Extract from:

UNITED NATIONS
JURIDICAL YEARBOOK

1989

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)

Claims and liability issues

1. Legal basis for instituting claims against troop-contributing Governments to compensate the United Nations for loss of, or damage to, United Nations property — Legal principles concerning negligent acts as applied to members of the staff and members of military contingents of United Nations peacekeeping operations — Liability of troop-contributing Governments for gross negligence of members of their military contingents — Definition of gross negligence

Memorandum to the Assistant Director for Peacekeeping Matters and Special Assignments, Office for Programme Planning, Budget and Finance

1. You have asked for our opinion as to the legal basis for instituting claims against troop-contributing Governments to compensate the United Nations for loss of, or damage to, United Nations property caused by members of their military contingents who are found at fault.

2. From a review of our files, it would appear that this Office supported the Organization in its endeavour to seek compensation, by way of set-off of accounts, from Governments contributing troops to the United Nations Emergency Force (UNEF) and the United Nations Operation in the Congo (ONUC). However, most of our legal opinions were answers to specific individual questions posed from time to time. To formulate, now, a general opinion it is necessary to examine the applicable legal principles in the context of the status of the military component of peacekeeping forces together with the staff surcharging rules and the claims settlement procedures evolved over the years. We will first (in section I) examine the legal principles concerning negligent acts as applied to: (*a*) members of the staff of the Organization; and (*b*) members of military contingents of United Nations peacekeeping operations in cases where such individuals cause damage to United Nations property while performing official duties. We will then (in section II) examine the liability of troop-contributing Governments for gross negligence of members of their military contingents.

I. Principles of liability for tortious acts as applied by the Organization with respect to:

(A) *Staff members*

3. Legally, the United Nations can ask any person who it believes has caused damage to United Nations property to compensate the United Nations for the damage. If the person does not comply, then the United Nations may sue him or her, and the determination as to the financial responsibility of that person would involve a judicial process under domestic law. If, however, the person causing damage is a staff member, then staff rule 112.3 of the United Nations Staff Regulations and Rules applies, which operates in conjunction with financial rule 110.15(b). Staff rule 112.3 provides as follows:

> "Any staff member may be required to reimburse the United Nations either partially or in full for any financial loss suffered by the United Nations as a result of the staff member's negligence or of his or her having violated any regulation, rule or administrative instruction."

Financial rule 110.15 provides as follows:

> "(*a*) The Controller may, after full investigation in each case, authorize the writing-off of losses of United Nations property or such other adjustment of the records as will bring the balance shown by the records into conformity with the actual quantities.
>
> "(*b*) Final determination as to all surcharges to be made against staff members or others as the result of losses will be made by the Controller."

The Controller, in exercising responsibility for surcharges against staff members, acts upon the advice and recommendations of the Headquarters Property Survey Board or the Local Survey Boards as appropriate (financial rules 110.32(e) and (f) and 110.33(b)).

The standard of conduct to be applied in such cases, namely, negligence (not gross negligence), has been a cause of controversy and much discussion within the Organization. According to our files, the majority of cases in which United Nations property was damaged arose out of motor vehicle accidents caused either by full-time United Nations drivers or by staff members who had to drive themselves on official business. Hence, most of our legal opinions addressing the question of the financial responsibility to the Organization of staff members for damage caused to United Nations property concerned damage to motor vehicles. While additional aspects, such as driving on official duty or for recreational purposes, played an important role in those cases, there is no doubt that the United Nations policy which evolved from those cases embraces loss of or damage to all types of United Nations material property, and that, since 1969, the policy has been to require proof of gross negligence to justify a staff member being held accountable for the damage he or she caused to United Nations property. The view of the Legal Office was expressed in a memorandum from the Legal Counsel of 17 October 1969, and published in the *United Nations Juridical Yearbook, 1975*, page 186, entitled: "Question of the financial respon-

sibility to the Organization of members of the staff for accidental damage caused to United Nations vehicles while driving such vehicle — policy of the Organization in this respect". It remains valid. The pertinent excerpts of this opinion, which commented on a draft text that attempted to establish assessment policy guidelines, but which never materialized, read as follows:

> "5. It does not seem reasonable to us, however, that a United Nations driver should be made financially accountable [for damage caused to a United Nations vehicle being used on official business, as a result of negligence as distinct from gross negligence] ... it seems to us to be only equitable, if a United Nations vehicle is damaged while driven on official business in circumstances involving negligence *but not gross negligence* on its driver's part, that the Organization [which chooses to be self-insured for damage to its vehicles] should meet resulting costs and not require the driver to bear such costs totally or in part." (emphasis added)

(B) *Members of military contingents*

4. The aforementioned rules and the assessment procedure do not apply to military members for reasons inherent in the setup of peacekeeping operations. Although the military members of peacekeeping operations are international personnel under the authority of the United Nations and subject to the orders of the Force Commander through his chain of command, they nonetheless remain part of their respective national armed forces, especially for disciplinary purposes. It must be stressed, however, that the remaining link with their armed forces does not make them agents or servants of their respective Governments while performing United Nations duties in a United Nations peacekeeping force; this is because they operate under United Nations command and are performing United Nations, not national, duties. In this connection, this Office offered the following advice in a memorandum of 20 August 1975, which was later published in the *United Nations Juridical Yearbook, 1975*, page 161:

> "2. While in general, Contingent Commanders have broad disciplinary authority, they have little or no authority to impose financial assessments upon members of contingents. The financial element which may attach to the disciplinary powers of military commanders is limited and is more in the nature of a fine than of a compensation for damage.
>
> "3. Normally, a determination as to the financial assessment of military personnel lies with national jurisdictional organs and involves a judicial or quasi-judicial administrative process under domestic law. We believe that because of constitutional and structural requirements, it is unlikely that the exercise of such judicial or jurisdictional power would be or may be extended to Contingent Commanders."

5. Thus, while civilian staff of United Nations peacekeeping operations may be surcharged in accordance with the aforementioned staff rule and financial rules authorizing the Controller to act upon the advice and recommendation of the Property Survey Board, military personnel are not. Hence, although the Local Survey Board can express an opinion on the degree of negligence of mili-

tary personnel, it can only recommend, rather than require, that a United Nations claim be made against the Government contributing the military contingent in question. The situation is clearly reflected in a memorandum of 22 December 1971 from this Office ..., which stated in part:

> "... while United Nations staff members assigned to the United Nations Peacekeeping Force in Cyprus are required to reimburse the United Nations in accordance with Local Survey Boards' assessments in cases where United Nations property is lost or damaged as a result of their fault, the Local Survey Board makes no assessment and accordingly no reimbursement is made to the United Nations when those involved are members of national contingents ..."

6. The lack of a common assessment procedure for civilian and military staff was a matter of great concern to the Organization, leading to extensive discussions in the early 1970s between the Office of General Services and this Office on how to solve this problem. The situation was further complicated by the fact that, although the United Nations might have had legal claims against the individual military drivers, it was reasoned that it would be inequitable and unfair to claim compensation directly from them as they did not (and perhaps could not) obtain insurance protection, and since they are continuously exposed to traffic and to err is human, it is to be expected that they will eventually become involved in accidents resulting in damage to United Nations property.

7. Also, in the early 1970s, the Administration considered requesting participating Governments to delegate to the commander of their national contingents the authority to impose and recover appropriate assessments in cases involving members of their contingents. Those proposals were rejected and the United Nations practice has since been neither to assess nor to sue the individual military members of its peacekeeping forces for tortious acts causing loss or damage to United Nations property.

II. Liability of troop-contributing Governments for gross negligence of members of their national contingents

8. In the legal opinion of 20 August 1975 mentioned above, entitled "Advice on the procedure to be followed to collect compensation for damage caused to UNEF property by members of military contingents", it was further stated that:

> "... we consider that in the light of legal and practical considerations it is advisable that damage to the United Nations property resulting from acts or omissions of military members of contingents should be settled internationally, namely, through a direct relationship between the United Nations and the Government concerned. This conclusion is supported by the practice followed in previous and existing peacekeeping forces; the situation is different in the case of United Nations military observers who are seconded to the United Nations in their individual capacity and can be assessed on emoluments paid to them by the United Nations."

"... A possible procedure to collect compensation for damage caused to United Nations property by members of contingents may be that the assessments of the Property Survey Board, together with the proceedings of the Board and the opinion of the Contingent Commander, should be transmitted to the competent service at Headquarters, which in turn would either set up a debit against the Government concerned (applied to offset United Nations obligations to the said Government) or would submit a claim to the Government for reimbursement of the amount of damage involved ..."

9. The viewpoint expressed in the 20 August 1975 legal opinion is, in brief, that claims against troop-contributing Governments are to be based on general principles of law and on such particular agreements and understandings as may have been concluded between the United Nations and the contributing government. Although not expressly stated in the opinion, it is implicit in it that the troop-contributing Government is not legally liable for damage caused to United Nations property by one of the members of its contingent; (as explained below) that result stems from:

(*a*) The absence of vicarious liability of the Government as master or principal vis-à-vis a servant or agent respectively; and

(*b*) Absence of an agreement or consent of, or by, the government to have Government claims against the United Nations being offset by costs incurred by the United Nations as a result of damage caused to United Nations property by members of the Government's contingent.

Vicarious liability

10. Since, as mentioned above, the military members of United Nations peacekeeping operations are under the United Nations command and since they are agents of the United Nations, they are not servants or agents of their Government while performing United Nations duties. Therefore, as a principle of law, their Governments are not vicariously liable for their tortious acts.

The "off-setting" procedure

11. The 20 August 1975 legal opinion reintroduced the "off-setting" procedure as a possible means to collect compensation for damage caused to United Nations property. While the opinion is silent as to the legal basis for such procedure, there is no doubt that paragraph 5 of General Assembly resolution 1575 (XV) of 20 December 1960 (by which the General Assembly approved the recommendations of the Secretary-General relating to UNEF I contained in report A/4486 (paras. 70) of 13 September 1960) confers upon the United Nations Administration the authority to seek compensation for United Nations property lost or damaged in the field, at least for UNEF I. The pertinent part of paragraph 70 reads as follows:

"The General Assembly might also consider it appropriate for the claims of Governments [against the United Nations] in respect of equipment to be offset by the cost of loss or damage to equipment arising from the gross or wilful negligence of members of their contingents."

