[22]

Conclusion

15. In the particular case you referred to, relating to a service contract between OECD and a travel agency incorporated in France for provision of services in France, determination of the applicable law may very well depend on the arbitration procedure provided for in the contract and the view an arbitration tribunal might take regarding the relevance of article 1496 of the French International Arbitration Law of 1981.[23] However, it might be possible for OECD to successfully argue for exclusion of the whole or certain provisions of French law (even if this were found to be the proper law of the contract), based on the arguments advanced in paragraph 10 above.

5 February 1988

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2. CONTRACT BETWEEN UNITED NATIONS INSTITUTE FOR DISARMAMENT RESEARCH AND THE INSTITUT FRAN_AIS DES RELATIONS INTERNATIONALES — FINANCIAL RULES 110.10, 110.18 AND 110.19 — DISTINCTION OF CONTRACTS — OBLIGATION TO CALL FOR BIDS AND PROPOSALS PRIOR TO CONTRACTING — FINANCIAL REGULATION 10.5

Memorandum to the Senior Legal Officer, Legal Liaison Office, United Nations Office at Geneva (UNOG)

1. This responds to your memorandum of 29 April 1988 concerning the above-captioned subject. We have considered your memorandum and the documents attached thereto, and our views on the issues raised in the memorandum are as follows.

Whether the proposed contract has to be submitted to the United Nations Office at Geneva (UNOG) Committee on Contracts

2. As you have noted, the Financial Regulations and Rules of the United Nations are made applicable to UNIDIR by article VII, paragraph 7, of its Statute. Since the proposed contract provides for a payment of $40,000 by the United Nations to the Institut fran_ais des relations internationales (IFRI) for the preparation of the intended study, the contract would have to be submitted to the Committee on Contracts at the United Nations Office at Geneva by reason of United Nations Financial Rule 110.17(d)(I).

Whether it is necessary to call for bids or proposals in respect of the proposed contract (Rule 110.18)

3. We agree with your view that, in terms of financial rule 110.18, bids or proposals should be called for in respect of the proposed contract, unless an exception were to apply under rule 110.19. As you point out, the exceptions which might apply in the instant case are those specified in rule 110.19(f) and (h).

Applicability of rule 110.19(f)

4. As regards the applicability of financial rule 110.19(f) to the proposed contract, we are unable to endorse your view that that subsection is inapplicable because the proposed contract is not a contract which "relates professional services", but is "a contract for a work to be delivered". We appreciate that, when a contract provides for an interconnected supply by a contractor both of professional services and goods, there is sometimes considerable difficulty in determining whether the contract is one for the supply of professional services within the meaning of rule 110.19(f). The difficulty is particularly great when the entirety of the services to be supplied has as its output a physical item to be delivered (in this case, the written study in question). We do not feel it useful to refer to national legal rules as an aid to the resolution of this problem, because of the different tests adopted by those systems (these differences are indicated in the *International Encyclopedia of Comparative Law, vol. VIII, chapter 8*, "Contracts for Work on Goods and Building Contracts" (Werner Lorenz, II, "Types of Contract", A,2). If on a practical assessment of the circumstances it is unclear whether a contract is to be categorized as one for the supply of professional services, we suggest the application of the test contained in article 3(2) of the 1980 Vienna Convention on Contracts for the International Sale of Goods,[24] which test is intended to identify non-sales contracts to which the Convention does not apply. That provision is as follows:

> "This Convention does not apply to contracts in which the preponderant part of the obligations of the party who furnishes the goods consists in the supply of labour or other services."

5. Applying this test, we are of the view that the preponderant part of the obligations of IFRI consists in the research and analysis required to produce the study (which in our view are professional services), and not in the supply of the document embodying in written form the results of those activities. Consequently, rule 110.19(f) would be applicable.

6. We are also unable to agree that services which would be classified as professional services when supplied by an individual or individuals would cease to be so classifiable if supplied by an entity with legal personality. In our view, the classification of the services would depend on their nature, and on the legal character of their supplier.

7. The above paragraphs reflect the practice of the Headquarters Committee on Contracts.

Whether it is necessary to call for bids or proposals despite the applicability of rule 110.19(f)

8. In considering this question, it should be noted that one of the main objectives of financial regulation 10.5, dealing with contracts and purchases, and of the rules promulgated to implement that regulation, is that the Organization should obtain for its contracts the most advantageous terms available, and in particular, goods or services of high quality at a fair price. The principal mechanism employed in the Rules to secure this objective is the obligation to call for bids or proposals prior to contracting, and the award of the contract on a comparison of the bids or proposals received (rules 110.18, 110.20, and 110.21). While rule 110.19 in specified cases allows exceptions to the obligation to call for bids or proposals, it should not in our view be interpreted as derogating from the obligation to secure for the Organization the most advantageous terms available in relation to contracts covered by the exceptions. Authorized officials engaged in purchasing, renting or selling activities (rule 110.16) should, therefore, adopt procedures appropriate to circumstances of each contract directed to securing such terms. Those procedures may range from calling for bids or proposals (which is not excluded by rule 110.19 — see the opening words of that rule) to informal market surveys. Where a contract has to be submitted to a Committee on Contracts in terms of rule 110.17, the procedures adopted and the proposed terms of the contract would be subject to review by that Committee, which would thereafter make a recommendation to the Assistant Secretary-General for General Services pursuant to that rule. The above account reflects the understanding and practice at Headquarters, where, in addition, when the calling of bids or proposals is dispensed with, the Committee on Contracts always records the reasons therefor, why the chosen Contractor was selected, and why the price or fee charged is considered reasonable.

9. In relation to the contract under consideration, therefore, while UNIDIR is not obliged to call for bids or proposals, it would have to satisfy the Committee on Contracts at the United Nations Office at Geneva that it would be unproductive to call for bids or proposals in respect of the professional services in question, and that the proposed contract with IFRI is the most advantageous which is available to the Organization.

Applicability of rule 110.19(h)

10. We agree that it would be possible to award the contract in question without calling for bids or proposals if the Director-General of the United Nations Office at Geneva or an official duly authorized by him (Financial Rule 110.10) determines that competitive bidding or calling for proposals will not give satisfactory results. The reasons for that determination must, under rule 110.19(h), be recorded.

16 May 1988

3. STANDARDS OF EVALUATION OF THE WORK OF AN EXTERNAL CONTRACTOR — ISSUE OF PAYMENT TO CONSULTANTS

Memorandum to the Deputy Executive Director, United Nations Fund for Population Activities

1. This responds to your memorandum of today's date on this subject.

2. For a legal point of view, in evaluating the work of an external contractor, such as a consultant engaged on Special Service Agreement, a distinction must be made among three separate standards:

(*a*) Whether the contractor did what he was obliged to do under the terms of the contract, which is relevant to whether he should be paid;

(*b*) Whether, in performing his obligations, a contractor's level of performance was as high as the Organization expected it would be, which is relevant to whether he should be employed again, for the same sort of work or for any work;

(*c*) Whether the product is usable for the purpose intended, which is relevant to whether and how it is to be utilized.

3. Obviously, these three standards are related, and in an ideal world they would be identical. However, a contractor may have fulfilled his contractual requirements and his product may still not be usable, either because he was not really suitable for the project (in which case he should not be employed again on a similar task), or because the contract may not have specified his task properly, or because the task may have been misconceived. In all these situations the contractor must be paid, because the contract so requires, but it would be appropriate to engage in some internal investigation to determine the cause of the revealed discrepancy among the various standards, i.e., why an unsuitable contractor was selected or why the task given to him was not appropriately specified or was otherwise faulty.

4. There is yet another legal/practical reason why a contractor should be paid in full whenever he arguably has fulfilled the terms of his contract, or at least partially if there is substantial performance. In this connection, it should be noted that the risk of selecting an inappropriate contractor falls on the Organization, unless the former misled us as to his qualifications. If full payment is not made and the contractor insists, the Organization is required to offer some means of settling the resulting dispute — usually ad hoc arbitration; however, such a procedure (and the preceding negotiations) is inherently expensive, and an arbitrator is most unlikely to find entirely against a contractor so that at least a partial award is likely to be made in his favour. This is aside from the question of whether the Organization desires to get a reputation, in some circles, of being unreasonable in settling contractual obligations.

5. All this does not mean, however, that the Organization must or should accept clearly unsatisfactory work, e.g., work that manifestly does not come up to contractual standards, or work that does not come up to the abilities of the

contractor because he did not apply himself sufficiently. As a counterpart to the caution at the end of the last paragraph, it should be said that the Organization should also not get the reputation of uncritically accepting and paying for unsatisfactory services.

6. To sum up, our view is that the most advisable procedure when a contractor submits his work is to determine, in the light of the relevant circumstances (many of which have been mentioned above), whether it should be rejected, in which case of course no payment at all should be made. If the work is not rejected outright, full or appropriate partial payment must be made. It would appear that in at least some of the cases highlighted by the Board of Auditors, on a proper evaluation the work submitted should have been rejected.

20 October 1988

Copyright

4. QUESTION OF WHETHER A MAGAZINE OF THE UNITED NATIONS DEVELOPMENT PROGRAMME CONSTITUTES A TRADE MARK INFRINGEMENT — COPYRIGHT ISSUES — TRADE MARK LAW IN THE UNITED STATES

Memorandum to the Officer-in-Charge, Office of the Administrator, United Nations Development Programme

1. Your memorandum of 20 June, with which you attached a letter addressed to the Administrator dated 15 June by a firm on behalf of a publishing company, requested our opinion on the validity of the grounds advanced by this Company for objecting to publication of the United Nations Development Programme *World Development* magazine. In this connection, you will find enclosed a Memorandum of Law on the applicability of the United States Trademark Act (The Lanham Act) (15 U.S.C. 1114 and 15 U.S.C. 1125), upon which the Company relies for its objections.

Background

2. We note from the information you supplied us that the Division of Information of UNDP began sometime this year publication of the UNDP *World Development* magazine, and that the first two issues appeared in March and May 1988. In June, UNDP received the letter from the law firm on behalf of the Publishing Company, objecting to the use by UNDP of the title "World Development", on the grounds that the Company publishes a monthly journal with this title, since 1973, which is devoted to the study and promotion of development among nations. The Publishing Company claims that its title is a trade mark and the use of this title by UNDP infringes on its rights.

3. As you will note from the memorandum of law, our conclusion is that the Company has no legal grounds to object to continued publication of the *World Development* magazine by UNDP on the following grounds:

(*a*) While the *World Development* journal is copyrighted, its title is not covered by the copyright protection, since words and short phrases such as names, titles, and slogans are not protected by copyright under United States law [37 CFR Sec. 202.1(a) (1987)];

(*b*) The words "World Development" are merely descriptive of the contents of the journal published by the Company, and have not acquired a secondary meaning identifying them with the Company; the Company cannot therefore claim statutory protection;[25]

(*c*) The UNDP magazine is essentially for the propagation of the work of UNDP and is distributed free of charge to the public at large; it is not a scholarly journal, which the Company's publication is, and cannot therefore be the subject of a valid statutory claim for infringement of trade mark on the basis of unfair competition (The Lanham Act);

(*d*) The design of the magazine and the presentation of its title are distinctively different from the *World Development* journal published by the Company and there can therefore be no common-law claim for infringement of the trade mark based on possible confusion between the two in the minds of the readers, since in any case both magazines are aimed at different audiences.

4. In the light of our above conclusion, we consider that the objections by the Company to continued publication by UNDP of the *World Development* magazine cannot be sustained. However, we feel uncomfortable that the title of the UNDP magazine and the journal published by the Company are identical. In the decided cases we have reviewed and where allegations of trade mark infringement based on similarity of titles have been denied, there have always been certain variations in those titles so that though similar they were not identical. For this latter reason, UNDP may wish to consider whether, while retaining the words *World Development*, the title of the magazine could be varied so as to avoid the charge of possible confusion, though such a charge in this case might be difficult to prove. For example, the UNDP magazine could be entitled "UNDP and World Development", as already appears to be the case; presently UNDP is divorced from the actual title block "World Development".

5. However, should it be decided to retain the present title, you may wish to consider a reply to the law firm representing the Company along the lines of the attached text.

28 July 1988

Dear …

This responds to your letter of 15 June, regarding the UNDP publication *World Development*, in which it is alleged that the use of the title "World Development" on the UNDP magazine could lead to confusion between that publica-

tion and the monthly journal of the same title published by the (name of the Company), and thus constitutes an infringement of the rights of the Company.

UNDP does not accept the allegations contained in your letter regarding its publication. The title "World Development" was selected by UNDP to appropriately describe the subject matter of the magazine articles, which are devoted to propagating the activities of UNDP within its mandate, granted by the General Assembly of the United Nations, to promote world development. In fact, unlike the journal published by your Company, the UNDP magazine is a journalistic feature-type publication, principally staff written, freely distributed to the public at large and its design and title logo are different. Therefore, we see no likelihood of confusion between the two publications.

Furthermore, UNDP disputes that the title "World Development" can be claimed as a valid trade mark. The words "World Development" in themselves in the title are merely descriptive of the contents of the journal and in absence of proof of a secondary meaning identifying the title with the publisher, no protection as a trade mark is possible under United States law. Accordingly, UNDP does not accept that continued use of the title "World Development" on the UNDP magazine causes confusion between the two publications, or that it constitutes any infringement of the rights of the Company.

UNDP World Development Magazine Memorandum of Law on Claim of Trade Mark Infringement

I. Introduction

This memorandum concerns the use of the title "World Development" for an information magazine published by United Nations Development Programme. UNDP has published two issues of the magazine, one in March and the other in May 1988, in an effort to educate the public about UNDP projects worldwide. On 15 June 1988, UNDP received a letter written on behalf of the English publishing company (the Company), objecting to the use of the magazine's title. The Company asserts that it has published a monthly journal since 1973 entitled *World Development*, which is devoted to the study and promotion of development among nations. The Company claims that the title is a trade mark and that UNDP's use of the title constitutes an infringement of that trade mark.

II. Scope of memorandum

This memorandum is limited to an analysis of the substantive elements of trade mark law in the United States.

There are two provisions of the United States Trademark Act (The Lanham Act) which provide protection to a title — 15 U.S.C. 1114 and 15 U.S.C. 1125.[26] Section 1114 protects registered trade marks, while section 1125 protects registered or unregistered trade marks alike. There is, however, no greater substantive protection granted a registered trade mark — registration confers only procedural advantage.[27] Because of this, the elements of proof required to establish a trade mark infringement under either section are essentially the same. Therefore, the following analysis will determine the probability of a successful suit under section 1114, and then apply that reasoning to an action if maintained under section 1125. The memorandum will then conclude with an opinion that a suit filed by the Company under either provision would be difficult to maintain,

and that UNDP can likely continue to publish the magazine *World Development* without legal repercussions.

III. Analysis of case under 15. U.S.C. 1114

Section 1114 grants protection for trade marks which are registered as provided in the Lanham Act. Because the Company does not maintain that the title "World Development" has been registered, nor claim any protection under section 1114, there is every reason to believe that the title has not been registered. However, because there is no assurance that the title is not registered, the following analysis will start with the assumption that the Company did in fact register the title.[28]

Trade marks

A trade mark is anything which is adopted and used to identify the source of origin, and which is capable of distinguishing that source from goods emanating from a competitor. A trade mark may consist of a word (e.g., a brand name), or a group of words (e.g., a slogan or a jingle) or a pictorial representation or other symbol or some other device (e.g., the shape of a container), or of a combination thereof.[29] The title "World Development" does have characteristics which could satisfy the definition of a trade mark.

Valid registration of trade marks

To succeed in a case against UNDP, the Company has first to establish that it has valid trade mark rights.[30] Even if the title has been registered, that does not automatically mean that the registration is valid; registration provides only prima facie evidence of a trade mark.[31] A registration is considered invalid if it does not fall into specific categories or fulfill certain necessary assumptions, and although registered, an invalid registration receives no protection under trade mark law.[32]

Trade mark protection for a title

There are four categories of terms for a title: generic, descriptive, suggestive, and arbitrary or fanciful.[33] A generic term is one which is commonly used as the name or description of a kind of goods and receives no trade mark protection. A descriptive term conveys an immediate idea of the ingredients, qualities, or characteristics of the goods and is entitled to trade mark protection only if the descriptive term has acquired secondary meaning in the public's mind. A suggestive term falls between the merely descriptive category and the arbitrary or fanciful category. Suggestive terms are entitled to trade mark protection without a showing of secondary meaning. The strongest trade mark protection is granted to arbitrary or fanciful terms — terms which have no relation to the nature of the product they represent.

The title "World Development" falls into the category of descriptive terms because it only gives the reader literal information about the contents of the magazine. There is no "suggestive" inference to be made from the terms "World Development" beyond that which ordinarily accompanies the terms in everyday usage. Because the title is a descriptive term, the Company has to show that the title has acquired a secondary meaning in order to establish it as a valid trade mark.

To satisfy their burden of proving that "World Development" has acquired a secondary meaning, the Company must show that the relevant buyer class associates the name with the product or the source.[34] Since the existence of secondary meaning is a factual question, there can be no abstract test, quantitative or qualitative, to determine what level of consumer association is sufficient. The court in *American Association*, however, considered the following factors relevant on this question: (*a*) the duration and continuity of use of the mark; (*b*) the extent of advertising and promotion and amount of money spent thereon; (*c*) figures showing sales of plaintiff's product or number of people who have viewed it; and (*d*) identification of plaintiff's and defendant's respective markets.[35] It is impossible to determine whether the Company periodical has acquired a secondary meaning without further information. It can be said in general, however, that establishing a secondary meaning for the title of a periodical presents special problems. In most cases, the repetitious use of similar titles by competing publishers prevents the establishment of a secondary meaning for a descriptive title.[36] It is in fact more likely that the public would associate the United Nations with a periodical entitled "World Development", than with an academic institution.

Infringement

Assuming the Company could claim that the title "World Development" has acquired a secondary meaning and therefore has valid trade mark protection, there still is infringement only if the words or designs used by UNDP are so identical with, or so similar to, the Company's that they are likely to cause confusion.[37] The protection against confusion is not intended to create exclusive rights in the use of words; rather it is designed to prevent a competitor from taking away a business's goodwill trade by deceiving the consuming public into buying another product. "A trade mark only gives the right to prohibit the use of it so far as to protect the owner's goodwill against the sale of another's product as his. It does not confer a right to prohibit the use of the word or the words. It is not a copyright."[38] Therefore, because UNDP does not sell its product, and does not present a threat to the Company-buying public, the Company cannot successfully allege any infringement of its trade mark by UNDP.

Likelihood of confusion

The test at common law has sometimes been predicated in terms of likelihood of consumers being deceived by use of a mark similar to that of another.[39] It is perhaps on the basis of this that the Company asserts in their letter that UNDP's use of the title identical to the Company's could cause "readers to confuse these publications or mistakenly assume both have the same publisher or common sponsorship". We have found no case on this point, but in a case filed to prevent the *registration* (not *infringement*) of an "identically named product" (under 15 U.S.C. 83), the Circuit Court held that the identity of the words rendered a showing of likelihood of confusion "irrelevant".[40] However, there are strong factual arguments against this allegation. Although the words used for titles are identical, the question of whether there is confusion cannot be judged only by looking at the words. One has to look at how the mark (the title) ap-

pears.[41] A close look at the titles reveals significant differences. The logo of the United Nations appears in the "o" of UNDP's "World Development", while the Company has placed a different, distinctive mark to the side of the title words. These differences may be sufficient to defeat a claim of "identity."

To determine the likelihood of confusion, the court considers the general impression of the ordinary purchaser, buying under the normally prevalent conditions of the market in buying that class of goods.[42] To determine if the words or design create probable confusion, two methods have been utilized: the marks themselves may be compared and contrasted, or evidence may be introduced to show actual instances of confusion in the purchase of goods.[43]

Comparing and contrasting the marks

The court in *Scott* identified the following factors as necessary in an analysis of comparative marks to determine the likelihood of confusion: (*a*) strength of plaintiff's designation; (*b*) the degree of similarity between the plaintiff's and defendant's marks; (*c*) the relative nature of products involved; (*d*) the marketing of the products; (*e*) the degree of care exercised by the consumer; and (*f*) frequency of purchase. The principal focus in analysis is whether the consuming public is likely to be confused as to the origin or sponsorship of goods.[44]

(1) *Strength of designation*

Common law has established that where trade marks are merely suggestive or descriptive, they are "weak marks" affording protection to the owners only in the narrow and restricted field in which they have been applied.[45] As discussed previously, the Company's mark is descriptive and thus gets only "weak" protection.[46] As a result, it can be said that if there is a trade mark protection for the Company, this protection cannot reach a high level.

(2) *The degree of similarity between the marks*

As the court distinguished in *McGraw-Hill Pub. Co. v. American Aviation Association*, 117 F.2d 293, 295 (1940), differences in titles can be established by regarding the size and shape of the letters used. In *McGraw*, the court decided that there was no likelihood of confusion because the registered title had all capital letters and the opponent title had capitalized only the first letter. Further differences were seen in that the registered title's first letter had a pointed top while the other title was flat. Analysing the title "World Development" on the respective periodicals reveals an even greater disparity than that found sufficient by the court in *McGraw*. The Company's title uses bigger letters for "World" than for "Development." Furthermore, each word of UNDP's title fills the entire line, while the Company's title centres the word "World" over the word "Development". Additionally, UNDP's title is printed on a distinctive yellow tag, while the Company simply prints the title on the white cover of the periodical. Another factor which could weigh in favour of distinguishing the periodicals through a comparison is that the respective sources are mentioned on the front side of each periodical.