12. The only other provisions reflecting a purported authority of the United Nations to seek payment, by way of set-off of accounts, from troop-contributing Governments are the "Regulations for the United Nations Force in the Congo", published by the Secretary-General (ST/SGB/ONUC/1), dated 15 July 1963. Paragraph 42 of the Regulations, entitled "extra and extraordinary costs", reads as follows:

> "*... Extra and extraordinary costs*. Participating States may be compensated for all or part of the extra and extraordinary costs directly incurred with respect to the service of their contingents with the Force, in accordance with decisions of the General Assembly. The Secretary-General, through the Officer-in-Charge and the Commander, shall make necessary arrangements for records and verifications with respect to such costs and for offset against participating Governments of losses occasioned to the United Nations by recklessness or gross negligence of members of the Force contributed by them."

This provision has been interpreted by this Office (memorandum of 20 July 1978) as meaning that the offsetting procedure could only apply with respect to damage to United Nations equipment and, more importantly, that the United Nations could not claim from any Government until such time as that Government made a claim against the United Nations for costs it had incurred which would fall under the category of extraordinary expenses for its contingent in UNEF or ONUC. Moreover, the Office of Legal Affairs qualified its interpretation by underlining the fact that the United Nations Controller, in reply to the United Nations Auditors on 14 April 1965, expressly stated that the amounts that the United Nations tried to offset were not amounts "due" or owed by the Government to the United Nations; the full statement quoted reads:

> "The records of the Property Survey Board have proved to be useful in the negotiating proceedings which have taken place in the settlement of government claims for reimbursement of extra and extraordinary costs involved in furnishing supplies and equipment to their contingents. *However, the amounts included in the records of the Property Survey Board could not be construed to represent payments due from Governments* but could only be utilized for the purpose of indicating to Government-negotiating representatives that, when comparing usage of property, certain excessive losses had accrued to the United Nations for reasons other than 'fair wear and tear'." (emphasis added)

In other words, the United Nations Controller felt that the United Nations had no legal right to be compensated by the Government for damage to United Nations property caused by a member of the Government contingent; and that the only use that the United Nations could make of the report of the Survey Board concerning damage caused to United Nations property by the gross negligence of a member of a military contingent was that the United Nations too had incurred "excessive losses", and that this should be considered by the Government in calculating its claim against the United Nations because the United Nations loss or expense was attributable to one of the Government's soldiers.

III. Analysis

13. A close examination of the terms of the proposal of the Secretary-General in paragraph 70 of the UNEF I progress report as adopted by the General Assembly, and the subsequent provision enunciated in the ONUC regulations, raises questions as to whether the words used were intended:

(*a*) To impose a legal obligation on the Government to reimburse the United Nations for its losses caused by gross negligence of its military members, or whether the words only confer upon the United Nations Administration the power to negotiate an ad hoc arrangement according to which the troop-contributing Government would agree to the "offset" by the United Nations; and

(*b*) To apply only to UNEF and ONUC respectively, or whether the words used were declaratory of a general principle applicable to Governments contributing to any United Nations peacekeeping force.

14. With regard to (*a*) above, in the absence of any pronouncement by the General Assembly on the proposal of the Secretary-General, it is difficult to say that this proposal was intended to be binding on Governments. Indeed, it seems unlikely that the suggestion of the Secretary-General was intended by him and by the General Assembly to be more than what the Controller expressed (as quoted above), namely, a bargaining procedure.

15. With regard to (*b*) above, while the Secretary-General's proposal to the General Assembly made for UNEF I in 1960 was incorporated into the 1963 internal ONUC regulations, the proposal did not find its way into the 1964 Regulations of the United Nations Peacekeeping Force in Cyprus (UNFICPY).[1] Since the UNFICYP Regulations are otherwise identical with the earlier ONUC regulations, it would be reasonable to infer that the provision on "Extra and extraordinary costs" was deliberately omitted. It would seem to be clear, therefore, that even though it would have been to the benefit of the United Nations to construe the approval of the terms of the UNEF I report by the Member States in the General Assembly proceedings as a general principle or obligation applicable to all future United Nations peacekeeping forces, the facts and circumstances do not support that construction.

16. The foregoing analysis appears to be consistent with practice. The cases in our files tend to indicate that the Organization, when faced with a Government's refusal to acknowledge the "offset" of accounts, does not pursue the matter further.

IV. Conclusion

17. In our opinion:

(*a*) The Administration does have a legal right to recover from a State contributing a military contingent to a United Nations peacekeeping force the cost of repairing or replacing damage to, or loss of, United Nations property caused by a member of that State's military contingent in that force, unless that State has agreed to pay such cost.

(*b*) Although the offsetting procedure adopted for UNEF I and ONUC is not binding on States, in respect of current or future United Nations peacekeeping forces, the United Nations Administration could, with agreement of any

troop contributing State, apply the procedure in respect of that State's military contingent in existing or future United Nations peacekeeping forces.

18. In view of the foregoing, including the fact that mostly United Nations vehicle damage is involved, the Administration may wish to consider that a reasonable and equitable policy for the United Nations to follow would be to insure all its vehicles against collision damage in addition to third-party liability.

19. Finally, we wish to add a word with respect to the recurring requests for guidance from this Office on the application of the criterion of gross negligence as a basis for assessments against staff members. We should like to reiterate that an all-embracing definition of negligence or gross negligence is practically impossible to formulate. All we can say is that gross negligence amounts to an utter disregard for the lives and safety of people, i.e., wanton recklessness. Hence, for example, driving an automobile beyond the legal speed limit, or breaching any other rule of the road, while it may constitute negligence, and a traffic offence, would not constitute gross negligence unless the circumstances were such as to clearly show the driver's utter disregard for the lives and safety of people. Gross negligence is very rare.

31 August 1989

2. Liability of United Nations under road projects executed by the Office for Project Services — Employer and employment of personnel engaged to work on a United Nations Development Programme Project

Memorandum to the Deputy Director, Division for Administrative Management Services

1. This responds to your memorandum of 20 June 1989, by which you requested our advice on whether the Office for Project Services (OPS) is protected against eventual claims from personnel employed on road projects or their families, under the arrangements you describe in your memorandum, and whether it might be necessary for OPS to procure liability insurance for such personnel.

I. The current arrangements

2 In your memorandum, you state that the construction of roads under projects executed by OPS is not carried out by a contractor or a governmental organization, under the usual contractual arrangements, but by an "autonomous mechanized brigade" composed of engineers, supervisors and workers, employed under the following arrangements:

(*a*) Engineers are "either recruited directly by OPS or under a service contract from an international consulting firm".

(*b*) National supervisors are detached to the project for on-the-job training purposes.

(*c*) Workers are hired "by the project" in accordance with local labour laws and practices and "are neither employees of the Government nor directly hired by or attached to the United Nations Development Programme".

(*d*) Monthly deductions made by OPS from the work-site personnel salaries, plus an employer contribution, are paid on a quarterly basis to the National Social Security Fund for pension contributions and workmen's compensation insurance, in conformity with local labour laws.

II. Legal analysis

3. Before commenting on these arrangements, we wish to make the following observations regarding the determination of who is the employer of personnel engaged to work on a UNDP project.

A. *Employer of project personnel*

4. It is stated in your memorandum that "Workers *hired by the project* ... are neither employees of the Government *nor directly hired or attached to UNDP*" (emphasis added). However, a project, which is an activity and not a legal person, cannot be an employer, since it does not have the legal capacity to enter into a contract or to perform any other juridical act. Therefore, notwithstanding any provision in a contract of employment that the employer is a UNDP project or, as seems to have been sometimes the case, a UNDP Project Manager or Coordinator, UNDP will be, in law, considered the real employer.

B. *Employment of project personnel*

5. Our view is that: (*a*) the arrangements described in your memorandum are defective from a legal viewpoint and expose UNDP to potential liability; and (*b*) they do not accord with the UNDP applicable rules and procedures, notably those set out in section 30400 of the UNDP Programme and Projects Manual. In these respects, we note the following:

(*a*) Under the current arrangements, the contracts with the workers engaged on the projects are subject to local labour laws and practices. However, the United Nations, including UNDP, is immune from local jurisdiction and consequently the workers may not be able to enforce in local courts their rights, if any, under the relevant contract and no provision is made for arbitration. At worst, the provisions making local labour laws applicable to the contract might be wrongly interpreted, in the case of a dispute, as a waiver of UNDP's immunity from local jurisdiction (which only the Secretary-General can do) and therefore as an acceptance by UNDP to submit any disputes to the competence of local labour courts. Moreover, we are concerned that in the absence of a legal regime for the employment of such personnel, the United Nations Administrative Tribunal could conceivably determine that such "personnel" are United Nations staff entitled to all the benefits and allowances, including the Appendix D benefits, under the United Nations Staff Regulations and Rules.

(*b*) The UNDP Programme and Projects Manual specifies, in its section 30400, the categories of project personnel which alone may be directly contracted by UNDP, as well as the type of contracts under which such personnel are to be employed (i.e., fixed-term contracts under the United Nations Staff Regulations and Rules, special service agreements, service contracts and reimbursable loan agreements). The standard forms utilized for such contracts specify, notably, for each category of personnel, its status vis-à-vis UNDP, its entitlements and benefits, the procedure for the settlement of disputes arising out of the contract (United Nations Administrative Tribunal for personnel subject to the United Nations Staff Regulations and Rules; arbitration for other personnel). With regard to insurance, for the personnel which are not intended to be subject to the United Nations Staff Regulations and Rules, the respective obligations of the parties in case of illness, injury or death are precisely set out in the relevant standard contract forms. When appropriate, the benefits provided under Appendix D of the United Nations Staff Rules are extended to such personnel (personnel employed under a special service agreement or a service contract) or, in the case of personnel employed under a reimbursable loan agreement, the releasing organization is made responsible for assuming all legal and financial obligations resulting from their employment. The workers referred to in your memorandum do not correspond to any of the categories of project personnel enumerated in the Programme and Projects Manual, and the arrangements under which they are employed, as described in paragraphs 2 and 3 of the memorandum, do not accord with any of the conditions of employment of project personnel described therein, and more generally with those adopted in the practice of the United Nations.