(3) *Relative nature of the products*

When considering the relative nature of the products, the court determines whether the item is used by different groups of purchasers for different purposes.[47] In the present case, beyond the fact that both periodicals deal with the same topic of world development, they have little in common. The Company's "World Development" is a highly specific, scientific magazine, written in small type, and containing articles of a high intellectual grade. In contrast, UNDP's "World Development" is a public information outlet for UNDP projects. The pages contain many large pictures and more spacious typesetting, and the intent is not to inform a scholarly audience of the technical issues of development, but rather to allow "decision-makers, teachers, citizens' groups, non-governmental organizations and the media … [to] better understand what UNDP does, how it works and why it makes a difference."[48] Because of the differing intent, intellectual grade and format of the periodicals, the "purchasers" are vastly different. There is little likelihood of purchaser confusion between the two sources — even the most cursory review of the content, format or titles would reveal the difference.

(4) *Marketing of the products*

It is likely that the Company markets its periodical mainly through paid subscriptions. UNDP, however, does not sell its periodical and therefore has no provisions for paid subscription. Even if the Company in fact sells a large portion of their periodicals at bookstores or other similar outlets, the fact that UNDP's publication is free would make any confusion between the two unlikely. The only place the marketing channels can cross would be at libraries where both periodicals are available. In that situation, however, there would be no *purchasing* public who could be misled.

Furthermore, the distribution channels utilized by UNDP are unique. UNDP distributes its *World Development* through its information offices in the countries where it is engaged. The periodicals are also sent to agencies, organizations, etc., which are interested in the work of UNDP and request information. There is little possibility of this periodical crossing into the traditional trade channels of a "for profit" publication. Because there is little possibility of a mix between the channels of trade, there is little possibility of the consumer confusion that trade mark law seeks to prevent.

(5) *Degree of care exercised by consumer*

In *Scott*, the court made a distinction between sophisticated and normal purchasers, finding that sophisticated purchasers were less easily confused and more able to determine the difference between similar items.[49] The Company's periodical is, as previously discussed, a highly scientific magazine with a subsequently sophisticated readership. The [Company] readers, therefore, will be able to recognize the differences between the two periodicals and suffer minimal confusion.

Furthermore, the purchasers of the Company's periodical take a decisive choice when purchasing the periodical — the purchasing of the magazine is the result of a well-considered decision. The present case, therefore, is distin-

guished from the case of *Playboy Enterprises, Inc. v. Chuckleberry Pub., Inc*., 687 F.2d 563, 566 (1982), in which the court saw a likelihood of confusion because the "ultimate decision to buy is typically impulsive". Moreover, the court in *McGraw* determined that an audience comprised of mail subscribers is not highly susceptible to confusion.[50] This is likely to be the case with the purchases of the Company periodical.

(6) *Frequency of purchase*

Another argument that serves to differentiate the two periodicals and mitigate against confusion is that the magazines are published in different periods: the Company's *World Development* is published monthly while UNDP's is published every second month.

Summary

Gathering together all the elements involved in a comparison of the marks, there are not enough points of similarity between the UNDP periodical and the Company's to support an inference of confusion to justify a finding of trade mark infringement.

Evidence of Actual Instances of Confusion

The second method by which the Company could prove the existence of a likelihood of confusion is to introduce evidence showing actual instances of confusion in the purchase of goods.[51] The Company did not mention any actual case of confusion in their communication, and because of the previously discussed differences between both periodicals, there probably will be no actual case of confusion. Even if, however, there is one actual case of confusion, this will not necessarily be convincing evidence. In the *McGraw* case, there was an affirmative showing in evidence of mistakes in personnel and in addressing letters between the two companies involved. The court found that both types of mistakes are often made even with old, well-established concerns, and that "a publisher though he has a registered trade mark cannot be protected from all of the inadequacies of human thought and memory … Probable confusion cannot be shown by pointing out that at some place, at some time, someone made out a false identification."[52] Using this analysis, it is not probable that the Company will be able to show sufficient evidence to sustain a finding of likelihood of confusion between the two periodicals at issue.

UNDP's Intent

Although intent is not an element of trade mark infringement, intent to pass off goods as the product of another "raises an inference of likelihood of confusion".[53] UNDP has no intent to deceive the public into thinking its mark represents the Company publication. First, UNDP's reputation is outstanding, and it does not need to steal another organization's goodwill. Second, because UNDP distributes its magazine for free, and is seeking no profit from such distribution, it cannot be said that UNDP's periodical is "parasitic upon plaintiff's goodwill", much less manifesting any attempt to "palm off its wares" for those of the Company.[54]

The reason that UNDP uses the title "World Development" is that this is a descriptive way of informing the public of the work of UNDP and the contents of the magazine. As the court in *McGraw* held: "That magazines may be described by their subject matter is too clear to be doubted".[55] UNDP's intent in using the title for its magazine was not to traffic in the Company's market, to infringe its trade mark, to confuse the trade or public, or to exploit any goodwill associated with the Company's mark, and thus will not create any inference of trade mark infringement in a suit by the Company.[56]

The fact that a defendant has continued to use a mark after an objection has been construed as evidence of bad faith in some instances.[57] Despite this fact, the letter the Company has sent to UNDP does not necessarily mean that the latter must cease use of the name to show goodwill to the former. An exception to the inference of bad faith occurs when the defendant is advised and believes that no infringement exists and is standing on his rights.[58]

Result

UNDP's use of the title "World Development" does not in our view infringe the rights of the Company under 15 U.S.C. 1114, even if one assumes that the Company's title is a registered, valid trade mark.

IV Infringement under 15 U.S.C. 1125

Section 1125 contains a provision that prohibits false designations of origin and false descriptions of goods and services even when federally registered trade marks are not involved. The Company alleges that UNDP's use of the same title results in a false designation of origin. To maintain a suit under this claim, the Company would have to first establish that the use of their title has resulted in a protectible, valid trade mark. The assumptions for establishing this are the same as under section 1114, and the weakness of the mark discussed earlier would have the same negative repercussions for the Company if they file a suit under section 1125. Even assuming that the Company has a valid trade mark, the publishing company bears the same burden as under section 1114 in showing likelihood of confusion by comparing the marks or by putting into evidence actual instances of confusion of purchases. The difficulties this showing would entail, as detailed in the discussion under section 1114, suggest that an action under this section would also fall short of success. In sum, because of the reasons discussed under section 1114, UNDP's use of the title "World Development" does not infringe upon the Company's periodical under the provisions of 15 U.S.C. 1125.

V. Trade mark dilution claim

The Company claims that the UNDP periodical will have a negative impact on the reputation of their trade mark. Common law provides a cause of action for "trade mark dilution" if the use of a mark similar to the plaintiff's has an adverse effect on the value of plaintiff's mark by potentially depriving it of all distinctiveness.[59] In a case of a trade mark dilution, there is no required showing of actual confusion or the likelihood of confusion. Instead, the plaintiff must establish the mark's distinctiveness. The distinctiveness may be the result of the mark's extraordinary uniqueness or a considerable advertising effort.[60]

As previously discussed, the Company's mark may not even be protectible, but if it is, it is "weak" and therefore gets only weak protection. Even in the *Scott* case, the court rejected the notion of extraordinary uniqueness for the mark "Micro Nauts" (which is more fanciful than the title "World Development"), because the prefix "micro" is used by many other trade marks in the same business, and the term "nauts" is merely a shortened version of the term "nautical".[61] Such a challenge could also be launched against a similar claim by the Company.

Additionally, a dilution of the advertising value of a mark is only possible when there is wide or extensive advertising.[62] It is doubtful whether the advertising the Company maintains is sufficient to satisfy this assumption. Moreover, the Company has the burden of establishing that the use of the title "World Development" by UNDP could tarnish the "affirmative associations" that a mark of the Company may convey. Considering the stature of UNDP, and the great differences in the periodicals themselves, this would be difficult if not impossible.

VI. Possible Recovery of Damages in an Infringement Action

If the Company is successful in a suit against UNDP, 15 U.S.C. 1117 provides remedies. The majority of infringement suits are equity actions and an injunction against the infringing party is the most common remedy. In an action seeking injunctive relief, the plaintiff does not need to show actual damage, but needs only to show likelihood of damage.[63] Section 1117 does, however, provide for damages of lost profits resulting from infringement. As a general rule, the plaintiff must show lost sales to be awarded damages; other courts have refused an award of damages on the ground that there was no competition between the parties.[64] Since it is likely that distribution of UNDP's free magazine will not result in any lost profits for the Company, and is not really a "competitor", damages are probably not to be awarded.

Exemplary damages have been awarded, but the infringement must be wilful and wanton to justify the award.[65] There is, therefore, little fear of such damages being assessed against UNDP. Finally, the Supreme Court has held in *Fleischmann Corp. v. Maier Brewing*, 386 U.S. 714, 721 (1966), that attorney's fees are not granted in trade mark infringement cases.

VII. Privileges and immunities

The United Nations, including UNDP, is, by virtue of section 2 of the Convention on the Privileges and Immunities of the United Nations, immune from every form of legal process, except where expressly waived in a particular case.[66] However, section 29 of the Convention requires the Organization to make provisions for appropriate modes of settlement of, among others, disputes of a private law character to which the United Nations is a party. In the event of a formal claim by the Company, therefore, the United Nations would be obligated to offer arbitration as a possible mode of settlement of the dispute or to waive its immunity for the purpose of adjudicating that particular case.

27 July 1988

5. LEGAL STATUS OF NATIONALLY RECRUITED PROJECT PROFESSIONAL PERSONNEL — SECTION 18 OF THE 1946 CONVENTION ON THE PRIVILEGES AND IMMUNITIES OF THE UNITED NATIONS — STANDARD BASIC ASSISTANCE AGREEMENTS

Memorandum to the Principal Advisor, Project Personnel, Policy Division, Bureau for Programme Policy and Evaluation (BPPE)

1. This is in reply to your memorandum of 21 January 1988 requesting our advice on the legal status of nationally recruited project Professional personnel (NPPP) in the light of the proposed revision of chapter 4500 (Project Personnel) of the United Nations Development Programme Manual and the Model Service Contract therein.

2. The present legal status of NPPP is regulated by the relevant provisions of the Standard Basic Assistance Agreement (SBAA), the Manual and the Model Service Contract. None of these documents, in their present form, contains or could be interpreted as providing the ground for NPPP to be entitled to a status of staff members or officials of the United Nations and organizations of its system.

3. The legal status of officials of the Organization is governed by Article 105 of the Charter which, *inter alia*, prescribes that they "… shall similarly enjoy such privileges and immunities as are necessary for the independent exercise of their functions in connection with the Organization".

4. Some detailed provisions on privileges and immunities are incorporated in the 1946 Convention on the Privileges and Immunities of the United Nations. Section 18 of that Convention provides that "officials" of the United Nations, among other matters, shall be immune from legal process in respect to words spoken or written and all acts performed by them in their official capacity be exempt from national taxation, be immune from national service obligations, and be accorded the same privileges in respect of exchange facilities as are accorded to the officials of comparable ranks forming part of diplomatic missions, etc. The General Assembly has officially interpreted "official" to mean all staff members of the United Nations with the exception of those who are locally recruited and paid on hourly rates.[67]

5. These privileges and immunities are granted to officials in the interests of the United Nations and not for the personal benefit of the individuals themselves. Such facilities constitute the so-called functional immunities as they are applied only during the performance by staff members of their official functions. In addition, the Convention also contains the provisions regulating the legal status, privileges and immunities of experts performing missions for the United Nations (this category is called "experts on mission").

6. Article IX, entitled "Privileges and immunities", of the Standard Basic Assistance Agreement, provides for an obligation of the Government con-

cerned to apply the provisions of the 1946 Convention to "… the United Nations and its organs, including UNDP and United Nations subsidiary organs acting as UNDP Executing Agencies … and to their officials …". Paragraph 4(a) of the article contains a special exception related to locally recruited personnel. It derives from this provision that privileges and immunities of the 1946 Convention should be accorded to all persons performing services on behalf of the UNDP, "…other than Government nationals employed locally". It is understood that the term "Government nationals employed locally" includes NPPP.

7. Pursuant to the Manual, NPPP do not have the status of staff members of the United Nations. Therefore, they are not covered by the staff rules of the Organizations of the United Nations system.

On the basis of the provisions of the SBAA and the Manual cited above, the Model Service Contract in section V correctly requires that the subscriber shall not be considered in any respect as being a staff member of the executing agency and shall neither be covered by the Executing Agency Staff Rules and Regulations nor by the Convention on the Privileges and Immunities of the United Nations.

8. Negotiations with various countries on the Standard Basic Assistance Agreement clearly show that the Governments are highly reluctant, if not expressly opposed, to granting any privileges and immunities to their nationals employed locally for assisting UNDP in carrying out its projects. According to our files, none of the existing Standard Basic Assistance Agreements accords any such immunities, facilities or privileges to locally recruited nationals.

9. The 1987 Report of the Consultative Committee on Substantive Questions (CCSQ) (section VI of which you kindly provided us with) clearly indicates that governments were frequently not in agreement to providing NPPP even with limited functional immunity by including the relevant provision to this effect in the project document. It seems that to negotiate such a provision on limited functional immunity of NPPP in project documents would require the relevant substantive changes in the text of the Standard Basic Assistance Agreement with all related implications.

10. Therefore, at this stage it does not appear desirable to single out NPPP as a new category of "staff". However, if in some cases there is a strong necessity to extend several functional immunities to certain NPPP, that could be done on an ad hoc basis. Such a possibility is not completely ruled out by the Standard Basic Assistance Agreement itself. In accordance with article IX, paragraph 4(a), the government indeed is not obligatorily required to grant privileges and immunities to its nationals employed locally. However, there is a condition in the Agreement that that shall be done "… except as the Parties may otherwise agree in project documents relating to specific projects…".

11. As to the Service Agreement used by the International Labour Organization, please be advised that the Agreement contains certain inconsistencies and, in our opinion, requires several clarifications. For example, paragraph 4 provides for a non-applicability of the Staff Regulations of ILO. At the same time, in paragraph 12 it is mentioned that the provisions of annex II to the ILO Staff Regulations could be applied to the signatory as if he were a fixed-term official. In addition, we believe that such terms as "reasonable period" (paras. 15 and 18), "serious misconduct" (para. 17) and "any favour" (para. 20) should be specified from the legal point of view.

12. The foregoing comments and remarks constitute our preliminary views on the matter, pending specific proposals in this regard.

11 February 1988

Privileges and immunities

6. STATUS OF THE UNITED NATIONS AND UNITED NATIONS AGENCIES IN RELATION TO CONVERSION TAX — SECTIONS 5(B), 7(A) AND 18(E) OF THE CONVENTION ON THE PRIVILEGES AND IMMUNITIES OF THE UNITED NATIONS — ARTICLE 34 OF THE VIENNA CONVENTION ON DIPLOMATIC RELATIONS OF 1961

Note verbale to the Permanent Representative of a Member State

The Legal Counsel of the United Nations presents his compliments to the Permanent Representative of (name of State) and has the honour to refer to the question of the thirty percent currency conversion tax which has, since May 1987, been applied in (name of State) to the United Nations including the United Nations Development Programme and other agencies of the United Nations with programmes in that State.

The Legal Counsel has been advised that the official accounts located in (name of State) of the United Nations, UNDP and other United Nations agencies, as well as project accounts and the personal accounts of staff, have been affected.

In the view of the Legal Counsel the status of the United Nations, UNDP and other United Nations agencies located in (name of State), in relation to the matter of tax and the convertibility of currency, may not have been fully appreciated and should be urgently clarified.

As the Permanent Representative of (name of State) is aware, the Agreement of 29 April 1977 between UNDP and (name of State) deals in article IX with privileges and immunities and provides, in particular, that the Government "shall apply to the United Nations and its organs including the UNDP and … their property, funds, and assets, and to their officials … the provisions of the Convention on the Privileges and Immunities of the United Nations."

The Convention on the Privileges and Immunities of the United Nations states, in section 7(a), that the United Nations and its assets shall be exempt from all direct taxes and, in section 18(b), that officials of the Organization shall be exempt from taxation on the salaries and emoluments paid to them by the United Nations.

The Convention also provides, in section 5(b), that the United Nations "… shall be free to transfer its funds, gold or currency from one country to another or within the country and to convert any currency held by it into any other

currency". The Convention states, in section 18(e), that officials of the United Nations shall be accorded "the same privileges in respect of exchange facilities as are accorded to the officials of comparable ranks forming part of diplomatic missions to the Government concerned". It should be noted in this connection that the Vienna Convention on Diplomatic Relations of 1961,[68] to which this State is a party, provides in article 34 that a diplomatic agent shall be exempt by the receiving State "… from all dues and taxes, personal or real, national, regional or municipal".

It is the opinion of the Legal Counsel that the 30 per cent currency conversion tax, if applied to the United Nations, UNDP and other United Nations agencies with programmes in (name of State) and their staff, would constitute a direct tax within the meaning of section 7(a) of the Convention on the Privileges and Immunities of the United Nations. It also would be contrary to the intent of the provisions of section 18(e) of the Convention on the Privileges and Immunities of the United Nations as read with article 34 of the Vienna Convention on Diplomatic Relations.

The Legal Counsel trusts that the appropriate adjustments will be made in the implementation of the currency conversion tax by the competent authorities in (name of State) to ensure concordance with the international obligations noted above.

9 February 1988

General Assembly

7. STATEMENT BY THE LEGAL COUNSEL CONCERNING THE DETERMINATION BY THE SECRETARY OF STATE OF THE UNITED STATES OF AMERICA ON THE VISA APPLICATION OF MR. YASSER ARAFAT, MADE AT THE 136TH MEETING OF THE COMMITTEE ON RELATIONS WITH THE HOST COUNTRY, ON 28 NOVEMBER 1988*

1. In the meeting which took place this morning, a number of representatives referred to the statements issued by the Secretary-General and by the President of the General Assembly regarding the denial of the visa application of Mr. Yasser Arafat. It had not been my intention, therefore, to make a statement in the meeting, but in the light of the statements made by a number of representatives, and in particular that of the host country, I wish to make the following remarks.

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*Originally appeared as a document of the Sixth Committee on Relations with the Host Country of the General Assembly (A/C.6/43/7). Circulated pursuant to a decision of the Sixth Committee at its 51st meeting, on 29 November 1988.

2. First of all, I should like to confirm that as the Permanent Observer of the Palestine Liberation Organization (PLO) stated this morning, a visa request for Mr. Yasser Arafat, Chairman of the Executive Committee of the PLO, was presented to the Secretary-General on the afternoon of 8 November 1988. The visa request stated explicitly that the purpose of Mr. Arafat's visit was to participate in the work of the forty-third session of the General Assembly. The note was transmitted by me to the United States Mission on 9 November; in view of the fact that the visa was requested for the Chairman of the Executive Committee of the PLO, I handed the note personally to Ambassador Herbert S. Okun of the United States Mission. In transmitting the request on 9 November, I drew the attention of Ambassador Okun to the fact that the note was worded in exactly the same way as the normal PLO visa requests, that Mr. Arafat was designated therein as the Chairman of the Executive Committee of the PLO and that the purpose of his visit was to participate in the work of the forty-third session of the General Assembly; therefore, in my view, the request fell under sections 11, 12 and 13 of the Headquarters Agreement. As you know, sections 11, 12 and 13 of the Headquarters Agreement provide, *inter alia*, that invitees of the United Nations shall not be impeded in their access to the Headquarters district, that this applies irrespective of the state of bilateral relations of the host country and that the necessary visas "shall be granted … as promptly as possible".

3. I note from the statement of the Department of State dated 27 November 1988 on the determination by the Secretary of State on the visa application of Mr. Arafat that the United States recognizes that it is obligated to provide certain rights of entry, transit and residence to persons invited to the United Nations Headquarters district in New York. The statement of the Department of State goes on to say that "The Congress of the United States conditioned the entry of the United States into the Headquarters Agreement on the retention by the United States Government of the authority to bar the entry of aliens associated with or invited by the United Nations 'in order to safeguard its own security'." On page 3 of the statement of the Department of State, it is said that "the Headquarters Agreement contained in Public Law 80-357 reserves to us [i.e., the United States] the right to bar the entry of those who represent a threat to our security". This is the so-called security reservation which was referred to by the representative of the host country this morning.

4. In this respect, I note that the Headquarters Agreement states in section 13(d) that "Except as provided above in this section and the General Convention, the United States retains full control and authority over the entry of persons…into the territory of the United States". Thus, the Headquarters Agreement makes it clear that there is an unrestricted right of the persons mentioned in section 11 to enter the United States for the purpose of proceeding to the Headquarters district.

5. The Agreement does not contain a reservation of the right *to bar* the entry of those who represent, in the view of the host country, a threat to its security. What is referred to in the statement of the Department of State is, apparently, section 6 of Public Law 80-357 which reads as follows:

> "Nothing in the Agreement shall be construed as in any way diminishing, abridging or weakening the right of the United States to safeguard its own security and completely to control the entrance of aliens into any territory

of the United States other than the Headquarters district and its immediate vicinity … and such areas as it is reasonably necessary to traverse in transit between the same and foreign countries."