III. Opinion

6. In the circumstances, our opinion is that: (*a*) the workers to which you referred may not be hired directly by UNDP/OPS, and (*b*) the arrangements which you described may not be utilized by UNDP/OPS for any sort of employment contract.

7. It is suggested that, instead, UNDP/OPS should obtain the services of the type of personnel referred to in your memorandum through the usual contractual arrangements, whereby such personnel are provided by a contractor, with whom a contract is signed. The contract should incorporate, *inter alia*:

(*a*) A provision defining the status of the contractor as that of an "independent contractor" vis-à-vis the United Nations, meaning, notably, that only the contractor is responsible for acts performed by his personnel, as well as for dealing with questions relating to the status and conditions of employment of such personnel (it should be noted in this context that the United Nations Administrative Tribunal considers that personnel contracted by the United Nations are entitled to appeal to the Tribunal and claim similar benefits as United Nations staff members unless explicitly excluded);[2] and

(*b*) Provisions for service-incurred death, injury or illness which oblige the contractor to provide workmen's compensation insurance, liability insurance for death, bodily injury or damage, covering the contractor's employees as well as claims by third parties, and medical and other health benefits for the contractor's employees, etc.

8. In the situations you describe, we consider that the only way UNDP/OPS can carry out the projects is to adopt the arrangements described in the paragraph above. Apart from permitting the recruitment of personnel which could not otherwise be directly employed under the applicable rules and procedures, such arrangements offer the advantage that UNDP would have to deal with only one contractor, which in turn is responsible for dealing with all questions relating to status, entitlements and benefits, etc., of its personnel assigned to the project. The supervisory personnel also would be provided by the contractor, so that the contractor assumes fully the direction and control over, and the responsibility for, the work performed by its personnel under the relevant contract.

9. Our records show that model contracts were prepared by this Office for use in, respectively, "small contracts" and "large/complicated contracts" and are contained in the UNDP/OPS Operations Manual. We suggest that these be used and, in cases of doubt, that this Office be contacted for assistance.

5 September 1989

3. Liability of the United Nations for parking facilities — Article III, section 7(b), of the Headquarters Agreement — "Garages and Parking Places" section of the New York General Obligations Law

Memorandum to the Secretary, Torts Claims Board

1. This responds to your memorandum of 26 September 1989 requesting us to submit our views on the tort claim of Mr. X. on the tort claim of the Counsellor of a United Nations Permanent Mission (hereinafter indicated as "Mr. X").

(*a*) *Facts relating to claim*

2. By letter of 12 January 1989, the Counsellor of the Permanent Mission of [State] to the United Nations, Mr. X requested partial reimbursement by the United Nations for the previously reported loss of the four wheels from his BMW automobile parked on the first parking level of the United Nations garage. The loss occurred during 5/6 September 1988. Following the initial report of the loss to the United Nations Security and Safety Service, a careful in-house investigation was carried out which did not throw any light on the circumstances under which the wheels disappeared. It is clear, however, that Mr. X had locked the car and had not left the keys with anyone during the more than three weeks

the automobile was parked in the garage. Mr. X is claiming compensation in the amount of $500 for losses and outlays incurred by him which were not covered by his automobile insurance.

(*b*) *Parking arrangements*

3. The arrangements entered into between the Organization and members of permanent missions such as Mr. X (delegates) in regard to parking in the United Nations garage are well settled. Upon presentation of a valid vehicle registration, the delegate is given a decal enabling him to drive into and park in the garage. He can drive in and drive out at any time and can park in any part of that portion of the garage which is reserved for delegates. He retains the keys to the car after parking. A fee of $2.50 is charged per night for vehicles parked overnight.

4. These parking arrangements are set out in a booklet entitled "Information for delegations", which is sent to each permanent mission and each diplomat at a permanent mission. The booklet covering the period in which the theft occurred (document ST/CS/37 — September 1987) contains the following disclaimer:

> "*Liability for loss and damages*
>
> "In arranging for parking facilities to be available, the United Nations seeks to accommodate delegations, but does not assume any responsibility for the cars or their contents. The United Nations, therefore, is not responsible for fire, theft, damage to or loss of a vehicle or any property or article left inside such vehicle."

5. In addition, the 48th Street entrance to the garage has a sign reading as follows:

> "The United Nations is not responsible for fire, theft, damage to, or loss of any vehicle or any articles therein, while the vehicle is in the garage."