6. There is a difference of opinion between the United Nations and the United States on the legal character and validity in international law of that proviso. That difference has surfaced occasionally, but I do not think that it is necessary to go into that difference of opinion on which the position of the United Nations was firmly established in a memorandum of the United Nations Legal Department reproduced in Economic and Social Council document E/2397 of 10 April 1953, in particular paragraphs 9 to 11. In the present circumstances, it suffices to refer to the wording of section 6, whatever the international legal character of that proviso might be, which speaks of the need to "safeguard its own security and completely to control the entry of aliens into any territory of the United States *other than the Headquarters district and its immediate vicinity* [emphasis added] … and such areas as it is reasonably necessary to traverse in transit between the same and foreign countries".

7. Mr. Arafat's visa application is precisely to visit the Headquarters district and nothing else. The application thus situates itself precisely within the scope of section 11, precisely within the scope of the exception provided for in section 13(d) of the Headquarters Agreement and precisely within the area left open by section 6 of Public Law 80-357.

8. I would like to recall, moreover, that in 1953 when a problem arose concerning the denial of a visa to an invitee of the Economic and Social Council on the grounds of national security, the then Secretary-General, Dag Hammarskjöld, engaged in negotiations with the host country in an effort to find a way in which such difficulties could be handled and dealt with. On these negotiations, the Secretary-General published a progress report in document E/2492 of 27 July 1953 and a chapter in his annual report for 1953/54 (A/2663) dealt with this matter. In these reports, he stated that the right to transit to and from the Headquarters district had not been made the subject of any reservation. He added also that from the United Nations point of view, it should be recognized that a person should be excluded from the host country if there was clear and convincing evidence that a person intended in bad faith to use his or her trip as a cover for activities against that country's security. He informed Member States that the United States representatives had assured him that if in the future there should arise any serious problems with respect to the application in special cases of provisions concerning access to the Headquarters district or to sojourn in its vicinity, the latter would consult him and keep him as fully informed as possible in order to ensure that the decision made was in accordance with the rights of the parties concerned. I note that no consultation took place nor was the Secretary-General kept fully informed in this manner.

9. In her statement this morning, the representative of the United States referred to, and I quote, "rare occasions" on which the United States had declined to issue visas to persons entering the United States for United Nations purposes in order to protect national security. The United States representative went on to assert that United Nations practice confirms that the United States had the right to decline the issuance of visas and the United Nations had, on a number of occasions since 1954, acquiesced in such a practice.

10. For the record, I wish to state that the United Nations has not acquiesced in such a practice. It is true that, on certain occasions, the United States has declined to issue visas to representatives of States or to persons invited to the United Nations, and the United Nations has not insisted where the requesting State itself, for reasons of its own, did not pursue the matter. The United Nations legal position regarding the obligation of the host country to grant visas has at all times been perfectly clear to the host country, as was the United Nations position with respect to the so-called security reservation.

11. As to the reasons given by the host country in the present case, I would like to indicate, finally, that the statement of the Department of State does not make the point that the presence of Mr. Arafat, Chairman of the Executive Committee of the PLO, at the United Nations would per se in any way threaten the security of the United States. In other words, the host country did not allege that there was apprehension that Mr. Arafat, once in the United States, might engage in activities outside the scope of his official functions directed against the security of the host country. The reasoning given in the statement of the State Department of 27 November 1988 does not meet the standard laid down in the talks between Secretary-General Hammarskjöld and the United States authorities and reported back by Mr. Hammarskjöld in the report cited above.

12. To sum up, I am of the opinion that the host country was and is under an obligation to grant the visa request of the Chairman of the Executive Committee of the PLO, an organization which has been granted observer status by the General Assembly.

Procedural and institutional issues

8. QUESTION OF WHETHER A STATE NOT A MEMBER OF AN ECONOMIC AND SOCIAL COUNCIL FUNCTIONAL COMMISSION PARTICIPATING IN ITS DELIBERATIONS MAY RAISE POINTS OF ORDER OR MAKE PROPOSALS OF A PROCEDURAL NATURE — RULE 69, PARAGRAPH 3, OF THE RULES OF PROCEDURE OF FUNCTIONAL COMMISSIONS — "POINTS OF ORDER" — PARAGRAPH 79 OF ANNEX V TO GENERAL ASSEMBLY RULES OF PROCEDURE

Cable to the Director-General, United Nations Office at Geneva

Regarding our cable on whether a State not a member of an Economic and Social Council functional commission participating in its deliberations may "raise points of order or make proposals of a procedural nature":

Rules of Procedure of Functional Commissions[69] do not provide expressly for this matter.

It is true that rule 69, paragraph 3, of the Rules of Procedure of Functional Commissions provides that "a State thus invited shall not have the right to vote, but may submit proposals which may be put to the vote on request of any member of the Commission or of the subsidiary organ concerned". However, having regard to clear differentiation in the rules of procedure between "procedural motions" and "substantive proposals and amendments" (see in particular rules 43, 48 to 55, 57 to 65 and 68), and provisions of rules immediately preceding Rule 69 which distinguish between substantive proposals and procedural motions, it seems reasonable to conclude that the expression "proposals" in rule 69, paragraph 3, should be interpreted to mean substantive proposals (including amendments) and not procedural motions which thus cannot be made by States not members of the functional commission in question.

Such an interpretation would also accord with United Nations practice of reserving procedural motions, which concern conduct of business, for full members of the body.

Concerning "points of order", please see description of "point of order" in paragraph 79 of annex V to the General Assembly rules of procedure,[70] which is equally valid, with reference to points of order raised in functional commissions. Thus, points of order raised under rule 42 of functional commission rules would be questions which require a ruling by the presiding officer, subject to possible appeal, relating to conduct of business and consequently are reserved solely for full members of the body.

The following further points should also be noted. As explained in paragraph 79 of annex V to the General Rules, United Nations practice by which participants rise to a "point of order", a means of obtaining the floor in order to seek information or clarification, should not be confused with raising "true" points of order under rule 42 and may be entertained by presiding officer when raised by non-members.

Non-members of functional commissions may, however, make statements or comments on procedural matters which are not in fact procedural motions or points of order under rule 42.

29 January 1988

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9. DESIGNATION OF SUBSIDIARY ORGANS OF THE UNITED NATIONS AS EXECUTING AGENCIES FOR UNITED NATIONS DEVELOPMENT PROGRAMME PROJECTS — STATUS OF THE INTERNATIONAL RESEARCH AND TRAINING INSTITUTE FOR THE ADVANCEMENT OF WOMEN

Memorandum to the Principal Officer, Office of the Director-General, Development and International Economic Cooperation

1. This refers to your memorandum of 10 February, in which you requested our advice on the questions regarding the application made to the Ad-

ministrator of the United Nations Development Programme by the International Research and Training Institute for the Advancement of Women to be designated as an Executing Agency of UNDP. Below are our views regarding INSTRAW's application.

A. Status of INSTRAW

2. INSTRAW was established, pursuant to General Assembly resolution 3520 (XXX) of 15 December 1975, by the Economic and Social Council resolution 31/135 of 16 December 1976. The Statute of the Institute was approved by Council decision 1984/124 of 24 May 1984, and endorsed by General Assembly resolution 39/249 of 9 April 1985. Under article 1 of the statute of INSTRAW, the Institute is "an autonomous institution within the framework of the United Nations established in accordance with the Charter of the United Nations". The Institute has its own governing body — the Board of Trustees — which formulates principles, policies and guidelines for the activities of the Institute. The Institute would thus seem to be, as a matter of law, a subsidiary organ of the United Nations in terms of Article 7(2) of the Charter.

B. Designation of subsidiary organs of the United Nations as executing agencies for UNDP projects

3. The practice of UNDP in respect to executing agencies has been to designate an international organization as a whole. This practice is based on the several Economic and Social Council and General Assembly resolutions constituting the statute of UNDP.[71] UNDP has designated subsidiary organs of the United Nations as executing agencies only when a decision of a competent intergovernmental body expressly conferred that status on the organ concerned, or expressly requested the Administrator to utilize the services of that organ as an executing agency. This is true of the United Nations Conference on Trade and Development,[72] United Nations Industrial Development Organization[73] before it became a specialized agency, and the regional economic commissions.[74]

C. Conclusion

4. Since INSTRAW is a subsidiary organ of the United Nations and not an organization eligible to be selected as executing agency for UNDP projects within the meaning of the relevant resolutions, and neither the General Assembly nor the Economic and Social Council, which are the competent intergovernmental bodies in the case of INSTRAW, has conferred executing agency status on the Institute, or has requested the Administrator to utilize its services, we are, therefore, of the opinion that a decision either by the General Assembly or by the Economic and Social Council conferring such status on the Institute would be necessary before the Institute can be selected as a UNDP executing agency.

18 March 1988

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10. POSSIBILITY OF A UNITED NATIONS FUND PARTICIPATING IN THE EQUITY OF PRIVATE ENTERPRISES AS A SHAREHOLDER — UNITED NATIONS CAPITAL DEVELOPMENT FUND MANDATE — GENERAL ASSEMBLY RESOLUTION 2186 (XXI) OF 13 DECEMBER 1966

Memorandum to the Executive Secretary, United Nations Capital Development Fund

1. This responds to your memorandum of 3 March 1988 (CDF/PROG/POL/6-CDF/FIN/LOAN PROG) in which you requested our views on the possibility of the United Nations Capital Development Fund (UNCDF) participating in the equity of private enterprises, as a shareholder, as part of the development assistance provided to recipient countries. You requested us, in particular, to review the legal ramifications entailed in such participation, such as UNCDF's "responsibilities and legal liabilities as a Board of Directors member, tax situation of a United Nations Agency, handling of profits, divestiture, etc.". You provided us, as an example of the type of operation envisaged, a proposed UNCDF project in a Member State, under which UNCDF would participate, with other local and foreign institutions, in the share capital of a company called Small Enterprise and Advisory Company, which would be incorporated under the laws of that Member State for the purpose of providing credit to selected small-scale entrepreneurs of that Member State.

A. Capacity of UNCDF to acquire shares in the capital of privately incorporated companies

2. The question of participation in the ownership of the share capital of a company or corporation by a subsidiary organ of the United Nations involves a number of policy and legal issues going far beyond the limited questions you raised. While not all such questions need be dealt with here, it might be useful for purposes of responding to your request to examine, in this regard, the mandate granted to UNCDF by the General Assembly.

UNDCF Mandate

3. UNCDF was established by General Assembly resolution 2186 (XXI) of 13 December 1966, which also contains its Statute. Article 1 of the Statute defines the purpose of UNCDF as follows:

> "The purpose of the Capital Fund shall be to assist developing countries in the development of their economies by supplementing existing sources of capital assistance *by means of grants and loans*, particularly long-term loans made free of interest or at low interest rates …". (Emphasis added.) (See also article V of the Statute and Regulation 8.8 of the UNCDF Financial Regulations and Rules.)

4. Article III, paragraph 1, of the same resolution provides that:

"Assistance from the Capital Development Fund may be given to the Government of a State Member of the United Nations or member of a specialized agency or of the International Atomic Energy Agency or to a group of Governments of such States or, at the request of the Government of one of these States, to an entity having juridical personality within the territory of that State …"

5. Article V provides that:

"1. The Capital Development Fund shall extend both grants and loans.

"2. …

"3. Assistance shall be extended after the conclusion of an agreement between the Capital Development Fund and the recipient Government. In the case of loans, the agreement shall specify the date of maturity, rate of interest and currency of repayment of the loan, taking into consideration the recipient State's economic position, as shown, for example, by its balance of payments."

4. …

6. It would seem from the statutory mandate of UNCDF as outlined above, that while it is authorized to provide grants and loans for capital development, to Governments and, at their request, to both public and private enterprises, participation in the ownership and management of such enterprises has not been authorized by the General Assembly. Equity participation in private enterprises by UNCDF would thus seem to be inconsistent with the purposes and objectives for which UNCDF was established, which are, according to General Assembly resolution 2186 (XXI), to provide an alternative institutional set-up to existing financial institutions (International Bank for Reconstruction and Development, International Finance Corporation, International Monetary Fund, etc.) for promotion of capital development in developing countries.

7. If it is decided to seek the requisite legislative mandate for the proposed participation in the ownership and management of the private enterprises assisted by UNCDF, this Office will be happy to examine further this question and any specific proposals in this regard.

B. Suggested arrangements for the proposed UNCDF project in a Member State

8. For the limited purpose of implementing the project, we suggest the following solution, in lieu of the proposed arrangements in the draft project document attached to your memorandum:

An agreement could be concluded, between the government of the Member State and UNCDF, outlining the nature of the project envisaged and the extent of UNCDF assistance. UNCDF, pursuant to the agreement with the government, could then extend grants and/or loans, as appropriate, to assist in the capitalization and operation of proposed company, as well as in the establishment of the guarantee scheme and the revolving fund envis-

aged. The agreement could also contain a provision providing for the level and nature of participation in the project of the other local and foreign financing parties, e.g., the Dutch Development Bank.

17 May 1988

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11. COMPETENCE OF THE UNITED NATIONS ADMINISTRATIVE TRIBUNAL TO DEAL WITH AN APPLICATION IF THE APPLICANT IS NOT A STAFF MEMBER OF THE ORGANIZATION

Memorandum to the Presiding Officer, Joint Appeals Board, Geneva

1. Please refer to your memorandum of 30 May 1988 requesting our views on the above case, in which the Geneva Joint Appeals Board decided on 10 May 1988 that it has no competence and jurisdiction as Mr. X was never appointed as a staff member of the United Nations. The Board also decided to request us to advise Mr. X about which forum in the United Nations could consider his appeal. Mr. X wrote to me on 24 June 1988 about that matter.

2. It appears that on 17 September 1985, while Mr. X was employed by the Office of the United Nations High Commissioner for Refugees in a Member State as a consultant, UNHRC offered him a one year appointment at the L-3 level, step 8. According to the Head of the Personnel Services, he accepted the offer and later changed his mind and explained that he was only willing to accept a contract at the L-4, step 8. According to the Head of the Personnel Services this refusal led to rejection of the offer. According to Mr. X a valid contract was concluded.[75] Therefore, the issue is whether a contract was concluded between the parties.

3. According to its jurisprudence, the United Nations Administrative Tribunal considers itself competent to deal with an application even if the applicant is not a staff member of the Organization, provided that an *offer of employment* has been made by the competent authority (emphasis added).[76] When asked to resolve the legal situation arising out of an offer of a contract made by the Administration, the Tribunal declared that "It is not open to dispute…that the issue is one which must be resolved essentially on the basis of rules of law which it is the responsibility of the United Nations Administrative Tribunal to apply. The question whether or not the Applicant must be regarded as the holder of a contract of employment with the United Nations can therefore be decided only after a substantive consideration of the case, which it is incumbent on the Tribunal to carry out".[77] Thus, the Tribunal would be an appropriate forum to hear the case.

21 July 1988

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12. STATUS OF SHORT-TERM STAFF MEMBERS AS INTERNATIONAL CIVIL SERVANTS — AUTHORITY OF THE SECRETARY-GENERAL TO DETERMINE WHO IS A STAFF MEMBER

Memorandum to the Secretary-General

A problem has arisen which makes your intercession with the President of the State concerned necessary. I concur.

The Foreign Ministry of the State concerned has informed the United Nations that it backs a decision of the authorities of the city where it is located that, while not imposing any direct tax on the international emoluments of certain short-term staff members, these emoluments are taken into account for the purpose of calculating the rate of tax to be applied to their other income (*taux global*). This is justified by the assertion that the authorities do not regard these short-term staff members as international civil servants. The persons in question are freelance translators and interpreters employed by the United Nations not full time but for certain periods of increased activities and meetings and sessions only. The translators and interpreters are not dealt with as contract employees; their link with the United Nations is of such close and confidential nature that it seems necessary to extend the disciplinary power of the Secretary-General over them and they are therefore given fixed-term appointments under the 300 Series of the Staff Rules and Regulations.

The refusal of the authorities to recognize these staff members as such constitutes a hardship for the translators and interpreters concerned; their professional unions are up in arms against both the authorities and the international organizations. The question of reimbursement by the organizations under the unionized contracts of the staff members in question arises. Even more importantly, the State's refusal to recognize these persons as staff members raises a fundamental problem in that it draws into question the authority of the Secretary-General and the executive heads of the other organizations concerned to determine who is a staff member.

This second aspect seems so important that after all other approaches have failed, it seems indicated that you write to the President of the State concerned, explain the situation and ask for his intervention. The attached letter is to serve this purpose.

11 August 1988

Mr. President,

I am writing to you to raise a question concerning a fundamental principle relating to the status and functioning of the United Nations and its specialized agencies.

The United Nations offices were informed by some of their staff members of the decision of the Council of State and the local authorities to apply the "aggregate rate" system to the taxable income of staff members in a certain category, namely, those with short-term contracts, such as translators and inter-

preters. This means that the tax-exempt income paid to these staff members by their organizations will not be disregarded but rather taken into account in establishing the tax rate applicable to income from other sources. Indeed, the Permanent Mission of (name of the State) has confirmed that, in establishing tax rates, the local tax administration would take into consideration the emoluments of these staff members under contracts with international organizations, on the grounds that they were not regarded as international civil servants during the periods in which they were "bound to the organizations by contract".

First of all, this position calls into question the prerogative of the executive heads of these organizations to freely determine the categories of personnel regarded as civil servants solely within the limits of the relevant Constitutions and staff regulations, and subject only to the approval of the Member States collectively represented in the governing bodies.

It is therefore my duty, as Secretary-General of the United Nations, to intervene in order to reaffirm to the Government this essential principle of the functioning of the organizations concerned.

The prerogative of the executive heads of organizations in this regard is indeed embodied in the Constitutions, in the Headquarters Agreements and in long-standing practice. It is inherent in the special status granted to the organizations concerned in order to enable them to pursue their constitutional objectives in complete independence. It is indeed imperative that these organizations be able to accord civil-servant status not only to their permanent or regular staff members but also to other categories of employees called upon to fulfil, under the authority of the executive heads, tasks that are often of a confidential nature and which, in any case, where interpreters are concerned, are absolutely essential to their operations, even if it is only for short periods.

The only means available to the organizations to guard against any abuse is to take disciplinary measures applicable exclusively to *civil servants* of organizations. Thus, in its own interest, each organization must grant the status of international civil servant to this category of personnel.

It goes without saying that, if this argument were accepted, application of the aggregate rate would become a non-issue since, as civil servants, the interested persons should derive the full benefit of the tax-exempt regime applicable to them. Moreover, in 1979, the authorities, at the request of the United Nations, recognized that the aggregate rate system could not be legitimately applied in the absence of express provisions in the Headquarters Agreements concluded between … and …

I am convinced that the Government of (name of State), as a party to the Headquarters Agreement, would wish to confirm that it shares this point of view. Thanking you in advance,

15 August 1988

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13. STATUS OF THE ENVIRONMENT FUND AND HABITAT FOUNDATION — FINANCIAL RULES 206.1 AND 210.1 — ARTICLE 97 OF THE CHARTER — GENERAL ASSEMBLY RESOLUTION 2997 (XXVII) OF 15 DECEMBER 1972 — ROLE OF THE EXECUTIVE DIRECTOR AND GOVERNING BODIES OF THE UNITED NATIONS ENVIRONMENT PROGRAMME AND THE UNITED NATIONS CENTRE FOR HUMAN SETTLEMENTS (HABITAT)

Memorandum to the Assistant Secretary-General for Programme Planning, Budget and Finance/Controller

1. This responds to your memorandum of 17 August, requesting a legal opinion on the status of the Environment Fund and the Habitat Foundation and, in connection therewith, the specific authority of the Secretary-General and the Executive Directors of UNEP and Habitat.

A. The Environment Fund

2. The Environment Fund was established pursuant to General Assembly resolution 2997 (XXVII) of 15 December 1972, by which (in section III, paragraph 1) the General Assembly decided that, "in order to provide for additional financing for environmental programmes, a voluntary fund shall be established, with effect from 1 January 1973, in accordance with existing United Nations financial procedures".

3. The resolution also established (in section I) a Governing Council (in section II) and provided for the establishment of an Environment Secretariat in the United Nations, "to serve as a focal point for environmental action and coordination within the United Nations system in such a way as to ensure a high degree of effective management". In accordance with paragraph 3 of section II of the resolution, the costs of servicing the Governing Council and providing the Environment Secretariat are to be met from the regular budget of the United Nations, and the operational programme costs, programme support and administrative costs of the Environment Fund are to be met from that Fund.

4. The Governing Council was charged with the functions and responsibilities, among others:

> "(g) to review and approve annually the programme of utilization of resources of the Environment Fund referred to in section III below."

The Governing Council was also charged with the responsibility to formulate "such general procedures as are necessary to cover the operations of the Environment Fund". The General Procedures were adopted by the Governing Council by its decision 2(1) on 22 June 1973. Article IV of the Procedures provides that the financial resources of the Fund shall be acquired, authorized, administered, used and disposed of in conformity with the Financial Rules of the Environment Fund of UNEP.

The UNEP Financial Rules were promulgated by the Secretary-General under the United Nations Regulations, pursuant to resolution 3192 (XXVIII) of 18 December 1973, and became effective on 1 January 1976.