(*c*) *Legal effect of the parking arrangements*

6. By reason of article III, section 7(b), of the Headquarters Agreement,[3] New York State law would govern the relationship between the Organization and Mr. X arising from the aforementioned parking arrangements.

7. Under that law, those arrangements would result in the creation of the relationship of licensor (the Organization) and licensee (Mr. X) between the parties, Mr. X obtaining a licence from the Organization to park in the garage. The arrangements would not result in the creation of the relationship of bailor (Mr. X) and bailee (the Organization) between the parties, since the Organization does not retain the dominion and control over the delegate's property required to constitute the Organization as bailee. We note, therefore, that Mr. X would have no claim based on a bailment.

8. The legal duty owed by the Organization (as licensor) to Mr. X (as licensee) is solely to warn of dangerous defects which the licensee would not discover after a reasonable inspection of the garage premises. It is clear that there has been no breach of this duty by the Organization.

9. Mr. X might possibly advance a claim based on tort (negligence), independent of the relationship of licensor and licensee. Even if such a claim is sustainable, in our view the circumstances attending the loss do not disclose negligence on the part of the Organization causing or contributing to the loss. We have been informed that all open points of entry into the garage are guarded by the United Nations Security Service at all times. In addition, the garage is patrolled by the Security Service once each night. Furthermore, surveillance cameras have been installed directed to detecting movement of vehicles. These are precautions which, in our view, amount to the taking of reasonable care of vehicles parked in the garage, having regard to the arrangements for parking in the garage.

10. We have considered S.5-325(1), "Garages and parking places", of the New York General Obligations Law, which prevents any person who conducts or maintains a garage from exempting himself from liability for damages resulting from his negligence or the negligence of his employees. Having regard to our view that the Organization has not been negligent, we do not find the provision to be relevant.

(*d*) *Conclusion*

11. Our conclusion, therefore, is that the Organization is under no liability to compensate Mr. X.

20 October 1989

Commercial issues

4. Issue whether it is legally proper for the United Nations to distribute advertising material with the United Nations publications — guidelines and safeguards to be followed in accepting advertising in a United Nations publication

Memorandum to the Executive Officer, Department of Public Information

1. This responds to your memorandum of 19 December 1988 to this Office, attaching for our view a draft contract between the United Nations and an advertising company (hereinafter indicated as "the Company"), under which the Company would be engaged to prepare and print books containing advertisements to be published as supplements to *Development Business*. We were also asked to comment on a question raised in relation to this proposed contract by the Committee on Contracts: "whether it was legally proper for the United Nations to distribute advertising material with a United Nations publication."

Factual background

2. We have been informed that the issues referred to us arise in the following context:

3. The United Nations and the United Nations University are the co-publishers of *Development Forum*, a journal devoted to examining world social and economic development issues from the perspective of the United Nations organizations. The publication is funded by the United Nations (a grant included in the regular budget) and contributions from the specialized agencies and the International Atomic Energy Agency (all members of the Joint United Nations Information Committee (JUNIC)). Since the direct funding proved to be insufficient, *Development Business* was started about 11 years ago to bring in supplementary funds to support *Development Forum*. Advertisements appear in *Development Forum*, but only occasionally.

4. *Development Business*, which is subtitled "The Business Edition of *Development Forum*" and also a "Fortnightly Guide to Consulting, Contracting and Supply Opportunities around the World", contains for the most part listings of international projects and procurements, as well as the monthly operational summaries of the World Bank and other development banks. The remaining space is largely devoted to articles on the developmental activities of development banks and other international organizations, written from a business or commercial standpoint. Each issue also contains several advertisements of goods and services by commercial firms.

5. *Development Business* from time to time also publishes advertising supplements, which focus on a particular country, highlight the developmental activities of the country, and contain numerous advertisements for goods and services supplied by firms from that country. We understand that so far eight such supplements have been published.

6. In addition, somewhat different advertising supplements to *Development Business* have also been published. These consist of booklets entitled: *Product Information: A [Complete] Buyer's Guide to Leading Suppliers Worldwide*. These booklets consist solely of full-page advertisements for goods and services from suppliers throughout the world. We understand that so far six such supplements have been published.

7. JUNIC has laid down the following provisional guidelines to be followed in accepting advertising in *Development Forum* and *Development Business* (JUNIC/1984/R.20, para. 28):

> "— The objectives of carrying advertising are to increase revenue and to enhance the interest and usefulness of the publication.
>
> "— No advertising should be accepted which is in any way contrary to the letter or spirit of General Assembly resolutions.
>
> "— The content of all advertising should be consistent with the objectives of *Development Forum* and its editorial policy.
>
> "— Advertisers should not express opinions or promote policies.
>
> "— The amount of advertising in any one issue should not exceed 15 per cent. of the total space.
>
> "— Advertising rates should be calculated to show a profit after the costs of promotion and management have been taken into account."

Policy/legal issues

8. Against this background, the following policy and legal issues arise:

(*a*) Whether it is appropriate for the United Nations to generate funds through the publication and distribution of advertisements from commercial firms, in conjunction with a United Nations publication;

(*b*) Assuming that such activity is appropriate, what safeguards should be adopted to protect the United Nations?