5. As regards the administration of the resources of the Environment Fund, financial rules 206.1, 209.1, and 210.1 are relevant. These rules read as follows:

> *Rule 206.1.* The Secretary-General shall act as custodian of the funds in the Fund account and shall designate the bank or banks in which such funds shall be kept.
>
> *Rule 209.1.* The financial resources of the Fund are to be available at all times to the maximum extent possible for Fund programme purposes, subject only to the maintenance on a continuous basis of a financial reserve. *After provision has been made annually for the programme support costs and administrative costs of the Fund*, all resources not otherwise committed or reserved can be utilized for project activities. (emphasis added.)
>
> "*Rule 210.1. The Executive Director shall prepare a budget to cover all anticipated programme and programme support costs (other than those borne by the regular budget of the United Nations) of the Fund* in the form consistent with relevant United Nations budgetary regulations, rules, policies and practices. The budget may include provision for contingencies." (emphasis added)

6. The powers of the Secretary-General of the United Nations are derived, in part, from Article 97 of the Charter, which states that he shall be "the chief administrative officer of the Organization". In pursuance of that authority, the Secretary-General appoints staff, under the Staff Regulations, and acts as custodian of all funds of the Organization, in accordance with the Financial Regulations. Thus, it is the Secretary-General who appoints the Executive Director of UNEP, under the Staff Regulations (Article 101 of the Charter), upon his election by the General Assembly. As regards the UNEP Fund, the Secretary-General exercises his authority, under the Financial Regulations, through the promulgation of rules for its management and, by which rules, he retains custody of the Fund (General Assembly resolution 3192 (XXVIII) and UNEP financial rule 206.1).

7. Much of the authority vested in the Secretary-General has, of course, been delegated by the Secretary-General to the Executive Director, and the General Assembly has delegated to the Governing Council the functions relative to the programme activities of UNEP. However, such delegation does not derogate from the ultimate responsibility and authority of the Secretary-General or the General Assembly.

8. It should be noted in this respect that, in General Assembly resolution 2997 (XXVII), a distinction is drawn between costs associated with administrative and programme support of the activities financed from the Environment Fund and the costs associated with the financing of the programme activities themselves. In respect of the programme activities themselves, the Governing Council has been given authority under paragraph 2(g) of section I of the resolution "to review and approve annually the programme of utilization of resources of the Environment Fund referred to in section III below". Section III, paragraph 3, of the resolution defines the scope of the programme activities to be financed from the Fund as may be decided by the Governing Council.

9. The expenses of the Environment Secretariat, whether borne by the regular budget or the Fund, are covered by the administrative arrangements incorporated in the note by the Secretary-General of 19 October 1973 to the General Assembly (A/C.5/1505/Rev.1). The financial and personnel arrangements envisaged under that Note were that the Executive Director would be delegated a maximum degree of decentralized authority to administer the funds from the Environment Fund and to utilize them for programme support and administrative costs.

10. However, in view of his overall authority as Chief Administrative Officer of the Organization, the Secretary-General retains the ultimate authority to establish arrangements for the common services at Nairobi and to make budget proposals to the General Assembly, including the allocations to be made from the Environment Fund to finance those services. This is particularly so when the Secretary-General acts in implementation of a General Assembly mandate, such as in its resolution 41/213 which requires the Secretary-General "to institute measures to improve the efficiency of the administrative and financial functioning of the United Nations with the view of strengthening its effectiveness in dealing with the political, economic and social issues". Once the General Assembly has acted on such proposals, it would then be for the Executive Director, in compliance with the decision of the General Assembly, to include the necessary expenditures from the Fund in the budget called for by financial rule 210.1, for authorization by the Governing Council under article VI of the General Assembly Procedures covering the operations of the Fund.

B. Habitat Foundation

11. The United Nations Habitat and Human Settlements Foundation was established by the General Assembly in its resolution 3327 (XXIX) of 16 December 1974 on the basis of decision 16(A)(II) of the Governing Council of the United Nations Environment Programme. The Executive Director of UNEP was charged under the resolution with the responsibility, under the authority and guidance of the Governing Council of UNEP, of administering the Foundation and providing the technical and financial services related to that institution. By General Assembly resolution 32/162, the responsibilities of the Governing Council were transferred to the Commission on Human Settlements, and provision was made for the establishment of the United Nations Centre for Human Settlements (Habitat) to be headed by its own Executive Director. Under that resolution, the Commission is charged with the responsibilities:

"(d) To give overall policy guidance and carry out supervision of the operations of the United Nations Habitat and Human Settlements Foundation;

"(e) To review and approve periodically the utilization of funds at its disposal for carrying out human settlement activities at the global, regional and subregional levels; and

"(f) to provide overall direction to the secretariat of the Centre referred to in section III below".

The Executive Director of the Centre was given the responsibility to administer the Habitat Foundation and to exercise the functions previously per-

formed by the Executive Director of UNEP over the Foundation under General Assembly resolution 3327 (XXIX).

12. In this note by the Secretary-General to the General Assembly regarding the administrative arrangements of the Habitat Foundation (A/C.5/32/24 of 17 October 1977), the Secretary-General proposed as follows:

> "The financial operations of the Foundation are to be governed by the Financial Regulations and Rules of the United Nations, including any necessary special or clarifying rules required to meet the authorized purposes of the Foundation. These will be promulgated by the Secretary-General, including such additional financial rules as may be required to further control the activities under the Financial Regulations described in paragraph 42 and annex II, if they should be approved by the General Assembly. While it would be the intention of the Secretary-General to delegate much of the authority so provided, he would retain custody of the funds of the Foundation and the right to further amend or change the relevant financial rules as conditions may require."

Following acceptance of those proposals by the General Assembly, the Secretary-General promulgated special financial rules applicable to the Foundation (300 Series to the United Nations Financial Regulations and Rules).

13. In the light of the above, we consider that the Secretary-General has the authority, even more directly than in respect of the Environment Fund, to propose to the General Assembly for its approval in accordance with the Financial Regulations of the United Nations, the allocation of resources from the Foundation to cover the programme support and administrative expenses of the Foundation, including any common services.

C. Role of the Executive Directors and the governing bodies of UNEP and Habitat

14. The exercise by the Secretary-General or the General Assembly of the residual authority under the United Nations constitutive instruments as outlined in the preceding paragraphs does not take away the respective roles of the Executive Directors or the Governing Council (Council) of UNEP and the Habitat Commission on Human Settlements (Commission). For, when the Secretary-General or the General Assembly act in accordance with their respective competences, they establish only the framework within which further action is to be taken, in accordance with the applicable rules and procedures, by the Executive Directors in the case of a decision by the Secretary-General, or by the Council or the Commission in the case of action by the General Assembly. Thus, once the General Assembly has acted on a proposal by the Secretary-General regarding allocations of funds from the Environment Fund and the Habitat Foundation for the common services, it would still be for the Executive Directors to work out the details, and to obtain the necessary authorizations from the Council and the Commission for the expenditures included in the budget approved by the General Assembly.

15 September 1988

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14. QUESTION OF WHETHER THE SECRETARY-GENERAL CAN RECEIVE NOMINATIONS FOR ELECTION OF MEMBERS TO THE COMMISSION AGAINST APARTHEID IN SPORTS AFTER THE DESIGNATED PERIOD OF TIME — ISSUES RELATING TO THE REGIONAL DISTRIBUTION OF COMMISSION SEATS AMONG THE STATES PARTIES — ARTICLE 11, PARAGRAPHS 1 AND 3, OF THE INTERNATIONAL CONVENTION AGAINST APARTHEID IN SPORTS

MEMORANDUM TO THE ASSISTANT SECRETARY-GENERAL, CENTRE AGAINST APARTHEID, DEPARTMENT OF POLITICAL AND SECURITY COUNCIL AFFAIRS

1. I wish to refer to a memorandum of 9 September 1988 on the above-mentioned subject.

2. In that memorandum the following questions were raised:

(*a*) Can the Secretary-General, in his capacity as depositary of the International Convention against Apartheid in Sports,[78] legally receive nominations for election of members to the Commission against Apartheid in Sports after a two-month period within which submission of nominees was invited (8 August 1988), referred to in article 11, paragraph 3, of the Convention?

(*b*) In the light of the fact that fewer nominations than the number of Commission members have been received so far, could the meeting of the States Parties to be convened by the Secretary-General pursuant to article 11, paragraphs 3 and 4, of the Convention, be postponed?

(*c*) If the States Parties decided on a pattern for the regional distribution of Commission seats among the States Parties, what would happen if the nominees from a regional group were fewer than the number of seats allocated to that group?

3. The views of the Office of Legal Affairs are set out below and correspond to the questions above:

(*a*) The text of the article provides that nominations are invited to be submitted within a two-month period; it does not prohibit receipt of nominations after that date. In the light of the foregoing and of the Secretary-General's practice with regard to the submission of nominees to the General Assembly in Assembly elections, it is our view that the Secretary-General should receive all nominations sent to him by the States Parties up to the date of convening of the meeting of the States Parties. He should in his report to the States Parties (and, if necessary, addenda thereto) inform them of the nominations which were received between 8 June and 8 August 1988 and nominations received thereafter. It would then be for the States Parties to decide on the receivability of the nominations received after 8 August 1988. The practice of the General Assembly in such circumstances is to normally agree to receive such "late" nominations.

(*b*) The provisions of article 11, paragraph 3, state unambiguously that "the initial election shall be held six months after the date of the entry into force of the present Convention". The convening of the meeting of the States Parties

to elect the members of the Commission is not made subject to any condition. The meeting should be convened as required by the Convention. The Secretary-General should report to the States Parties at that meeting if there are circumstances which prevent proceeding to the election of the Commission as envisaged by the Convention, such as too few nominees to fill the posts to be elected. The States Parties would then decide on what course of action would be most appropriate. We have not been able to ascertain in the practice of the General Assembly that such situations have arisen in the past or how they might be resolved. However, one way of dealing with the matter would be to suspend the meeting of the States Parties and request the States Parties which have not yet done so to submit nominations. This procedure can be followed with or without a partial filling of the Commission seats during the initial part of the meeting of the States Parties.

(*c*) (1) The Convention provides, in article 11, paragraph 1, that in the election of the members of the Commission, the States Parties should have "regard to the most equitable geographical distribution and the representation of the principal legal system". If the States Parties agree *inter se* that the most effective way of implementing that provision is by allocating seats to regional groups of the States Parties based on a particular pattern of distribution, such agreement would constitute a "gentlemen's agreement" among the States Parties. The geographical distribution and representation of the principal legal systems on the Commission would clearly be based upon the States Parties to the Convention and, logically, would be proportionate to the geographical distribution and principal legal systems representation that exists among the States Parties at the time of election. As the term of Commission members is limited, pursuant to article 11, paragraph 5, the States Parties may make adjustments if they wish in the distribution of seats among geographical regions or principal legal systems by agreeing on further "gentleman's agreements" at subsequent elections to reflect changes in the geographical distribution and principal legal systems representation among the States Parties.

(2) If, after agreement has been reached on the geographical distribution, there are too few nominees for a particular region to fill its allocated seats, there is no legal obstacle to filling them with nominees from other groups. Indeed, the specific treaty obligation of the States Parties is to elect a 15-member Commission. On the other hand, it is for the States Parties to ascertain whether any deviations from an agreed distribution of seats pattern would run counter to the treaty obligation that Commission members are to be elected by the States Parties "having regard to the most equitable geographical distribution and the representation of the principal legal systems". Alternatively, the States Parties could, as stated in paragraph 3(*b*) above, suspend the meeting and, with or without a partial filling of the Commission seats, invite more nominations.

23 September 1988

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15. POSSIBILITY OF SUBMISSION OF DRAFT RESOLUTIONS BY THE PRESIDENT OF THE GENERAL ASSEMBLY

MEMORANDUM TO THE UNDER-SECRETARY-GENERAL, OFFICE FOR POLITICAL AND GENERAL ASSEMBLY AFFAIRS

1. As is well known, draft resolutions are normally submitted by Member States. Other possibilities exist, however. Subsidiary organs reporting to the General Assembly have been urged to make every effort to submit draft resolutions in order to facilitate the consideration of the items in question. (See paragraph 31 of annex VI to the Assembly's rules of procedure.) Furthermore, the Chairman or a Vice-Chairman of the Main Committees have, following consultations on a particular draft, submitted draft resolutions on the theory that such drafts represented "consensus" or "no objection" drafts. (For example, in 1985 the Chairman of the Sixth Committee submitted a draft resolution on the "Terrorism" item.)[79]

2. As far as the plenary practice is concerned, we are not aware of instances of the President formally submitted and circulating a draft resolution (i.e., a document with the heading "Draft resolution submitted by the President"). There have, on the other hand, been examples of the President proposing decisions to be taken by the General Assembly. These normally relate to organizational or procedural matters, such as the appointment of members to certain subsidiary organs.[80]

3. The rules of procedure of the General Assembly not containing any provision to the contrary, there would be no legal obstacle to the President of the Assembly submitting a draft resolution to the plenary, just as Chairmen of Main Committees have done.

11 October 1988

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16. STATUS OF THE FEDERATION OF INTERNATIONAL CIVIL SERVANTS' ASSOCIATIONS — ISSUE OF FICSA ACQUIRING CONSULTATIVE STATUS WITH THE ECONOMIC AND SOCIAL COUNCIL — COUNCIL RESOLUTION 1298 (XLIV) OF 23 MAY 1968

Memorandum to a Social Affairs Officer, Non-Governmental Organizations Unit, Department of International Economic and Social Affairs

1. This responds to your inquiry concerning whether the application of the Federation of International Civil Servants' Associations (FICSA) for consultative status with the Economic and Social Council, set out in its letter of 21 April 1988, can legally be considered.

A. Is FICSA a non-governmental organization?

2. The first question is whether FICSA is a "non-governmental organization" within the meaning of United Nations Charter Article 71, on which NGO consultative status with the Economic and Social Council is based. In this connection, it should be noted that the Council, in paragraph 7 of its resolution 1296 (XLIV) of 23 May 1968 (which in this respect is based on resolution 288 B (X) of 27 February 1950), has specified that "any international organization which is not established by intergovernmental agreement shall be considered as a non-governmental organization for the purpose of [the arrangements for consultations with NGOs]". Since FICSA was plainly not established by a treaty, it would seem to qualify.

3. It might, however, be noted that the legal status or rather nature of FICSA is quite obscure — i.e., it might be questioned whether it is an "organization" at all. First, it is plainly not a legal person created by a national law. Second, its members are staff associations of United Nations family intergovernmental organizations (article 6 of the FICSA statutes of 13 February 1986), and these in turn are quasi-organs of their respective intergovernmental organizations, which derive their legal personality from these organizations. The Federation, however, was not created by an agreement among those intergovernmental organizations themselves, but among the staff associations — an agreement that was concluded neither under any national law, nor as a treaty under international law, nor yet under the law of a particular organization (e.g., the United Nations). It has, however, achieved recognition from the competent United Nations and inter-agency organs (e.g., United Nations General Assembly, International Civil Service Commission, United Nations Joint Staff Pension Fund, Consultative Office on Administrative Questions of the Administrative Committee on Coordination, etc.) — but it is not known whether it has ever been "recognized" by any national government or organ.

4. Finally, it is listed in the authoritative *Yearbook of International Organizations*, in the 1987/88 edition under number CCO946y (i.e., as an "Intercontinental Membership Organization"). (N.B.: the Coordinating Committee for Independent Staff Unions and Associations of the United Nations System (CCISUA) is listed under number EEO236y, as an "Organization emanating from places, persons, other bodies".)

5. From all this it follows that FICSA may be considered to be an NGO within the loose definition established and used by the Economic and Social Council for this purpose.

B. Is FICSA's purpose compatible with consultative status with the Economic and Social Council?

6. Paragraphs 1 and 2 of Economic and Social Council resolution 1298 (XLIV) require NGOs with which consultative status is to be established to "be concerned with matters falling within the competence of the Council with respect to international economic, social, cultural, educational, health, scientific, technological and related matters and to questions of human rights" and to have aims and purposes "in conformity with the spirit, purposes and principles" of the Charter of the United Nations. On the face of it, the "Purposes and func-

tions" of FICSA as set out in chapter II of its statutes would seem to satisfy these requirements, though evidently it is up to the Council, acting on the recommendation of its Committee on NGOs, to determine whether the Council agrees that this is so.

7. However, the actual purposes and activities of FICSA, as appears both from its statutes and its reports, is to represent the staff of the United Nations system organizations in various organizations and organs that are capable of affecting these interests. It might therefore appear anomalous for such an organization, which is principally engaged in consultations and negotiations with various United Nations organs (though not the Economic and Social Council) on staff working conditions (i.e., the classical functions of a labour union with a relatively restricted membership), to seek a status that would enable it to intervene with various United Nations organs (the Economic and Social Council and its Commissions, the Secretariat and in particular the Department of Public Information, and even the General Assembly) — though generally speaking only on matters within its field of competence, i.e., the representation of the staff of intergovernmental organizations. Again, it is primarily for the Economic and Social Council to decide whether this anomaly should prevent the achievement of consultative status, though conceivably the General Assembly, which directly or through intra- and interorganizational organs created by it, deals with FICSA as an agent for the staff, might express its views on this question.

8. On the other hand, if it is assumed that FICSA's purpose in applying for consultative status is not in connection with its primarily union-like activities, but to bring to bear on international political processes and problems the collective experience and good will of its membership, then an even graver problem arises. How can an organization whose real members (i.e., the individual staff members represented by the staff associations that constitute FICSA), who are individually precluded as international civil servants from intervening in the proceedings of the representative organs of intergovernmental organizations, do so itself on their collective behalf? In this connection, it should be noted that in recent years we have several times advised that staff should not establish NGOs (e.g., Anti-Apartheid Group at United Nations Office at Geneva; "Africa Rights", a Pan-African NGO for the promotion and protection of human rights in Africa; International Association of Political Scientists for the United Nations (IAPSUN)) to carry out even activities that would seem praiseworthy and consonant with decisions of high political organs such as the United Nations General Assembly, if these NGOs are to have primarily political functions — for staff members are supposed to further the purposes of the organizations for which they work through their official activities carried out under the direction of their respective supervisors and executive heads, and not in an individual capacity.

9. This then is the essential dilemma in considering an application for consultative status from FICSA:

(*a*) Either FICSA wishes merely to expand its union-like activities by gaining access to United Nations organs in which it now has no standing and which have no competence for staff regulations — and this is undesirable as tending to confuse the management/staff relations in the United Nations and other common systems organizations;

(*b*) Or, FICSA wishes to transcend to some extent its narrow representative functions to enable its membership to make a different and substantive contribution to the work of the United Nations — but this would seem to be inconsistent with how international officials are supposed to bring their talents and efforts to bear on the international community.

C. Conclusion

10. Thus, though FICSA can, of course, apply for consultative status with the Economic and Social Council and the decision on whether to grant that status would be up to the Council (acting on the advice of its NGO Committee), we might advise that, while there is no clear legal obstacle that would prevent such a grant, important policy considerations suggest that such a step would be anomalous and undesirable.

12 October 1988

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17. ISSUE OF MEDALS BY THE UNITED NATIONS — POSSIBILITY OF ISSUING A COMMEMORATIVE MEDAL SERVICE RIBBON IN RECOGNITION OF THE 1988 NOBEL PEACE PRIZE AWARD TO UNITED NATIONS PEACEKEEPING FORCES

Memorandum to the Under-Secretary-General, Office for Special Political Affairs

1. This refers to the 7 October cable from the United Nations Peacekeeping Force in Cyprus Force Commander to you (UNFICYP No. 1455), proposing that the United Nations issue a special commemorative medal to mark the 1988 award of the Nobel Peace Prize to the United Nations peacekeeping forces. In this regard, the Force Commander suggests that "the peacekeepers serving on 29 September 1988, the date of the announcement, should be awarded the medal as representatives of those past and future peacekeepers".

Precedents regarding the issue of medals by the United Nations

2. Up to now, three medals have been established by the United Nations for award to military personnel who have served on behalf of the Organization.

(*a*) *The United Nations Service Medal (Korea)* was specifically authorized by the General Assembly in resolution 483 (V) of 12 December 1950, and regulations relating to the issue of the medal to personnel of the United Nations forces in Korea were prescribed by the Secretary-General on 25 September 1951,[81] and supplemented by an annex dated 17 October 1955,[82] pursuant to that resolution.

(*b*) *The United Nations Emergency Force Medal* was established for award to military personnel serving on assignment to the Force (1956-1967) on

the basis of regulations prescribed by the Secretary-General on 30 November 1957,[83] pursuant to the authority of General Assembly resolution 1001 (ES-1) of 7 November 1956.[84]

(*c*) *The United Nations Medal* was established on the basis of regulations prescribed by the Secretary-General on 30 July 1959[85] and revised in 1963,[86] which provide that the Secretary-General is to designate the United Nations organs in respect of which the medal shall be awarded.

3. At the time when the possibility of issuing a United Nations Medal was raised, this Office advised that the Secretary-General had the authority to establish such a special medal and award it to military personnel serving in any United Nations operation. In advancing this view, we focused on the Secretary-General's administrative and executive powers in respect of subsidiary organs, such as the United Nations peacekeeping missions concerned, in stating:

> "… [T]he Secretary-General, as chief administrative officer of the Organization and in accordance with the appropriate resolutions creating the subsidiary organs in question, has the authority to establish and award a United Nations medal for military personnel as a recognition of their services in a particular operation There is no doubt that he can send letters to any personnel under his authority, recognizing their services … [C]ommemorative medals for military personnel can be considered similar to such letters. When the question first arises of awarding the medal to the members of any particular organ it will, of course, be necessary to ascertain from the terms of the resolution creating that organ, that the Secretary-General has administrative and executive power in relation to that organ of the nature outlined …"

4. In concluding that the Secretary-General had the power to issue the United Nations Medal without express General Assembly authorization, we referred to an opinion given by this Office to Mr. Ralph Bunche, distinguishing between the two precedent cases of Korea and United Nations Emergency Force and explaining why a specific General Assembly resolution was required in the first situation and not in the other. The opinion pointed out that, in the case of Korea, forces and other assistance were made available, under Security Council resolution 84 (1950) of 7 July 1950, to a Unified Command under the United States, and that the Secretary-General was not given any authority over the Command or the forces under it.[87] In respect of UNEF, however, the position of the Secretary-General was different, as he was specifically authorized to issue regulations and instructions, and to take all other administrative and executive action in connection with the Force. The issue of a medal to military members of the Force was therefore considered to come within the terms of authority conferred on the Secretary-General.

Possibility of issuing a Commemorative Medal/Service Ribbon in recognition of the 1988 Nobel Peace Prize award to United Nations peacekeeping forces

5. On the basis of the above, it is our opinion that if the Secretary-General wished to issue a special medal commemorating the award of the 1988 Nobel Peace Prize to the United Nations peacekeeping forces, he has the authority to establish such a commemorative medal and to prescribe regulations governing the award thereof. Alternatively, instead of issuing a special medal,

the Secretary-General might consider designating a distinctive service ribbon, with features reflecting the Nobel Peace Prize award, to be attached to the United Nations Medal when issued to military personnel serving on the qualifying date in the respective peacekeeping missions.

6. If the Secretary-General decides to establish a special commemorative medal, the regulations to be prescribed for its issuance would need to specify, *inter alia*, the following:

(*a*) The United Nations peacekeeping operations in respect of service with which the medal shall be awarded (i.e., the particular observer missions and peacekeeping forces);

(*b*) The qualifying date or dates to serve as the basis for establishing eligibility to receive the medal (e.g., announcement of the Nobel Peace Prize award on 29 September 1988, conferral of the prize on 10 December 1988);

(*c*) Whether there need be a minimum period of service with any such peacekeeping operation in order to be eligible to receive the medal (e.g., 90 days, 6 months);

(*d*) The personnel of each such organ who shall be deemed to be eligible to receive the medal;[88] and

(*e*) The specifications for the form and other features of the medal.

7. If it is instead decided to commemorate the award of the Nobel Peace Prize by specifying a special service ribbon from which the regularly issued United Nations Medal will be suspended, the Secretary-General would need to determine the specifications of the ribbon, pursuant to the provisions of article II of the Regulations for the United Nations Medal, as well as the eligibility requirements referred to in subparagraphs 6(*a*) to (*d*) above.

10 November 1988

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18. ISSUE OF ACCOUNTABILITY OF EXECUTING AGENCIES — RELATIONSHIPS BETWEEN UNITED NATIONS DEVELOPMENT PROGRAMME AND THE EXECUTING AGENCIES

Memoranda to the Officer-in-Charge, Bureau for Programme Policy and Evaluation

1. This responds to your memorandum of 2 March on the accountability of executing agencies, the delay of which is greatly regretted.

2. We note that at the last Session of the Governing Council, a document entitled DP/1988/19/Add.4 was circulated for consideration by the Council on this subject. Paragraphs 12 and 13 of the document read as follows:

"12. The case can probably be made, if on no other ground than by analogy to the common law of principal/agency relations, that agencies have the duty to be accountable towards the United Nations Development Programme (UNDP) for funds entrusted to them. The real question is not whether agencies have a duty to account to UNDP, either based on signed agreements or common law principles, but rather what such accountability means in practice. The answer to this question, in turn, is one of practical, administrative reality. It is not a truly legal issue.

"13. It also appears that it would be difficult to apply penalties in the traditional type of UNDP project. Penalty schemes are normally associated with large-scale construction and civil works."

3. We, of course, share your appraisal of the question of accountability of executing agencies as important in the implementation of UNDP projects, and while we do not dispute that it is not just legal, we believe, however, that in order to engage the responsibility of executing agencies, financially, operationally or otherwise, a legal obligation must first be demonstrated. It is for this reason that we have taken some time to research the questions you raised and also to make attempts, unsuccessfully, to meet with you and obtain more information on the policy aspects of the matter.

4. There have been a number of cases in the past, which we are reviewing, in which the question of accountability has arisen, mainly as a result of the failure of the executing agency concerned to perform in accordance with: (*a*) the agreement between the executing agency and UNDP, (*b*) the agreement between the government, UNDP and the executing agency, or (*c*) the contractual arrangements made by the executing agency with third parties. This Office has, in fact, successfully assisted in resolving some of these cases and we consider that they can serve as precedents in the formulation of general principles to be applied in the future.

5. In this context, we wish to clarify that the relationship between UNDP and the executing agencies is governed primarily by: (*a*) the executing agency agreements; (*b*) the project documents signed between UNDP, the Governments and the executing agencies concerned; (*c*) the mandate accorded to the various organizations concerned, by their constitutive organs; and, generally, (*d*) the general principles of private and public international law. Therefore, the analogy merely to common law principles or individual national law regimes would in our view only lead to misconceptions as to the legal status of executing agencies and their role in execution of UNDP projects.

11 August 1988

1. This is further to our memorandum of 11 August, in response to yours of 2 March, and the meetings held recently between…representatives of our two offices, on the question of accountability of executing agencies.

2. In your memorandum of 2 March you requested advice on the interpretation and application of article VII of the United Nations Development Programme (UNDP) Agreement with Executing Agencies, which reads as follows:

In the execution of technical cooperation activities, the Executing Agencies shall have the status of an independent contractor vis-à-vis UNDP. *The executing agency shall be accountable to UNDP for its execution of such activities*. (emphasis added)

You wanted to know, more specifically:

(*a*) Whether the executing agencies that are parties only to the Special Fund Agreement and have not signed the UNDP agreement with executing agencies are bound by the same obligation of accountability specified by article VII above;

(*b*) The meaning of "accountability" in the context of the execution of development projects by the executing agencies with UNDP funds;

(*c*) Whether executing agencies are legally accountable to the UNDP for project funds entrusted to them by UNDP;

(*d*) The extent to which the obligation of accountability encompasses responsibility for the "good or bad" performance of the project; and lastly

(*e*) The sanctions at the disposal of UNDP if the executing agency fails in its duty of accountability to UNDP.

A. Special fund

3. Article XII of the Special Fund Agreement with Executing Agencies provides in paragraph 2 that "any matter for which no provision is made in this Agreement shall be settled by the Parties in keeping with the *relevant resolutions and decisions of the appropriate organs of the United Nations*".

4. Furthermore, the Special Fund Agreement provides that each project shall be implemented in accordance with a plan of operation (Project Document), as shall be agreed to by the Special Fund (now UNDP), the Government and the executing agency. The plan of operation normally provides that the project shall be carried out in accordance with the UNDP Standard Basic Assistance Agreement (SBAA) which states, in article I, that the assistance given to the Government shall be furnished and received in accordance with, *inter alia*, the relevant and applicable resolutions and decisions of the competent UNDP organs. A similar provision is to be found in article I(3) of the Special Fund Agreement with Governments.

5. The concept of accountability is contained in paragraph 43 of the annex to General Assembly resolution 2688 (XXV). It reads: "Every executing agent will be accountable to the Administrator for the implementation of programme assistance to projects". The General Assembly has also reiterated this in its more recent resolution 42/196 of 11 December 1987, which states, in paragraph 32, as follows:

> "[The General Assembly] … *requests* United Nations funding organizations, especially the United Nations Development Programme, to adhere rigorously to established criteria and procedures in the selection of executing agencies to be recommended to recipient Governments so as to ensure

the provision of technical expertise and appropriate project support, *including technical backstopping, as well as the reliability and accountability of the executing agencies*". (emphasis added)

6. Furthermore, the Governing Council has on many occasions, similarly, urged that executing agencies should be "fully accountable" for the fulfilment of their obligations to UNDP.[89] In the most recent of these decisions (decision 87/13 of 18 June 1987), the Governing Council urged "the Administrator to initiate appropriate measures to ensure improved performance by the executing agencies so that they are fully accountable for the fulfilment of their obligations in the execution of projects supported by the United Nations Development Programme".

7. It is considered, therefore, that the basic principles of General Assembly resolution 2688 (XXV), and in particular paragraph 43 of its annex, bind all executing agencies, including those which have not concluded an agreement with UNDP that incorporates article VII referred to in paragraph 2 above.

B. Accountability

8. The expression "accountable" or "accountability" was first used, without definition, in the Jackson report, entitled "A Study of the Capacity of the United Nations Development System" (Capacity Study),[90] and has not been expressly defined either by the General Assembly in its resolutions on the matter, or by the Governing Council. Black's *Law Dictionary* (fifth edition, 1979) defines "accountable" to mean "subject to pay, responsible, liable".

9. In the context in which the expression was used in the Capacity Study, it would seem that agencies, though recognized as partners with UNDP in the development field, were expected when implementing UNDP-funded projects to be answerable to the Administrator, who would in turn be answerable to the Governing Council, for the proper implementation of the project, in accordance with the provisions of the project document. The study states:

> "The Administrator of UNDP would thus be accountable to individual Governments for operations which UNDP undertook to conduct in agreement with them and to the Governing Council for the entire programme and its implementation. This would have implications for the relationship between UNDP and each Agency. The latter would be accountable to the Administrator of UNDP for any project operations that it undertook to execute on behalf of UNDP. It would thus act as an agent of UNDP at the request of the Administrator, under the terms of an agreement which might be called a contract."[91]

C. Obligations

10. Resolution 2688 (XXV) was adopted by the General Assembly following the recommendations contained in the Capacity Study. The Capacity Study envisaged that projects funded by UNDP would be executed by an agency on the basis of a contract containing the respective obligations of the parties. The agency would have a contractual obligation to UNDP for the proper performance of the project entrusted to it.

11. The Capacity Study recommended in paragraph 116, chapter V, that an executing agency should always be responsible to the Administrator for implementing the project in accordance with the contract, and the Administrator would in turn be responsible to the Governing Council for administering the contract. The Administrator would be responsible to ensure that the project was being carried out satisfactorily and that the terms of the agreement with the Government were being met.

12. In paragraph 118, chapter V, the Capacity Study states that among the obligations to be contained in the contract, which the Administrator would be responsible to enforce, would be to ensure that:

(*a*) Target dates were being met in accordance with the network analysis;

(*b*) Costs were as agreed;

(*c*) Personnel provided were effective and adaptable to local sensibilities; and

(*d*) Technical specifications were being adhered to.

13. The responsibilities of the executing agencies referred to in paragraph 116, chapter V, of the Capacity Study have been incorporated in the UNDP Agreement with Executing Agencies.[92] They are also contained in the UNDP Financial Regulations and Rules.[93]

However, it is normally the project document which defines the precise obligations of the parties to the project.[94]

Project document

14. The contract envisaged by the Capacity Study, to contain the obligations of executing agencies and of the other parties to the project: the Government and UNDP, is the project document, which is prepared for all UNDP projects and services as the obligating document for release of funds. The Study envisaged that once a project is approved, a project document would be concluded by the parties, and that it would form the basis for project implementation. The Study stated:

> "This document, which would be based on the project description outlined in paragraph 88, would first define clearly both the general objectives of the project and the overall responsibilities assumed by the Government and the Administrator of UNDP, respectively, for the attainment of those goals. The agreement would then specify in sufficient detail the actions to be performed by all concerned — notably the bodies designated to execute the project, both within the country and on the international side — to enable a network analysis to be prepared by which later performance could be measured against time and accomplishment targets. The joint responsibility of the parties would not end until appropriate follow-up action (e.g., investment, where relevant) had been achieved.

"133. In cases where execution was assigned to a specialized agency, the agency's contractual obligations to the Administrator would be specified. The agency would also be a signatory to the agreement with the Government. Where the Administrator had contracted the project to an agent outside the United Nations system, or was directly executing the project himself, he alone would sign the agreement with the Government. In the former case, a separate contract would be signed between the Administrator and the executing agent. Likewise, when responsibility for execution was assigned within the United Nations system, with the proviso that all or part of the work should be subcontracted outside, the specialized agency would sign a similar contract with the subcontracted agent or agents. Provision for the expeditious amendment of these documents by agreement between the parties concerned would be essential since changing conditions may invalidate earlier assumptions.

"134. In these documents, the responsibilities of each party would be defined as follows:

— The *Government* would undertake to fulfill its obligations in accordance with the agreed plan of operation.

— The *Administrator* would be fully responsible for those actions which he had undertaken to perform under agreement with the Government. If he had contracted with a specialized agency or agent to carry out some of these functions on his behalf, he would have to administer the contract to ensure that the functions were executed in accordance with the terms of the contract. He should delegate the authority for administering the contract in the field to the Resident Representative, assisted by appropriate staff.

— The *executing agency or agent*, in accordance with its contractual responsibilities to the Administrator, would implement those functions for which the Administrator had accepted responsibility towards the Government and would report on the progress of implementation to whomever the Administrator had delegated authority to administer the contract. In most cases, the Resident Representative would have this responsibility and, accordingly, authority should be given to the project manager to report to the Resident Representative. The project manager would naturally maintain direct contact with his employer, specialized agency or otherwise.

— The *Resident Representative* would have to ensure that the project was being implemented in accordance with the plan of operation, including the network analysis." (chapter five, "A Study of Capacity of the United Nations Development System")

15. In the circumstances, it would be correct to state that executing agencies are legally and operationally answerable to the Administrator for the proper implementation of the project entrusted to them for execution. This would encompass being responsible for the proper utilization of the funds budgeted for the project, timely completion of the project activities and accomplishing targeted objectives in the project specifications.

16. The main problem which seems to have arisen, assuming that the obligations of the parties are clearly defined in the relevant legal documents governing a project, is how the Administrator can enforce compliance of such obligations by the executing agency concerned. It is in this context, we note, that suggestions have been made regarding instituting sanctions or penalties, and even adopting further measures such as reducing the use of executing agencies in favour of government execution and encouraging competition among agencies (DP/1988/19/Add.4).[95]

D. Compliance

17. The question of compliance must be examined in the context of the imperfect international legal system which governs the relationship between international organizations among themselves or with Governments, in the execution of their respective mandates.[96] While in the national legal system, a state possesses the authority to impose sanctions or penalties for violations of the public order and compensatory schemes are established to enforce obligations arising from inter-personnel relations, such authority is at best deficient in the international legal order for lack of a sovereign power and enforcement procedures.

18. However, the lack of a sovereign authority or of a mechanism for enforcement of sanctions or penalties in the international legal order does not mean that legal obligations cannot be created, and that where created cannot be relied upon. On the contrary, in all international legal relations, *pacta sunt servanda* is recognized as an elementary and universally accepted principle,[97] and by and large the system functions relatively well on the basis that obligations freely entered into will be observed.[98]

19. *Pacta sunt servanda* is also incorporated in the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations,[99] as article 26 of the Convention. The executing agencies are therefore bound to observe in good faith the obligations freely entered into with UNDP in execution of projects entrusted to them. The non-existence of sanctions does not change this obligation.

20. In the UNDP Agreement with Executing Agencies, article XIV(2) provides that "*any relevant matter for which no provision is made in this agreement or any controversy between the Parties shall be settled in keeping with the relevant resolutions and decisions of the appropriate organs of the United Nations. Each Party shall also give full and sympathetic consideration to any proposal advanced by the other under this paragraph*".

21. The procedure for resolving disputes outlined in article XIV(2) of the UNDP Agreement with Executing Agencies has, in fact, been used effectively in the past when disputes have arisen. We consider that this procedure, together with the existing interagency forums such as the Administrative Committee on Coordination, the Consultative Committee on Administrative Questions (financial and budgetary), etc., established for review of development assistance questions, as well as the deliberative bodies such as the Governing Council, the Economic and Social Council and the General Assembly, are adequate to ensure that redress of any major problems which might arise in the course of project implementation are satisfactorily resolved.

22. In addition to the modes of settlement of disputes which might arise in the course of project execution involving United Nations system organizations as discussed in the paragraphs above, UNDP is, of course, entitled to take other action as provided in the UNDP agreement with executing agencies. Such action may not be equivalent to sanctions or penalties which are available within the national legal system but could, in appropriate cases, be used effectively as shown in the attached case studies, to ensure future compliance.

23. They could, for example, be held responsible for payment of compensation in case of breach of their contractual obligations under the subcontract or to pay compensation for injury to third parties, or to take remedial action in case of deficiencies in execution of the project. Steps can also be taken to monitor the performance of the executing agency on the project and take corrective action prior to extension or renewal of project funds, by withholding approval of additional funds for the extensions of project activities.

24. Finally, the alternative remedies available to UNDP include suspension or termination of execution of the project by the particular executing agency, as provided in article I of the Special Fund Agreement and article XII of the UNDP Agreement with Executing Agencies. UNDP can, of course, also decide to terminate the Executing Agency Agreement altogether in accordance with article XII (3) of the Special Fund Agreement and article XIV (3) of the UNDP Agreement with Executing Agencies.

Conclusion

25. On the basis of the above review of the various aspects of accountability, it is clear that the General Assembly intended that executing agencies should be held responsible for the proper management of funds entrusted to them by UNDP and the efficient implementation of the project activities agreed to between the Government, UNDP and the executing agency as specified in the project document.

26. The Administrator has the responsibility to monitor the performance of executing agencies and to report thereon to the Governing Council. The Governing Council in turn would have the option to take such action as is necessary to effect corrective measures to ensure proper performance of project activities by the agencies either on its own or through recommendations for appropriate action to be taken by the Economic and Social Council or the General Assembly.

27. In addition to such action as the deliberative bodies may decide to take, the Administrator has been accorded adequate administrative authority to enforce agreements entered into between UNDP and the executing agencies. The administrative action open to the Administrator consists, essentially, of enforcing the obligations undertaken by the executing agencies in their agreements with UNDP as well as in the project documents, through the settlement of disputes provisions or by taking the unilateral measures of suspension or termination, of the withholding of inadequately or improperly justified payments.

28. As can be seen from the case studies, there are adequate means for enforcing the obligations undertaken by the parties to a project on a case-by-case basis, and, in fact, this has been achieved in the past very successfully

through amicable settlement of disputes. It is our considered opinion that the existing procedures are sufficient to ensure enforcement of the obligations undertaken by the executing agencies and that most of what needs to be done to improve project execution is essentially operational and not legal.

21 November 1988

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19. DEFINITION OF THE TERM "UNFORESEEN AND EXTRAORDINARY EXPENSES" — GENERAL ASSEMBLY RESOLUTION 42/227

Memorandum to the Assistant Secretary-General for Programme Planning, Budget and Finance, Department of Administration and Management

1. I refer to your memorandum of 24 October 1988 requesting our interpretation of General Assembly resolution 42/227, which authorizes the Secretary-General, under specific conditions, to enter into financial commitments for which no provision has been made in the budget. With reference to paragraph 1(a) of the resolution, you specifically ask whether the Secretary-General may exercise the power to make the commitments referred to therein while the General Assembly is in session.

2. Under current practice, the General Assembly biennially adopts a resolution authorizing the Secretary-General to make commitments in respect of unforeseen and extraordinary expenses of certain kinds not contemplated in the budget appropriations approved by the General Assembly. The purpose of the resolution is to give the Secretary-General the financial means to respond immediately to certain needs, including certain emergency situations, while reserving ultimate control in financial matters to the General Assembly. Such expenditures may be needed, in particular, as a result of Security Council decisions relating to the maintenance of peace and security.

3. The scope of the present General Assembly resolution on unforeseen and extraordinary expenses was determined in 1961, after a review by the Advisory Committee on Administrative and Budgetary Questions (ACABQ) and the Fifth Committee of the scope of previous resolutions on this subject. The report of ACABQ at that time (A/4715) conveyed the impression that ACABQ was considering the issue of unforeseen and extraordinary expenses in the context of expenses arising between sessions of the General Assembly.

Although the fact that the Secretary-General has not, as far as we are aware, exercised the power to make commitments as authorized by paragraph 1(a) of the resolution while the General Assembly is in session suggests an understanding that those powers might be exercised only during the period between regular sessions, no firm conclusion can be drawn from this practice, as there is no evidence that a need to enter into such commitments ever arose during an Assembly session.

4. A far stronger case can be made for interpreting paragraph 1 as empowering the Secretary-General to make the commitments therein described even when the General Assembly is in session. In the first place, no temporal limitation on the exercise of the power is explicitly specified, even though an explicit limitation could easily have been included. Secondly, the opening words of the paragraph, which govern subparagraph (a), authorize the Secretary-General to "enter into commitments in the biennium 1988-1989", while subparagraph (a) authorizes the Secretary-General to enter into the commitments described therein "in any one year of the biennium 1988-1989". This language appears to empower the Secretary-General to enter into the commitments at any time during 1988 or 1989, even at periods when the General Assembly is in session.

5. This view is fortified by the following considerations. If subparagraph (a) were to be interpreted as not empowering the Secretary-General to enter into commitments described in the subparagraph at times when the General Assembly is in session, the Secretary-General would at such times have to obtain General Assembly authorization for such commitments, leading to a possibly unacceptable delay in dealing with emergency situations. In addition, since subparagraphs (a), (b) and (c) stand on the same footing within the paragraph, the same interpretation would have to be placed on subparagraphs (b) and (c). It is unlikely that the General Assembly would have intended its authorization to be necessary for, e.g., an unforeseen commitment of a small amount relating to expenses incurred in the appointment of assessors, or the calling of witnesses or the appointment of experts, in a proceeding before the International Court of Justice (subparagraph (b)(ii)), just because it happened to be in session.

6. Furthermore, paragraph 3 of the resolution clearly states or implies that, in respect of the commitments therein described, consideration by the General Assembly is necessary. The absence of any corresponding reference to the General Assembly in paragraph 1 suggests that Assembly consideration was not considered necessary for the smaller commitments therein described.