Propriety of the United Nations publishing/distributing advertisements

9. In determining this issue, a relevant consideration is that, depending on the content and format of the publication, the United Nations may be regarded by readers as endorsing the services or products in question, which at the very least is highly undesirable and possibly may even lead to liability if the advertisements are false or misleading. This danger is minimal in regard to *Development Business*, which, apart from containing a disclaimer[4] (although in very small print), resembles an ordinary newspaper, the advertisements in which are not normally understood by readers as being endorsed by the publisher. The danger may be marginally higher in the country advertising supplements (in which we did not find a disclaimer), because although they are also in a newspaper format a reader may carry over United Nations approval of the particular country's developmental activities perceived in the supplement to that country's advertised services and products. The danger exists in a very real form, however, in relation to the booklets. Despite a disclaimer on the second page,[5] the cover page (in particular, the words "A [Complete] Buyer's Guide" and the identification of the publication as "*United Nations Development Business*" on that page) may be taken to suggest United Nations approval of the products and services advertised in the supplement. Furthermore, while the advertisements in *Development Business*, and perhaps even in the country supplements, might be regarded as commercial activities incidental to the publication of *Development Business* itself, the booklets (except in name) are physically self-contained and their publication appears to be an independent business venture.

10. Another possible danger is that some of the firms whose advertisements are contained in the supplements may be collaborating with South Africa and thus violating the General Assembly resolutions prohibiting the United Nations Secretariat from dealing with such firms. As strict compliance with the second JUNIC guideline would prevent the acceptance of advertisements from such firms, we would like to be assured that advertisers are adequately screened.

11. In our view, the publication of *Development Forum* and *Development Business*, the main function of which is to publicize developmental activities, but which also incidently accept advertisements, is unobjectionable. On the other hand, the publication of the booklets seems to be an independent commercial venture directed to producing revenue through the dissemination of advertisements, a venture not directly connected with, or incidental to, any programme

of the Organization. While we recognize that the revenue derived will be devoted to *Development Forum*, itself an authorized activity, we nevertheless feel that the propriety, and even legitimacy, of disseminating advertisements as a commercial venture is open to question. As regards the country supplements, if the balance between editorial content and advertisements is weighted in favour of the former, each supplement might reasonably be regarded as publicizing developmental activities.

12. In the final analysis, the considerations involved in deciding whether particular publications are to continue are of a policy rather than a legal character. We, therefore, believe that a decision should be taken by the Administration (we suggest the Department of Public Information and the Office of General Service in consultation), in the best overall interests of the Organization, subject to the remarks set forth below on safeguards to be observed.

Safeguards

13. Whenever advertisements are published, a clear disclaimer[6] (that the United Nations does not endorse in any way the products or services advertised) should be prominently displayed. Further, the format of the publication should not give any impression of United Nations endorsement. In addition, the advertisers should be screened for collaboration with South Africa.

2 February 1989

Contracts

5. Government execution as a policy for implementation of United Nations Development Programme projects — role of the UNDP field office

Memorandum to the Deputy Assistant Administrator, Bureau for Finance and Administration, United Nations Development Programme

1. This is in response to your memorandum of 21 June 1989, requesting our advice on the practice of some field offices, particularly in Latin American countries, whereby the UNDP resident representative enters into a contract directly with a contractor under a Government-executed project, purportedly on behalf of the Government but in fact identifying UNDP as the named party to the contract.

Background

2. Government execution, as a policy for implementation of UNDP projects, derives from the guidelines on the New Dimensions in Technical Cooperation, adopted by the UNDP Governing Council in 1975 at its XXth session and endorsed by the General Assembly in its resolution 3405 (XXX) of 28 November 1975. Paragraph (e)(vii) of the annex to the resolution states that Gov-

ernments and institutions in recipient countries should be increasingly entrusted with the responsibility for executing projects assisted by the United Nations Development Programme.

Government's capability

3. In implementation of the policy on government execution, the Administrator has established policies and procedures under which Governments may be selected to execute UNDP projects. These are contained in part III, chapter V, section 30503, of the UNDP Programme and Projects Manual, subsection 2.1.1. of which states:

> "A prerequisite for government execution is the availability of the required technical and administrative capability within the Government to assume responsibility for the mobilization and effective application of UNDP-financed inputs towards the attainment of a project's objectives. If the extent of the Government's own capabilities, with or without UNDP assistance to strengthen those capabilities, does not allow it to discharge independently all the functions arising from its execution responsibility, arrangements may be adopted whereby:
>
> (*a*) The Government executes a UNDP-supported project with the participation of one or more agencies; or
>
> (*b*) Alternatively, and where appropriate, activities are organized into two or more self-contained but mutually reinforcing projects, with the Government assuming execution responsibility for one or several and the appropriate agency for the other(s)."