7. While, therefore, the question is not free from doubt, we favour the view that the Secretary-General can act in terms of paragraph 1 without authorization from the General Assembly, even when the Assembly is in session. The provisions of paragraph 2 would, however, have to be observed.

2 December 1988

20. FORM OF CREDENTIALS — QUESTION OF WHETHER REPRESENTATIVES OF STATES NOT HOLDING FORMAL CREDENTIALS OR INTERNATIONAL ORGANIZATIONS PARTICIPATING AS OBSERVERS MAY SIGN THE FINAL ACT OF A CONFERENCE

Cable to the United Nations Office at Vienna

Reference is made to your telephone inquiry of 15 December 1988 requesting our urgent response on the following questions:

(*a*) Whether representatives of States not holding credentials issued by the Head of State or Government or Minister for Foreign Affairs as provided for in rule of procedure 3, but nevertheless entitled under rule of procedure 5 to participate in the conference may sign the Final Act of the conference.

At the 1986 Vienna Conference on the Law of Treaties between States and International Organizations or between International Organizations, representatives of States who held letters or notes verbales from the permanent representative of the permanent mission of the State concerned signed the Final Act of the Conference. The Director of the Codification Division and the Chief of the Treaty Section are in agreement that as the Final Act is essentially a brief record in "journal form" of what transpired at a conference, representatives who participated in the conference under applicable rules of procedure should be entitled to sign the Final Act. As you know, of course, credentials from the Head of State or Government or the Minister for Foreign Affairs are necessary for signature of the Convention.

(*b*) Whether organizations participating in the conference as observers may sign the Final Act. Organizations participating as observers signed the Final Acts at the 1986 Vienna Conference on the Law of Treaties Between States and International Organizations or between International Organizations, at the 1983 Conference on Succession of States in Respect of State Property, Archives and Debts, and at the 1982 Third United Nations Conference on the Law of the Sea. In all such cases, the European Economic Community signed the Final Acts.

16 December 1988

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21. PROCUREMENT OF GOODS — FINANCIAL REGULATION 15.1 — UNITED NATIONS SPECIAL CONDITION ON COLLABORATION WITH SOUTH AFRICA — MEANING OF THE EXPRESSION "ACCEPTABLE BIDDER"

Memorandum to the Chief, Contracts and Procurement Service, United Nations Department for Transnational Corporations Development

1. Reference is made to your memorandum of 27 June, seeking advice on the United Nations Population Fund's request that, as in the case of South Africa, goods made in State A should not be supplied to State B under United Nations purchase orders.

Background

2. UNFPA's request seems to stem from purchase order No. 7-21-72119B issued by United Nations Department for Transnational Corporations Development (UNDTCD) on 30 December 1987 to a corporation for provisions of office supplies, including stencils which are said to originate from State A. The purchase order contained the United Nations Special Condition on Collaboration with South Africa, on the basis of which the UNFPA representative in State B requested that a similar provision should be adopted by the United Nations so that State A made goods are not supplied to State B, in view of that country's policy towards State A. His letter, dated 18 May 1988, reads as follows:

> "As you may know State B has no diplomatic or commercial ties with State A and bans all its products from being imported into the country.
>
> Therefore as in the case of South Africa, a special condition should be established so as no products made in State A be purchased for delivery under headquarters purchases for projects in State B. This is imperative in order to preserve the Fund's image in State B and avoid embarrassing situations with the national authorities."

Executing agency

3. UNDTCD acts in this case as executing agency of UNFPA and, under UNFPA financial regulation 15.1, the funds obtained from UNFPA are to be administered in accordance with the United Nations financial regulations, rules, practices and procedures. The regulation states:

> "The administration by executing agencies of funds obtained from or through UNFPA shall be carried out under their respective financial regulations, rules, practices and procedures to the extent that they are appropriate. Where the financial governances of an executing agency do not provide the required guidance, those of UNFPA shall apply."

Cancellation of the order

4. The Special Condition on Collaboration with South Africa, to which the UNFPA representative refers and on the basis of which he requested that a similar provision be incorporated in United Nations purchase orders for products made in State A, was adopted in compliance with the specific request of the General Assembly to the Secretary-General "to refrain from any purchase, direct or indirect, of South African products" and "to deny any contracts or facilities to transnational corporations and financial institutions collaborating with South Africa".[100] The condition is of general application and is incorporated in all United Nations General Conditions and purchase orders; it applies to all United Nations purchases worldwide irrespective of use or country of destination.

In the absence of an unequivocal legislative mandate, therefore, a Special Condition similar to that on South Africa cannot be incorporated in a United Nations purchase order to exclude purchases, or contractors, from a State Member of the United Nations.

5. Furthermore, United Nations contracts are awarded on the basis of competitive tenders to the lowest acceptable bidder. The expression "acceptable bidder" in financial rule 110.21 has in the past been interpreted to refer only to the responsiveness of the bid to the technical specifications in the advertisement or request for proposals. It has not been applied to take account of considerations extraneous to the tender process, except in compliance with a mandatory norm of the United Nations to exclude certain bidders or products. Accordingly, since no condition was incorporated in the contract with the vendor regarding State A products, we consider that there is no legal basis, without incurring substantial damages, for cancelling the order at this stage. We note, in this respect, that the purchase order has already been accepted by the vendor and the company's invoice ($2,295.20) submitted on 17 March 1988 awaits payment.

14 July 1988

Treaties

22. SIGNATURE OF TREATIES OR AGREEMENTS BY THE UNITED NATIONS — 1986 VIENNA CONVENTION ON THE LAW OF TREATIES BETWEEN STATES AND INTERNATIONAL ORGANIZATIONS OR BETWEEN INTERNATIONAL ORGANIZATIONS

Letter to the Legal Counsel, World Intellectual Property Organization

With reference to your letter of 26 November concerning the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, I regret the delay in replying, which was attributable to the press of business at the end of the General Assembly and then the holiday season.

In our view, the conclusion of this Convention was a very significant event in the process of the codification of international law in the field of treaty relations of international organizations. It is worth mentioning in this regard that the Administrative Committee on Coordination, at its second regular session held on 22 and 23 October 1986, took note of the outcome of the Vienna Conference at which the Convention was adopted and "urged the organizations of the United Nations system to give favourable consideration to seeking authorization from competent organs to sign the Convention in accordance with article 82, paragraph (c), thereof and, in due course, to deposit instruments relating to acts of formal confirmation in accordance with article 83 of the Convention".

As you know, under the Final Provisions of the Convention, namely, article 82, it was open to the international organizations invited to participate in the 1986 Vienna Conference, including the World Intellectual Property Organization, to sign the Convention until 30 June 1987. In a letter dated 19 February 1987, I informed you that pursuant to a General Assembly decision, the Secretary-General authorized myself and my deputy to sign the Convention for the United Nations and we did so on 12 February 1987.

The signature of treaties or agreements by the United Nations is one of the inherent powers of the Secretary-General and is, particularly as far as very technical matters are concerned, often delegated to the head of the department which has the operational responsibility for the instruments to be signed. Normally, therefore, the authorization of the General Assembly is not required. However, the Organization has never been in a position to sign a codification convention. Consequently, due to the nature of this Convention, it was decided that a request for authorization for the Organization to sign the Convention should be submitted to the General Assembly. This was done at the forty-first session and the required decision (41/420) was obtained on 3 December 1986.

…

With the time limit prescribed by article 82 of the Convention, it was signed by 27 States and 10 international organizations. It was subsequently ratified under article 83 of the Convention by two States.

Signature of the 1986 Vienna Convention by an international organization does not have the effect of expressing the consent of that Organization to be bound by the Convention. That would require a separate "act of formal confirmation" as foreseen in article 83 of the Convention. Therefore, the signature of the Convention by a sufficient number of international organizations was mainly sought for two purposes — first of all, to demonstrate the interest of organizations in the Convention and thus to help generate support from States to bring the Convention into force. Secondly, by signing the Convention the organization, in order to become a party to it, will later only have to submit an instrument of an act of formal confirmation and need not provide a declaration of its capacity to conclude treaties, which is required of organizations that accede to the Convention.

In this regard, it should be noted that under article 84 of the Vienna Convention, those organizations which failed to sign the Convention within the specified time limits may accede to it but must submit a declaration in the instrument of accession that the organization has the capacity to conclude treaties.

The question of the United Nations submitting an instrument relating to an act of formal confirmation does not arise at the current stage. Such a step is to be considered in the light of relevant developments, including the increase in the number of United Nations Member States ratifying or acceding to the Convention.

20 January 1988

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23. INTERPRETATION OF THE PROVISIONS OF ARTICLE 57, PARAGRAPH 1, OF THE AGREEMENT ESTABLISHING THE COMMON FUND FOR COMMODITIES — CONDITIONS FOR ENTRY INTO FORCE OF THE AGREEMENT

Memorandum to the Secretary-General of the United Nations Conference on Trade and Development

1. This is in reply to your request of 26 February 1988 for a legal opinion on the questions that have been raised in recent months as to the interpretation of the provisions of article 57, paragraph 1, of the Agreement Establishing the Common Fund for Commodities.[101]

I

2. The Agreement Establishing the Common Fund for Commodities was adopted on 27 June 1980 at a Negotiating Conference convened by the United Nations Conference on Trade and Development. The Secretary-General of the United Nations in article 55 of the Agreement was designated depositary and the Agreement was opened for signature on 1 October 1980. Article 57, paragraph 1, of the Agreement provides that it shall enter into force:

(*a*) on deposit of instruments of ratification, acceptance or approval from at least 90 States;

(*b*) *provided* "their total subscriptions of Shares of Directly Contributed Capital comprise not less that two thirds of the total subscriptions of Shares of Directly Contributed Capital allocated to all States specified in Schedule A and that not less than 50 per cent of the target for pledges of voluntary contributions to the Second Account … has been met"; and

(*c*) *provided further* "that the foregoing requirements have been fulfilled by 31 March 1982 or by such later date as the States that have deposited such instruments by the end of that period may decide by a two-thirds majority vote of those States;

(*d*) *and if* "the foregoing requirements have not been fulfilled by that later date, the States that have deposited such instruments by that later date may decide by a two-thirds majority vote of those States on a subsequent date".

For convenience of reference, subsequent paragraphs of this memorandum use the expressions: "*ratifying States*" to denote States that have deposited instruments of ratification, acceptance or approval; "*basic requirements*" to denote the requirements in (*a*) and (*b*) above; and "*date(s)*" to refer to the date 31 March 1982 and subsequent dates for fulfilment of the "basic requirements" in (*a*) and (*b*) above.

3. The basic requirements in (*a*) and (*b*) above were not fulfilled by the stipulated date *31 March 1982* and, as required by article 57, paragraph 1, the ratifying States by a two-thirds majority vote decided on a second date: *30 September 1983*.

4. The basic requirements were not fulfilled by the second date 30 September 1983; but a third date was not subsequently established as it was uncertain whether the basic requirements would in fact be fulfilled by such a third date if it was established.

5. The possibility of the basic requirements being fulfilled now seems probable and, consequently, the question of the conditions for the entry into force of the Agreement and, in particular, the matter of the establishment of the third date are presently under review.

II

6. Among the various matters that have been raised in the discussions, the following appear to be the essential questions.

(1) Whether establishment of a third date is, under article 57, paragraph 1, necessary for the entry into force of the Agreement?

This question has to be answered in the affirmative. The natural and usual meaning of the language of the provisions of article 57, paragraph 1, leaves no room for another interpretation. The relevant provisions of article 57, paragraph 1, read:

"This Agreement shall enter into force upon receipt by the Depositary of instruments of ratification, acceptance or approval from at least 90 States, provided that … and further provided that the foregoing requirements have been fulfilled by 31 March 1982 or by such later date as the States that have deposited such instruments by the end of that period may decide by a two-thirds majority vote of those States. If the foregoing requirements have not been fulfilled by that later date, the States that have deposited such instruments by that later date may decide by a two-thirds majority vote of those States on a subsequent date …"

Had the intention of the Negotiating Conference in 1980 been otherwise it would have been clearly necessary to formulate article 57, paragraph 1, in a different manner.

(2) If the establishment of such a third date is necessary, whether such a third date is under article 57, paragraph 1, the only further date that may be established?

This question has also to be answered in the affirmative. Such a conclusion follows, necessarily, from the language of the provisions of article 57, paragraph 1. If such was not the intention of the Negotiating Conference, the provisions of article 57, paragraph 1, would clearly have had to be formulated in a different manner. Furthermore, we understand that the very reason why a third date was not established in 1983 was because the ratifying States believed that if the basic requirements were not met by such a third date the establishment of a still further date would not under article 57, paragraph 1, be possible.

(3) A further matter that has been raised with us is as to when the Agreement would enter into force if a third date is established only after the basic requirements happen to be fulfilled. As it is an essential condition under article 57, paragraph 1, that a third date be "established", in order that the Agreement enter into force, it follows that the "establishment" of the third date would constitute fulfilment of such a condition; and would be the occasion on which the Agreement would enter into force as provided in article 57, paragraph 1.

(4) Whether the decision of the ratifying States on the establishment of the third date should be reached at a meeting of the ratifying States *or* through written communications between the depositary of the Agreement and the ratifying States?

The possibility of the convening of a meeting of the ratifying States should be given serious consideration. A meeting should not be convened only if practical difficulties make the convening of a meeting an unrealistic alternative and provided the ratifying States entitled to participate in the establishment of the third date are consulted on the written communication procedure and have no objection thereto.

It seems to me that such a course is necessary because of: the use of the expression "two-thirds majority vote" in article 57, paragraph 1; the fact that no reference is made in article 57, paragraph 1, to a written-communication alternative; and that a meeting of ratifying States was convened in 1983 for the purpose of establishing the second date: 30 September 1983.

If, notwithstanding, the written communication alternative is to be used, it should be noted that it would be obligatory on the depositary to conform as closely as practicable to the provisions of the penultimate sentence of article 57, paragraph 1: "If the foregoing requirements have not been fulfilled by that later date, the States that have deposited such instruments by that later date may decide by a two-thirds majority vote of those States on a subsequent date." This would require that the written communications should request States to respond by an affirmative vote, a

negative vote or by abstention, on whether the deadline proposed by the Secretary-General of UNCTAD, after appropriate consultations, is acceptable. Also, as will be noted, article 57, paragraph 1, does not refer to a two-thirds majority of "the States voting," but rather requires a two-thirds majority of "the States that have deposited instruments of ratification, acceptance or approval by 30 September 1983".

7. Finally, we must remember, in our consideration of the entire question of the entry into force of the Agreement, that the responsibilities of the Secretary-General as "depositary" of the Agreement require that he conform as closely as practicable to the provisions of article 57, paragraph 1.

11 March 1988

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24. PREAMBLE TO TREATIES — INCLUSION OF INTERPRETATIVE STATEMENTS IN "TRAVAUX PRÉPARATOIRES"

Facsimile to the Senior Legal Officer, Legal Liaison Office, United Nations Office at Geneva

Reference is made to your facsimile of 30 November 1988 on whether the Chairman of the Working Group preparing a Draft Convention on the Rights of the Child may, on behalf of the entire Working Group, include a statement in the *travaux préparatoires* which would read: "in adopting this preambular paragraph, the Working Group does not intend to prejudice the interpretation of article 1 or any other provision of the Convention by States parties". We have not, of course, seen the text of the preambular paragraph in question or the text of any of the provisions of the draft conventions and, thus, our views set out below are somewhat abstract in nature.

(*a*) The preamble to a treaty serves to set out the general considerations which motivate the adoption of the treaty. Therefore, it is at first sight strange that a text is sought to be included in the *travaux préparatoires* for the purpose of depriving a particular preambular paragraph of its usual purpose, i.e., to form part of the basis for the interpretation of the treaty. Also, it is not easy to assess what conclusions States may later draw, when interpreting the treaty, from the inclusion of such a text in the *travaux préparatoires*. Furthermore, seeking to establish the meaning of a particular provision of a treaty through an inclusion in the *travaux préparatoires* may not optimally fulfill the intended purpose; because, as you know, under article 32 of the Vienna Convention on the Law of the Treaties,[102] *travaux préparatoires* constitute a "supplementary means of interpretation" and hence recourse to *travaux préparatoires* may only be had if the relevant treaty provisions are in fact found by those interpreting the treaty to be unclear.

(*b*) Nevertheless, there is no prohibiting in law or practice against inclusion of an interpretative statement in *travaux préparatoires*. Though this is better done through the inclusion of such interpretative statement in the Final Act or in an accompanying resolution or other instrument. (Inclusion in the Final Act, etc., would be possible under article 31 of the Vienna Convention on the Law of the Treaties). Nor is there a prohibition in law or practice from making an interpretative statement, in the negative sense, intended here as part of the *travaux préparatoires*.

9 December 1988

B. Legal opinions of the secretariats of intergovernmental organizations related to the United Nations

UNITED NATIONS INDUSTRIAL DEVELOPMENT ORGANIZATION

1. STATUTES OF THE INTERNATIONAL CENTRE FOR GENETIC ENGINEERING AND BIOTECHNOLOGY — SOME PROCEDURAL ASPECTS OF RESERVATIONS AND ACCEPTANCE OF RESERVATIONS — LEGAL EFFECTS OF THE RESERVATIONS — LEGAL EFFECTS OF THE RESERVATIONS MADE BY THE GOVERNMENT OF CHILE ON THE APPLICABILITY OF THE STATUTES

Memorandum to H.E. R. Taylhardat, Ambassador Plenipotentiary, Chairman, Preparatory Committee for the Establishment of the ICGEB with legal opinion

1. On 19 November 1987, the Depositary of the Statutes of the International Centre for Genetic Engineering and Biotechnology (ICGEB) received from the Government of Chile an instrument of ratification, to which reservations to article 13, paragraphs 3, 5, 6 and 7, were attached.

2. Pursuant to your request for my legal opinion on the issues raised by the reservations attached by the Government of Chile to its instrument of ratification of the Statutes of the International Centre for Genetic Engineering and Biotechnology, I have prepared the analysis and opinion set out below. In view of the procedural and substantive issues to which the reservations give rise, it would in my view be appropriate for you to inform the members of the Preparatory Committee and the Depositary of the Statutes thereof as soon as possible.

3. The present opinion will comment, in the first place, on the procedural aspects of the reservations, including the right of member States to accept the reservations through the competent organ of the ICGEB. In the second place, the opinion will analyze the legal effects of the reservations on the applicability of the Statutes to Chile.

LEGAL OPINION

Concerning reservations attached by government of Chile to its instrument of ratification of statutes of ICGEB

I. The procedure for expressing reservations and the acceptance of reservations

1. It is recalled that the Statutes of the ICGEB contain no provision on the subject of reservations, acceptance and objections thereto.

2. The applicable rules relating to reservations, acceptance and objections to reservations are to be found in the 1969 Vienna Convention on the Law of Treaties and in the established practice of the Secretary-General of the United Nations as depositary of multilateral treaties.

3. According to article 20.3 of the Vienna Convention on the Law of Treaties and the practice of the Secretary-General, in the case of a treaty which is a constituent instrument of an international organization — such as the Statutes of the ICGEB — a reservation requires the acceptance of the competent organ of the organization unless the treaty otherwise provides. The depositary will transmit the text of the reservation to the international organization and will inform the State concerned accordingly. In this respect, the depositary shall act in conformity with the decision of the competent organ of the international organization.

4. As regards instruments which form the constituent instruments of international organizations "the integrity of the instrument is a consideration which outweighs other considerations … and it must be for the members of the organization, acting through its competent organ, to determine how far any relaxation of the integrity of the instrument is acceptable" (*Yearbook of the International Law Commission, 1966*, vol. II, para. 20, p. 207). When this question has arisen, the Secretary-General has referred it to the body having authority to interpret the instrument in question.

5. Concerning the entry into force of the Statutes, article 21.1 states that the Statutes shall enter into force "when at least 24 States, including the Host State of the Centre, have deposited instruments of ratification or acceptance and …" In the present case, unaccepted reservations will preclude the definitive deposit of the instrument of ratification by Chile. Therefore, Chile may not presently be counted among the parties required for the entry into force of the Statutes.

6. I would like to turn the question of the determination of which organ of the Centre is competent to accept or object to the reservations made by Chile. Once the Statutes will be in force, the Board of Governors, which according to article 6.2 of the Statutes is the supreme organ of the Centre with authority to decide on basic matters, will have the power to decide on the reservations. For this purpose and in accordance with article 6.5 of the Statutes, the presence of a majority of the members of the Board is required in order to constitute a quorum. Furthermore, the Board shall decide preferably by consensus, otherwise by a majority of the members present and voting, as stated in article 6.6 of the Statutes. The resolution establishing a Preparatory Committee adopted at Madrid,

9-13 September 1983, by the Plenipotentiary Meeting on the Establishment of ICGEB, did not entrust the Preparatory Committee with the legal capacity to accept or object to reservations to the Statutes. However, I would see no legal objection if the Plenipotentiary Meeting which established ICGEB were to entrust the Preparatory Committee with the authority to decide on reservations before the Statutes have entered into force.

II. The effect of the reservations made by the Government of Chile with respect to the applicability of the Statutes to Chile

A. *Article 13, paragraph 3*

7. Article 13.3 of the Statutes, which reads as follows:

> "3. All premises of the Centre shall be inviolable. The property and assets of the Centre wherever located shall be immune from search, requisition, confiscation, expropriation and any other form of interference, whether by executive, administrative, judicial or legislative actions."

has been the object of the following reservation:

> "The Government of Chile formulates a reservation to article 13, paragraph 3, of the Statutes, to the effect that, in accordance with the constitutional norms and internal law of Chile, the property and assets of the Centre may be expropriated under a general or special law authorizing expropriation for public purposes or in the national interest, as determined by the legislature."

8. The purpose of the inviolability of the property and assets of the Centre from any form of execution is to prevent the Centre from being deprived by member States, i.e., any organ of the State, of its property and assets. The integrity of the property and assets is necessary for the independent exercise of the functions of the Centre and for the fulfilment of its objectives. In this connection, treaty practice shows that the pertinent multilateral conventions and the headquarters agreements concluded between international organizations and host States invariably provide that intergovernmental organizations shall enjoy this immunity.

9. Article 13.3 of the Statutes repeats, *mutatis mutandis*, the provision of article II, section 3, of the Convention on the Privileges and Immunities of the United Nations and article III, section 5, of the Convention on the Privileges and Immunities of the Specialized Agencies.[103] In the practice of the United Nations and the specialized agencies, it is considered that the inviolability of property and assets has an absolute and mandatory character. This inviolability is absolute since the only acceptable limitations would be those which are expressly provided in the applicable convention or headquarters agreement; and it is mandatory since no waiver of immunity from jurisdiction may extend to any measure of execution.

10. The present reservation subordinates the integrity of the property and assets of the Centre in Chile to the internal law of Chile. Actually, the Centre will be protected by immunity from expropriation only until such time as the

national legislature decides to expropriate the Centre's property and assets. The unilateral condition attached to the reservation — the enactment of a law of expropriation by the member State — will place the Centre's property and assets in Chile under a constant threat of seizure or attachment, prejudicing the Centre's independence and the performance of its activities in the country, and neutralizing the intent and purpose of article 13.3 of the Statutes.

11. If implemented, the measure of expropriation would have a direct effect on the funds and property for which the Centre is accountable to its members.

12. The reservation might concern also the archives and documents of the Centre. The Statutes, unlike certain other conventions, do not expressly provide for the protection of the archives and documents of the Centre. Since, however, archives and documents can be taken to constitute a special kind of "property and assets" and since the reservation as well as the Statutes employ only this expression, it follows that the reservation is applicable to any archives and documents of the Centre to the same extent as the Statutes are deemed to be so applicable.

13. It is recalled that while the Statutes in article 12 call for the conclusion of headquarters agreements with the Host Government, no further bilateral agreements on privileges and immunities are foreseen. This seems pertinent since it follows that the intent of the Statutes is that the Centre in all member States shall enjoy a legal status and privileges and immunities at least to the extent described in Article 13 of the Statutes themselves.

14. The present reservation may be analysed also in the light of article 6.8, which provides that "the Board may establish subsidiary organs on a permanent or ad hoc basis, as may be necessary for the effective discharge of its functions …" Should the Board of Governors decide to establish a subsidiary organ in Chile, the reservations discussed above certainly would apply. Analysing the consequences of this reservation in this general perspective might cause member States to reflect on the desirability of setting such a precedent through acceptance of the reservation.

15. In view of the foregoing, there can be no doubt that the present reservation is incompatible with the object and the purpose of the Statutes.

B. *Article 13, paragraphs 5, 6 and 7*

16. Article 13.5, 6 and 7 has incorporated by reference important provisions of the Convention on the Privileges and Immunities of the United Nations, and to this article the Government of Chile has attached the following reservation:

> The Government of Chile formulates a reservation to article 13, paragraphs 5, 6 and 7, of the Statutes, to the effect that the privileges and immunities of representatives of the members and of officials and experts of the Centre shall be granted as stipulated therein, except when such persons are Chilean nationals."

PRIVILEGES AND IMMUNITIES OF THE REPRESENTATIVES OF THE MEMBERS

Article 13.5 of the Statutes

17. This part of the reservation presents no problem. In accordance with article IV, section 15, of the Convention on the Privileges and Immunities of the United Nations the provisions relating to privileges and immunities of representatives of members "are not applicable as between a representative and the authorities of the State of which he is a national …" Consequently, the reservation of the Government of Chile would be without object and in this sense not contrary to the Statutes.

PRIVILEGES AND IMMUNITIES OF THE OFFICIALS AND OF THE EXPERTS OF THE CENTRE

Article 13.6 and 7 of the Statutes

18. Article 13, paragraphs 6 and 7, of the Statutes reads as follows:

> "6. Officials of the Centre shall enjoy such privileges and immunities as are provided for by article V of the Convention on the Privileges and Immunities of the United Nations.
>
> "7. Experts of the Centre shall enjoy the same privileges and immunities as are provided for officials of the Centre in paragraph 6 hereinbefore."

19. The Convention on the Privileges and Immunities of the United Nations does not contemplate discriminatory treatment of officials based solely on distinctions between the nationalities of the officials concerned. There is a well established practice of the Secretariat of the United Nations upholding the inacceptability of such reservations to this article (or the corresponding article VI, section 19, of the Convention on the Privileges and Immunities of the Specialized Agencies).

20. Concerning official acts of experts and officials, the Convention on the Privileges and Immunities of the United Nations requires that the privileged persons "be immune from legal process in respect of words spoken or written and all acts performed by them in their official capacity". This immunity is limited to acts carried out in an official capacity, and the practice of the United Nations and the specialized organizations shows that they have not agreed to any derogation from this provision regardless of the nationality of the official concerned (*Juridical Yearbook, 1965*, p. 223).

21. In addition, the reservation raises the question of tax exemption. Section 18(b) of the Convention on the Privileges and Immunities of the United Nations states that officials shall "be exempt from taxation on the salaries and emoluments paid to them by [the Centre]". According to the reservation, Chilean officials and experts would not be entitled to exemption from taxation of official salaries and emoluments and this would place an additional economic burden on the Centre and/or the Chilean officials and experts while permitting the Government to derive an economic gain not available under the Statutes themselves.

22. Based on the foregoing considerations, it is my opinion that the reservations made to article 13.5, 6 and 7 would have the effect of discriminating between the Centre's officials and experts on the ground of nationality in a manner not compatible with the Statutes.

26 January 1988

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2. OBLIGATION TO SURRENDER BALANCE OF APPROPRIATIONS TO MEMBER STATES — FINANCIAL REGULATIONS 4.2(B) AND (C)

Memorandum to the Director-General

1. You have asked my opinion on the legal meaning of the provisions contained in financial regulations 4.2(b) and (c), which state an obligation for the Organization to surrender to member States "the then remaining balance of any regular budget appropriations retained" at the end of a period of twelve months following the end of each fiscal period. As also requested by yourself I have consulted the Treasurer, Mr. E. Whiting, on this question, in particular as far as it relates to the formulation of the annual assessment letters addressed to all member States by the Treasury. Finally, I have had the benefit of discussing with Mr. T. Verma some of the questions raised by the decision by the General Conference (see GC.2/Dec. 22) that under certain conditions 15 per cent of the 1988-1989 appropriations should be kept in reserve.

2. The first issue to be addressed in this memorandum is the nature of the "remaining balance of any regular budget appropriation", with respect to which financial regulation 4.2(b) and (c) imposes on the Organization an obligation to surrender within 30 days following the end of the first year of each fiscal period. In particular, the question has been raised whether the balance includes the "savings" realized during 1986/87 owing to the fact that actual expenditure has been less than the appropriated amount. In this connection, it seems clear that to the extent that such "savings" have been forced owing to a lack of cash stemming from non-payment of assessed contributions, and provided that non-payment continues through several fiscal periods, to surrender such "savings" — or amounts equalling the "savings" — would result in a continuous decline of cash availability in each biennium.

3. I have carefully read paragraphs (b) and (c) of UNIDO's financial regulation 4.2, and also the corresponding provisions in United Nations Financial Regulations 4.3 and 4.4, and I do not find any basis in the formulation of these Regulations for the assumption that they should refer to the so-called "savings".

4. Actually, any analysis of UNIDO regulation 4.2 should start with the main rule, which is stated in UNIDO regulation 4.2(a) as follows:

> "(a) Regular budget appropriations shall be available for obligation during the fiscal period to which they relate".

The *ratio* of this rule is so obvious that it hardly needs to be stated here. Suffice it to say that regulation 4.2 clearly rests on the assumption that there will be a series of two-year fiscal periods, each with a set of appropriations. In view of this, paragraphs (b) and (c) modify the main rule in paragraph (a) by extending for 12 months the period of availability of the appropriations for financing obligations raised during the immediately preceding fiscal period.

5. In consequence of the main rule in paragraph (a), as extended by paragraph (b), it is then provided in the last sentence of paragraph (b) and in more detail in paragraph (c) that any balance of a regular budget appropriation remaining after the 12-month extension beyond the fiscal period to which the appropriation relates, shall be surrendered.

6 The *ratio* of the obligation to surrender may safely be assumed to be the wish to ensure member States' budgetary control over the activities of the Organization. If, namely, the Director-General were to be permitted to accumulate funds stemming from regular budget contributions — whether by not implementing authorized activities or simply because implementation proved to be less costly than estimated in the relevant appropriation — the control over the Organization by member States through their authority over the budget would be frustrated. This interpretation of the underlying purpose of the regulation is also borne out by the last sentence of paragraph (c), which provides the same cut-off date — namely, the end of the twelve months following the fiscal period in question — beyond which any still unliquidated obligation shall be either cancelled or transferred to the next (current) fiscal period.

7. The remaining balance, referred to above, is not the same as the so-called "savings", however. The term "savings" as frequently used in recent UNIDO documents is not defined in the Financial Regulations for the simple reason that the Regulations rest on the assumption that all assessed contributions will normally be paid, and the Regulations therefore do not, except for the mentioning of "outstanding regular budget obligations to the Organization" in regulation 4.2(c), explicitly address the issues that arise when member States dishonour their obligation to pay assessed contributions.

8. In order to understand the meaning of the term "savings", as used during the fiscal period 1986/1987, it is relevant to turn first to an analysis of the statement in financial regulation 4.1(a) that:

> "(a) Approval by the Conference of the programme of work and corresponding regular budget shall constitute an authorization to the Director-General to incur obligations and to make payments for the purposes thus approved and within the appropriations approved therefor."

Prima facie, this appears to simply authorize the Director-General to commit up to the total amount of appropriations for each fiscal period. However, this conclusion is only possible if regulation 4.1(a) is applied without taking into account the context as represented by other Regulations and by the actual behaviour of member States in meeting their obligation to pay assessed contributions. Since the Director-General is not authorized to borrow to finance appropriations, he can cover a shortfall in receipt of assessed contributions only from balances available in the Working Capital Fund — or as was the case in

1986/1987 from the United Nations loan. It follows that it is not enough that an adequate appropriation is contained in the approved budget; it is also necessary that adequate funds to finance the appropriation are available, normally from receipt of regular budget assessed contributions or, pending the receipt of contributions, from the Working Capital Fund.

9. It follows that if payments of assessed contributions are inadequate to finance all the appropriations, reductions in budgeted expenditures must be implemented so as to avoid a deficit. Such reductions have in UNIDO documents been described as "savings". They do not constitute a "balance" that can be surrendered, however, since in essence they express the absence rather than the presence of funds. This is clearly different from the situation addressed in paragraphs (b) and (c) of regulation 4.2.

10. The conclusion that the "savings" are not amounts to be surrendered is firmly supported by an examination of the apportionment rules for surrender. The key for distributing the amount to be surrendered among member States ("in proportion to their assessed contributions", see financial regulation 4.2(c)) is clearly appropriate if the amount is derived from funds actually contributed. It is further clearly appropriate that any member State in arrears with its mandatory contributions should not share in the distribution, and this is also stated in paragraph (c), namely, in the part which reads "before the respective share of the balance is surrendered to any member that has outstanding regular budget obligations to the Organization, those obligations shall first be brought to account". It would be contrary to these principles to also require not merely the surrender of an amount equalling the "savings" stemming from non-payment of mandatory contributions, but the distribution of such an amount among all member States. The effect would be absurd since a delinquent member State in principle would share in the distribution and since the obligation would increase to equal the total of the arrears. Finally, it would be incompatible with the fact that the Regulations do provide that arrears constitute a continuing obligation of the member State or States concerned, which cannot be written off; see financial regulation 9.4.

11. I shall now turn to the second question which concerns the effect of paragraph (e) of the Conference's decision of 12 November 1987 (GC.2/Dec.22), reading:

> "(e) Decided that from the total amount of the 1988-1989 appropriations, an amount representing 15 per cent of those appropriations should be kept in reserve by the Director-General, pending receipt from member States of their assessed contributions."

12. This decision is not incompatible with the reasoning developed above to the effect that while an appropriation is a requirement for the Director-General to make payments and to enter into commitments, it is further required that funds are available to actually make the payments/liquidate obligations. The decision apparently goes further than expressing a general condition, however, in that it stipulates an exact percentage which shall be kept in reserve — or not committed — and this gives rise to certain questions of interpretation about the correct application of the decision.

13. While the decision's reference to the appropriations is expressly limited to those for 1988/89, the reference to the receipt of contributions is not so limited and therefore encompasses also receipt in 1988/89 of contributions assessed for 1986/87 or earlier. Similarly, in view of the 12 months' extension of the availability of the appropriations for 1988/89 to finance during 1990 unliquidated obligations raised in 1988/89, a contribution received in 1990 but credited against arrears for 1988/89 or earlier also may be used to finance unliquidated obligations raised in 1988/89. The fact that one is dealing with a dynamic, rather than a static situation both on the expenditure and on the income side inevitably introduces an element of uncertainty. By this I mean that certain commitments of a contractual nature, such as appointments of permanent staff or leases of premises, often must be undertaken for periods that go well beyond the end of a two-year fiscal period. Similarly, it is not possible to have absolute certainty regarding when and to which extent member States will pay assessed contributions. In actual fact, therefore, both income and expenditure levels must be projected by the Director-General on the basis of certain assumptions. In view of Conference decision GC.2/Dec. 22, para (e), however, the Director-General may not, for the purpose of authorizing expenditures/entering into commitments, assume that member States will contribute more than what is required to finance 85 per cent of the total amount of the appropriations. Only if the actual receipts exceed this level, may such excess receipts be used to finance the appropriations kept in reserve.

14. The foregoing does not in a strictly legal sense abrogate the procedure available under the Constitution and the Financial Regulations for seeking approval of supplementary estimates to meet a shortfall in contributions received. From a practical viewpoint it may nevertheless be less likely that the required two-thirds majority can be mustered in the Board and the Conference for a proposal that would neutralize the effect of the Conference's decision regarding the 15 percent reserve requirement.

25 March 1988

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3. THE BUDGETS OF UNIDO

Memorandum to the Director-General

1. I wish to refer to your request for my legal opinion on the question, which has been posed by certain members of the Programme and Budget Committee, whether there are any obstacles of a legal nature to "merging" or "integrating" UNIDO's regular and operational budgets.

2. The principal, applicable legal rules are contained in article 13 of the Constitution of UNIDO, as supplemented by annex II to the Constitution. Already paragraph 1 of article 13 uses the plural form "budgets" and thus anticipates that while there shall be one programme of work, there will be several budgets. Paragraph 1 reads:

"1. The activities of the Organization shall be carried out in accordance with its approved programme of work and budgets."

Paragraph 2 of article 13 requires all expenditures to be divided into those financed from the regular budget and those financed from the operational budget. Paragraph 2 further provides that regular budget expenditures shall "be met from assessed contributions" and that operational budget expenditures shall "be met from voluntary contributions to the Organization, and such other income as may be provided for in the financial regulations". The income that may thus be "provided for in the financial regulations" can, of course, not include assessed contributions, since that would be contrary to the just mentioned provision in paragraph 2 concerning the financing of the regular budget and since a financial regulation could not contravene a constitutional provision.

3. Paragraphs 3 and 4 of article 13, and annex II to the Constitution, stipulate the categories of expenditures, which may be met from, on the one hand, the regular budget, and on the other hand, the operational budget. Thus paragraph 4 stipulates:

"4. The operational budget shall provide for expenditures for technical assistance and other related activities."

Paragraph 4 constitutes, at the level of the Constitution, a comprehensive statement of those expenditures that may be financed from the operational budget.

Paragraph 3 similarly contains a comprehensive statement of those expenditures that may be met from the regular budget, namely: (i) administration; (ii) research; (iii) other regular expenses of the Organization; (iv) other activities as provided for in Annex II.

4. From the foregoing, it can be seen that the Constitution of UNIDO does not permit a "merger" or "integration" of the regular and the operational budgets of the Organization. Not only does paragraph 1 of Article 13 call for budgets in the plural form, but Article 13 also stipulates in detail the legally distinct manner of financing the two budgets as well as the distinct categories of expenditures that may be met from either budget. An assessed contribution constitutes a mandatory legal obligation and cannot conceptually or legally be merged or integrated with a voluntary contribution. Nor is there — except to a certain extent in paragraph B of annex II — any coincidence or overlap between the categories of expenditures permitted under the regular budget and those permitted under the operational budget.

4 SUSPENSION OF RIGHT TO VOTE OWING TO ARREARS

Note to the Director-General

1. In view of the information presented in PBC.4/9 on the arrears of member States with respect to assessed contributions to the regular budget, I wish to bring to your attention the provision in the first sentence of article 5.2 of the Constitution, which reads:

> "Any Member that is in arrears in the payment of its financial contributions to the Organization shall have no vote in the Organization if the amount of its arrears equals or exceeds the amount of the assessed contributions due from it for the preceding two fiscal years."

2. You will recall that on the occasion of Australia's withdrawal from UNIDO, it was necessary to determine the exact meaning of the expression "fiscal year" in order to determine Australia's obligation under article 6.2 of the Constitution to pay a contribution also for "the fiscal year following that during which" Australia would deposit its instrument of denunciation of the Constitution. A legal opinion dated 21 September 1987, which analysed this matter in the light of the terms used in the six authentic language versions of the Constitution, came to the conclusion that "fiscal year" meant "12 months" both in article 6 regarding withdrawal by a Member and in article 5 concerning the suspension of a member's right to vote due to arrears. In particular, paragraph 4 of the legal opinion states that this conclusion "is compatible with the use of 'fiscal year' in the Arabic, Chinese, English and Russian versions of article 5.2 of the Constitution, which defines the amount of arrears necessary before a Member may lose its right to vote."

3. The French and Spanish texts of the Constitution do not distinguish (as do the other language versions) between "fiscal year" in articles 5.2 and 6.2 and "fiscal period" in article 14.1, but use the same term "*exercise financier*" and "*ejercicio económico*" in all these articles. The fiscal period is, of course, defined by the Financial Regulations as being two calendar years, but this definition is only aimed at article 14 regarding the cycle for the programme and budgets and not at articles 5.2 and 6.2.

4. Over and above the legal arguments and conclusion in the legal opinion is the fact that Australia has been informed and has accepted that "fiscal year" means "12 months". It therefore would not seem defensible to maintain a different interpretation for other members that are now in arrears.

5. If the foregoing is accepted, the only manner in which the issue might be avoided during the current sessions of the Programme and Budget CHCE and the Industrial Development Board would be if all decisions are taken by consensus, thereby avoiding voting. To be prepared for voting, which would seem quite advisable, I would recommend that the Treasurer, Mr. Whiting, be requested by you to prepare a list of those member States that are presently in arrears with an amount equalling or exceeding their assessed contributions for 1986 and 1987 combined.

20 June 1988

Memorandum to the Director-General

1. I wish to refer to your request for my opinion on the legal consequences of withdrawal of a member State from UNIDO, including the financial aspects.

2. According to article 6.1 of the Constitution, a member may withdraw "by depositing an instrument of denunciation of this Constitution with the depositary". The depositary being the Secretary General of the United Nations, the instrument must be deposited with him. According to article 6.2 of the Constitution, "withdrawal shall take effect on the last day of the fiscal year, following that during which such instrument was deposited." This means, on the assumption that the expression "fiscal year" equals 12 months, that if for example a member State should deposit its instrument of denunciation between today and the end of 1987, the withdrawal would take effect on 31 December 1988, and membership rights and obligations would continue until that date.

3. In accordance with article 6, para. 2, the withdrawing member shall pay contributions for the last fiscal year of its membership, which shall be the same as the assessed contributions for the fiscal year during which the instrument of denunciation was deposited. The interpretation of the period referred to as "fiscal year" encounters the difficulty that while this expression is used in the Arabic, Chinese, English and Russian versions of the authentic texts of the Constitution, the French and Spanish versions use, respectively "*exercise financier*" and "*ejercicio económico*". The terms used in French and Spanish refer to a period of time without defining the length of the period, while the expression in English "fiscal year", and its equivalent in Arabic, Chinese and Russian, normally would be understood to refer to a period of 12 consecutive months. It is a well-established principle of international law that where authentic versions of a plurilingual treaty differ, an attempt must be made to conciliate the divergent versions. It is further well established that where one or more of the authentic texts contain a precise expression, in particular if it is a technical or legal term, that expression is applied, if its application is compatible with the more general or vague expressions used in one or more of the other authentic texts. It follows therefore that the length of the period is a fiscal year or 12 months.

4. The above conclusion is compatible with the use of "fiscal year" in the Arabic, Chinese, English and Russian versions of article 5.2 of the Constitution, which defines the amount of arrears necessary before a member may lose its right to vote. Article 5.2 provides that the arrears shall equal or exceed the assessed contributions due "for the preceding two fiscal years". Although the French and Spanish versions also in article 5.2 use the expressions "*exercise financier*" and "*ejercicio económico*", the divergence between the authentic texts can be conciliated in the same manner as discussed above for article 6.2.

5. Article 14.1 of the Constitution concerns the preparation of the budget and the programme of work and in this connection all the authentic versions employ the same expression, namely "fiscal period", "*exercise financier*", and "*ejercicio económico*" in English, French and Spanish, respectively. The Constitution does not itself define the length of the fiscal period but a definition is contained in the Draft Financial Regulations, namely regulation II.1, according to which "the fiscal period" shall consist of two consecutive calendar years, the

first of which shall be an even year." The definition contained in the Financial Regulations could not, however, be applied to questions not considered by any of the provisions of the Financial Regulations and therefore would seem to be of no consequence for the questions of suspension and withdrawal of Member States, which are dealt with in articles 5 and 6 of the Constitution.

6. Considering that the contributions to be paid by the withdrawing member for the last year of its membership "shall be the same as the assessed contributions for the fiscal year during which" the deposit of the instrument of denunciation was effected, it follows that any supplementary estimates must be included in the calculation.

7. Although the last contribution of the withdrawing member is not an assessed contribution in the strict sense of article 14 of the Constitution, it is a mandatory contribution to the regular budget and must be assimilated to assessed contributions. The Draft Financial Regulations do not deal expressly with this special contribution, but it would appear to be legally acceptable to treat it as "miscellaneous income to the regular budget" under draft financial regulation 10.1(b)(iv), and to credit it to the General Fund. If this is done, the contribution would become available to meet regular budget expenditures and it therefore would seem logical to deduct the amount of the special contribution from the total estimated expenditures for 1988/89 before distributing the remainder among the other Members in accordance with the scale of assessment.

8. With respect to the Working Capital Fund, the withdrawing member's obligation to make advances continues until its membership has lapsed. Since in accordance with Draft Financial Regulation 5.4(b) advances "shall be made in the proportion of the scale of assessments established by the Conference for the contributions of Members to the regular budget", the obligation for the last year of membership should be adjusted in the same manner as the contribution to the regular budget for that year is adjusted in accordance with article 6.3 of the Constitution.

21 September 1987

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5. UNITED NATIONS INDUSTRIAL DEVELOPMENT ORGANIZATION/SOUTH ASIA COOPERATIVE ENVIRONMENT PROGRAMME RELATIONSHIP AGREEMENT

Memorandum to Mr. K. Goldschwend, Officer-in-Charge, Section for Relations with Governments, Intergovernmental Organizations and United Nations Agencies, Department of External Relations, Public Information, Language and Documentation Services

1. Reference is made to your memorandum of 28 September 1988 asking for my views on the request of the South Asia Cooperative Environment Programme (SACEP) in connection with the above-mentioned draft Agreement that UNIDO accept the responsibility of acting as SACEP's focal point for the subject matter area "Technology for the Development of Renewable and Reusable Resources."

2. It is stated in the letter of 22 July 1988 from SACEP that the Consultative Committee of SACEP recommended to the Governing Council of SACEP to designate UNIDO as the focal point in this subject matter area (there being 13 others comprising the programme activities of SACEP) and that the 4th Governing Council meeting unanimously accepted the recommendation. SACEP in its letter further indicates that acceptance by UNIDO of this responsibility would be greatly appreciated. The Terms of Reference for the formulation of activities in this subject matter area as well as a copy of the Modalities of Focal Points of SACEP were attached.

3. Regarding the "Modalities of Focal Points of South Asia Cooperative Environment Programme" my comments are as follows:

> By accepting the designation to be a focal point for SACEP, UNIDO would implicitly also recognize the rules contained in the Modalities which would provide the structure for the relationship SACEP/UNIDO. Rule 1.1. states that "as provided in article 6 of the Articles of Association, the focal point shall work towards the implementation of its programmes and shall cooperate with the SACEP Secretariat in programme implementation". Then: "The National Focal Point shall, in consultation with all concerned member countries, identify the priority areas in which project proposals should be initiated …" It seems to me, however, that the National Focal Point is distinct from the Focal Point for a subject matter area such as UNIDO would be, so that this sentence does not concern UNIDO. According to paragraph 1.1, sentence 3, the Focal Point (= UNIDO) shall then circulate the brief outline among the member countries and consult with them directly, etc.

4. Already at this point it is evident that UNIDO as a focal point would act in a strict framework of clearly distributed and prescribed tasks with no executive responsibilities. The limitation to member States of SACEP would also be in possible conflict with UNIDO's constitutional, global mandate.

5. Paragraph 1.2 reads: "The matter will then be put before the Consultative Committee, who will authorize the project proposals to be taken up or give other instructions as they deem fit." It is clearly against the mandate of UNIDO's Secretariat to receive instructions from entities other than its governing bodies. Cooperation with other intergovernmental organizations must be based on the principle of equality and agreement regarding common projects. In such cooperation, therefore, UNIDO cannot become part of the institutional structure of another organization, subject to the instructions of its governing bodies.

6. In view of the above UNIDO is not in a position to accept the designation as a Focal Point for SACEP. The reasons advanced should be explained to SACEP, in particular that UNIDO cannot become part of the structure of another organization, in a subordinate position to its governing organs. There is, of course, no impediment to cooperation in the usual ways in the areas foreseen in the agreement.

1 December 1988

NOTES

[1]See vol. 57, tome 1, *Annuaire de L'Institut de Droit International*, Session d'Oslo 1977, Travaux préparatoires. For a discussion of the applicable law in the absence of a stipulation by the parties, see ibid., p. 48. See also *International Legal Materials* XXIV, No. 5 (September 1985), pp. 1350-1352, for the views of the UNCITRAL.

[2]See Dr. Karl Zemanek, *Das Vertragsrecht der Internationalen Organisationen* (Vienna, Springer-Verlag, 1957), in which a similar distinction is drawn.

[3]See *Juridical Yearbook, 1976*, p. 159. The opinion was in response to a questionnaire from the Institut de Droit International. The materials used in the opinion were derived from a study of the International Law Commission published in the *Yearbook of the International Law Commission, 1967*, vol. II, document A/CN.4/L.118 and Add.1 and 2, p. 207.

[4]See also *Annuaire de L'Institut de Droit International*, op. cit., note 1; The Hague Convention on the Law Applicable to Contracts for the International Sale of Goods, *International Legal Materials* XXIV, No. 6 (November 1985), 1573; the Conventions prepared by the United Nations Commission on International Trade Law on Arbitration Rules, Contracts for International Sale of Goods, etc.; for a list see: *United Nations Multilateral Treaties Deposited with the Secretary-General: Status as at 31 December 1986* (United Nations publication, Sales No. E.86.V.8).

[5]In the last 10 years, this Office has been involved in only two commercial arbitrations, both under the auspices of the American Association of Arbitration (AAA): *Canvas and Leather v. United Nations Children's Fund (UNICEF)*, decided on 1 February 1982, and *Reliable Van and Storage v. United Nations*, decided on 18 February 1982.

[6]See article 33 of the UNCITRAL Arbitration Rules. See also Dr. Karl Zemanek, op. cit., note 2 above, p. 135, where it is argued that contracts concluded by intergovernmental organizations with private suppliers of goods are governed by national law, determined to be the proper law of the contract, and not by the internal law of the organization concerned.

[7]See "Report on Possible Conflicts of Laws Rules and the Rules Applicable to the Substance of the Dispute" (Yves Derains — Rapporteur; Prof. Pierre Lalive — Chairman), in: *UNCITRAL's Project for a Model Law on International Commercial Arbitration* (Kluwer Law and Taxation Publishers, 1984), p. 169.

[8]The same solution is adopted in article 28 of the UNCITRAL Model Law on International Commercial Arbitration, *International Legal Materials*, vol. XXIV, No. 5 (September 1980), p. 1309, and the International Chamber of Commerce (ICC) Arbitration Rules. But see the European Convention on International Commercial Arbitration (1961), United Nations, *Treaty Series*, vol. 484, p. 364, which provides in article VII(1): "The parties shall be free to determine, by agreement, the law to be applied by the arbitrators to the substance of the dispute. Failing any indication by the parties as to the applicable law, the arbitrators shall apply the proper law under the rule of conflict that the arbitrators deem applicable." See also, in this respect, article 1496 of the new French Code of Civil Procedure, which provides: "The arbitrator shall decide (in the case of an international commercial arbitration) the dispute in accordance with the legal rules chosen by the parties; failing such choice, in accordance with the legal rules which he considers appropriate in the case. In all cases he shall take account of commercial usage." René David, *Arbitration in International Trade* (1985), p. 342.

[9]For the view that an arbitrator need not select the conflict rules of a particular national law but, instead, "a conflict rule which receives a large consensus internationally", see Report on *Possible Conflict of Laws Rules and the Rules Applicable to the Disputes*, op. cit., note 7.

[10]See *Juridical Yearbook, 1976*, p. 162.

[11]See *Standard Chartered Bank v. The International Tin Council*, *International Le-*

gal Materials XXV, No. 3 (May 1986), p. 650. The United Kingdom High Court of Justice (Queen's Bench Division) found that a Letter of Agreement with the plaintiff bank amounted to a waiver of the privileges and immunities of the Council and thus asserted jurisdiction in the case. While admittedly the clause on which the Court relied was outrageously broad, we do not normally wish to take any chances.

[12]Attorneys specializing in international trade law consider agreement on a choice-of-law clause particularly advantageous to their clients and will often strongly argue for application of a law of one of the major legal systems: English or French law or the law of one of the States of the United States of America. The United Nations has thus been more successful in excluding references to a particular municipal law by electing for non-inclusion of a choice-of-law clause altogether.

[13]See *In the matter of the arbitration between AMCO Asia Corp. and other and the Republic of Indonesia*, *International Legal Materials* XXIV, No. 4 (July 1985), p. 1026, where the ICSID Arbitral Tribunal, which by virtue of article 42 of the ICSID Convention is required to apply the law of the State party to the dispute and such rules of international law as are applicable, stated, in declining to be bound by a decision of a national court: "… an international Tribunal is not bound to follow the result of a national court … If a national judgement was binding on an international Tribunal such a procedure could be rendered meaningless."

[14]*Reliable Van and Storage Inc. v. United Nations* was an arbitration conducted under AAA, decided on 18 February 1982. In that case the Court fixed the price payable by the United Nations for shipment of a staff member's goods, based on estimates supplied by the Contractor. Condition 2 of the Contract expressly required the Contractor to notify the United Nations when the weight of the goods to be shipped, on the basis of which the price was fixed, was exceeded. This was not done. Relying on New York court decisions and trade usage, by which the transporter is entitled to payment on the basis of the actual weight of the goods shipped, the Contractor claimed payment from the United Nations for the excess weight (see D.C.N.Y. 1972 UCC Section 1-205(5)). However, the United Nations successfully argued that the United Nations "Conditions for Contracts for Removal and Shipment of Household Effects", which were made part of the Contract, prevailed over the usage of trade adopted by American court decisions.

[15]See "Report on Possible Conflicts of Laws Rules and the Rules Applicable to the Substance of the Dispute", op. cit. note 7, p. 186.

[16]See *DST v. Raknoc (Donaldson MR)*, *All England Law Reports*, 17 July 1987. In that case, relying on article 13(3) of the ICC rules, which is similar to article 33(3) of the UNCITRAL Arbitration rules, the arbitrators determined the proper law as the "internationally accepted principles of law governing contractual relations". The arbitration decision was upheld by the court. See also decisions on application of *lex mercatoria*, as the proper law of the contract, reported in *International Legal Materials*, vol. XXIV, No. 2 (January 1985), p. 360.

[17]One of the reasons why the Organization decided to abandon use of the American Association of Arbitration procedure was the experience encountered in the case of *Canvas and Leather v. UNICEF* decided on 1 February 1982, where the arbitral award constituted no more than a few paragraphs on a page, completely ignoring the legal arguments advanced by the Organization.

[18]Indeed, under article 33(2) of the UNCITRAL Rules, the parties must agree specifically to give the arbitrators this power.

[19]We, however, expressly provide in all cases that disputes shall be resolved exclusively by arbitration and that neither the choice of an applicable law, where this is done, nor the submission to arbitration shall be construed as a waiver, express or implied, of the privileges and immunities of the United Nations.

[20]See René David, op. cit., note 8, p. 350, and Berthold Goldman, "La lex mercatoria dans les Contrats et l'arbitrage international: réalité et perspective", *Journal du droit international*, 1979, No. 3, p. 475. See also J. Gillis Wetter, *The Legal Framework of*

International Arbitral Tribunals — Five Tentative Markings (1981), International Contracts, by Columbia University. For cases upholding arbitration based on the *lex mercatoria*, see *International Legal Materials*, vol. XXIV, No. 2 (March 1985), p. 360.

[21]Article 33(3) of the UNCITRAL Arbitration Rules provides: "In all cases, the arbitral tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction."

[22]Generally, we apply the comparative law method to determine the rules most commonly accepted in the national laws to which the contract is closely connected and the commercial rules and usage accepted internationally, taking into account also rules developed by application of Article 38(1)(c) of the Statute of the International Court of Justice. See also a discussion of this subject by René David, op. cit., note 8, p. 347; ibid., note 12.

[23]See note 8, above.

[24]United Nations, *Treaty Series*, vol. 1489, p. 3.

[25]The Publishing Company does not state whether the title of its journal has been registered as a trade mark, and we assume it has not. However, in the United States, registration of a trade mark merely serves to raise a presumption of validity; non-registration is not a requirement for purposes of maintaining an action for infringement, nor is registration an absolute bar to others using a merely descriptive title. In the United Kingdom, no action for infringement can be brought in respect of unregistered trade marks (see Trade Marks Act 1938, S.2). It might be useful at a later stage to investigate the registration status of the Company title in both the United States and the United Kingdom.

[26]The Trademark Registration Treaty, Misc. 28 (1974), Cmnd. 5749, to which the United States and the United Kingdom have both affixed signatures, does not provide any additional substantive protection of trade marks beyond the protection granted by national legislation. The two U.S.C. sections, therefore, are the only applicable statutory laws to a suit held in United States courts.

[27]*Dell Pub. Co. v. Stanley Pub., Inc*., 211 N.Y.S.2d 393, 399 (1961).

[28]A confirmation of whether or not the Company has registered "World Development" as a trade mark can be accomplished by an agent or attorney search through the files at the Library of Congress Trademark Office.

[29]See 15 U.S.C. Sec. 1127.

[30]*Frederick Warne and Co. v. Book Sales Inc*., 481 F. Supp. 1191, 1195 (1979).

[31]*Idem*, p. 1195.

[32]See *McGraw-Hill Publishing Co. v. American Aviation Associates, Inc*., 117 F.2d 293, 296 (1940).

[33]*Scott v. Mego International Inc*., 519 F. Supp. 1118, 1126 (1981).

[34]*American Association for Advancement of Science v. Hearst Corp*., 498 F. Supp. 244, 257.

[35]*Idem*, p. 257.

[36]*Dell Pub. Co. v. Stanley Pub., Inc*., 211 N.Y.S. 2d 393, 402, 9 N.Y.2d 126 (1961).

[37]See *McGraw-Hill Publishing Co. v. American Aviation Associates, Inc*., 117 F.2d 294 (1940).

[38]*Bayer Co., Inc., v. Shoyer*, 27 F. Supp. 633, 637 (1939).

[39]*Idem*, p. 1128.

[40]*Philadelphia Inquirer Co. v. Coe*, 133 F. 2d 385, 386 (1942).

[41]See, e.g., *idem*, p. 1129 (analysing the likelihood of confusion by comparing letter size and letter shape).

[42]*Idem*, p. 1133.

[43]See *McGraw-Hill Publishing Co. v. American Aviation Associates, Inc*., 117 F.2d 294 (1940).

[44]*Scott v. Mego International Inc*., 519 F. Supp. 1128 (1981).

[45]*Majestic Mfg. Co. v. Majestic Elec. Appliance Co*., 172 F.2d 862 (1949).

[46]*Scott v. Mego International Inc*., 519 F. Supp. 1129 (1981) (holding that the weaker the mark, the less protection it will be afforded).

[47]*Scott v. Mego International Inc*., 519 F. Supp. 1129 (1981).

[48]*World Development* (UNDP), March 1988, p. 2.

[49]*Scott v. Mego International Inc*., 519 F. Supp. 1133 (1981).

[50]See *McGraw-Hill Publishing Co. v. American Aviation Associates, Inc*., 117 F.2d 295 (1940).

[51]*Idem*, p. 294.

[52]See *McGraw-Hill Publishing Co. v. American Aviation Associates, Inc*., 117 F.2d 295 (1940).

[53]*Scott v. Mego International Inc*., 519 F. Supp. 1134 (1981).

[54]*Idem*, p. 1135.

[55]See *McGraw-Hill Publishing Co. v. American Aviation Associates, Inc*., 117 F.2d 295.

[56]*Scott v. Mego International Inc*., 519 F. Supp. 1135 (1981).

[57]See *Telechron, Inc. v. Telicon Corp*., 97 F. Supp. 131 (1951).

[58]See E. Vandenburgh, *Trademark Law and Procedure* (2nd ed.) (Indianapolis, United States, Bobbs-Merrill, 1968).

[59]*Scott v. Mego International Inc*., 519 F. Supp. 1137 (1981).

[60]*Idem*, p. 1138.

[61]Ibid.

[63]*Johnson & Johnson v. Carte-Wallace, Inc*., 631 F. 2d 186 (1980).

[64]See E. Vandenburgh, *Trademark Law and Procedure* (2nd ed.) (Indianapolis, United States, Bobbs-Merrill, 1968), p. 505.

[65]*Idem*, p. 505.

[66]United Nations, *Treaty Series*, vol. 1, p. 15.

[67]General Assembly resolution 76 (I).

[68]United Nations, *Treaty Series*, vol. 500, p. 95.

[69]E/5975/Rev.1.

[70]A/520/Rev.15.

[71]General Assembly resolution 222 (IV), annex I, para. 4; Assembly resolution 1240 B (XIII), para. 39; and Assembly resolution 2688 (XXV), annex, para. 40.

[72]General Assembly resolution 2401 (XXIII).

[73]General Assembly resolution 2152 (XXI).

[74]Economic and Social Council resolution 1952 (LIX).

[75]If the facts are as stated above, Mr. X is right in that his original acceptance created a contract, at L-3, step 8, from which he could, of course, resign but which he could not unilaterally alter to the L-4 level.

[76]See UNAT Judgements No. 115, *Kimpton*, para. IV; No. 106, *Vasseur*, para. II; and No. 96, *Camargo*, para. II.

[77]See UNAT Judgement No. 96, *Camargo*, para. II.

[78]Not yet published.

[79]A/C.6/40/L.31.

[80]See General Assembly decisions 42/309 and 42/310.

[81]ST/SG/2.

[82]ST/SG/2/Add.1.

[83]ST/SGB/UNEF/3.

[84]General Assembly resolution 1001 (ES-1) did not give express authority for the issuance of such a medal, but authorized the Secretary-General "to issue all regulations

and instructions which may be essential to the executive functioning of the Force … and to take all other necessary administrative and executive action".

[85]ST/SGB/119.

[86]ST/SGB/119/Add.1.

[87]See Security Council resolution 85 (1950).

[88]Eligibility for award of the previous commemorative medals has been limited to *military* personnel serving with the respective peacekeeping operations. In this regard, we note the views expressed by Mr. Ralph Bunche in a memorandum to the Director of General Services of 18 June 1964, advising *against* making Field Service Officers and guards serving in field missions eligible for the United Nations Medal.

[89]Governing Council decision 86/17; see also decisions 85/14, 85/15 and 87/13.

[90]The report issued in 1969 in two volumes as DP/5; see ibid., p. 302.

[91]Ibid., p. 302. The expression "agent" in the above paragraph was obviously used without regard to its legal implications, which later necessitated that it be clearly specified agreement with the executing agencies that they act as independent contractors vis-à-vis UNDP.

[92]See articles II and VI of the Agreement with Executing Agencies which establishes the conditions for execution of projects, as well as article XI which establishes financial accounting procedures for project expenditures. See also UNDP financial regulation 8.10.

[93]UNDP financial rule 108.13, which required UNDP to establish arrangements with executing agencies for, *inter alia*:

While the UNDP Financial Regulations and Rules do not apply to executing agencies, the requirements of financial rule 108.13 are normally incorporated in the project document.

[94]See para. 14 below.

[95]The proposed increase of government execution and the encouragement of competition among United Nations organizations, and even with private firms, for execution of UNDP-funded projects will require further review, in the light of their legal and operational implications. The World Bank experience in this regard should be examined; as we know, United Nations agencies opposed such competition among themselves or even with private firms on policy grounds.

[96]It is presumed, as the basis of our legal opinion of 8 October 1987, that the executing agencies referred to here are mostly United Nations system organizations. Government-executed projects could pose even more problems, since monitoring performance and enforcing compliance with agreed goals would be more difficult than with executing agencies.

[97]Lord McNair, *The Law of Treaties* (Oxford, Clarendon 1961), p. 493.

[98]Thomas M. Franck, "Legitimacy in the International System" (1988), vol. 82, No. 4, *American Journal of International Law*, p. 705.

[99]Not yet in force.

[100]General Assembly resolutions 34/93 A, 35/206, 36/172 D, 37/69, 40/64, 41/64 A, 41/35 B, and 42/23 B.

[101]Not yet published.

[102]United Nations, *Treaty Series*, vol. 1155, p. 331.