Cooperating Agency Agreement

4. The modalities for enabling participation of United Nations agencies in projects under government execution are set forth in section 30503 of the Programme and Projects Manual. The procedure is for the Government to designate the United Nations Agency as a cooperating agency (if UNDP is to be selected, then this would be the Office for Project Services (OPS), which is the executing arm of UNDP), and for a Cooperating Agency Agreement to be signed between the Government and the agency concerned. (A model of such an Agreement is also included in section 30503, subsection 5.3, of the Manual.) The Cooperating Agency Agreement contains the terms and conditions under which an Agency would participate with the Government in the execution of the project.

Administrative assistance

5. While the UNDP field office may in some cases render to the Government temporary administrative assistance, as provided in section 30503, subsection 1.3, of the Manual, in the course of project execution, including making direct payments on behalf of the Government to individuals or firms providing

UNDP-financed services under section 30503, subsection 6.3(a)(iv), field offices are expressly prohibited from undertaking direct executing responsibilities on behalf of the Government. In this respect, section 30500, subsection 4, provides:

> "... field offices, in assisting Governments in executing projects, are *not* authorized to undertake *executing responsibilities* on a Government's behalf" (emphasis added).
>
> Section 30503, subsection 1.4(e), also provides that "in providing such temporary (administrative) assistance to Government, field offices are *not* authorized to undertake *executing responsibilities* for the Government" (emphasis added).

Agreements with Contractors

6. The contract which was enclosed with your memorandum indicates on the covering page that it was signed on behalf of the Government of [name of State] by UNDP, but it still remains to be between UNDP and [name of Institute]. Furthermore, the contents of the contract show that it is UNDP and not the Government which is bound to perform the obligations undertaken in the contract. Section 1.01 states that "the Contractor and UNDP *shall be bound* by the provisions of pages 1 to 6 as well as by the General Conditions ..." (emphasis added) In this context, the hold-harmless clause which was proposed to be added to the contract would most probably not be sufficient to transfer responsibility from UNDP to the Government, without a formal agreement to that effect between UNDP and the Government. Furthermore, it is doubtful that the resident representative, as a United Nations staff member, would have the authority to act "on behalf" of a Government in view of staff regulation 1.3, which states that staff members "shall neither seek nor accept instructions from any Government or from any other authority external to the Organization".

Conclusion

7. While we appreciate the good intentions which prompted the Resident Representative to sign the contract in question, we find it difficult ourselves from a legal standpoint to support extension or continuation of the said practice. We can, of course, understand the possibility under Government-executed projects of confusing rendering administrative assistance to the Government, which is permitted, and assuming executing responsibilities on its behalf, which is proscribed. However, the distinction between the two is important and should be maintained because of the potential liability for UNDP in case of the latter, in absence of proper statutory authority, or a formal agreement with the Government, as required by UNDP financial rule 114.27(b)(i) and section 30503 of the Programme and Projects Manual.

2 August 1989

6. COPYRIGHT OF THE UNITED NATIONS TREATY SERIES AND RELATED PUBLICATION — ADMINISTRATIVE INSTRUCTION ST/AI/189/ADD.9/REV.2

Memorandum to the Chief, Treaty Section, Office of Legal Affairs

1. This responds to your memorandum of 14 August 1989 seeking our views on the proposed copyrighting of the publication *Multilateral Treaties Deposited with the Secretary-General*. Our views on such copyrighting also apply to the proposed copyrighting of the United Nations *Treaty Series*. We understand that at present outside publishers take advantage of the absence of United Nations copyright of these publications to copy and publish *Multilateral Treaties* and the *Treaty Series*.

2. Administrative instruction ST/AI/189/Add.9/Rev.2 sets out the general United Nations policy in relation to copyright of United Nations publications. It lists the categories of materials which, in general, are not to be copyrighted, when and how exceptions to this general policy are made and the procedures for obtaining copyright.

3. There are four broad categories of materials which are, in general, not copyrightable without prior approval of the Publications Board (ST/AI/189/Add.9/Rev.2, para. 3):

(*a*) Official records (of proceedings, conferences, etc.);

(*b*) United Nations documents (officially issued under a United Nations symbol);

(*c*) Public information material (brochures, pamphlets, etc., printed for distribution to the public);

(*d*) Where the legislative authority contemplates that the material remain in the public domain.

4. All other categories of publications are generally considered to be copyrightable: ST/AI/129/Add.9/Rev.2, para. 3.

5. The procedure for copyright of United Nations publications calls for, *inter alia*, the justification by the author department(s), in this case the Office of Legal Affairs, of the consistency of the decision to seek copyright with the legislative mandate of the publication for which copyright is sought.

6. The legislative mandate for the publication of *Multilateral Treaties* and the *Treaty Series* is contained in Article 102, paragraph 1, of the Charter of the United Nations, which states:

> "Every treaty and every international agreement entered into by any Member of the United Nations after the present Charter comes into force shall as soon as possible be registered with the Secretariat and published by it."

7. Although it could be argued that the objective of the Charter provision is to place the text of the treaties in the public domain, the directive to publish is also consistent with a desire that authoritative texts be made available to Governments and the public by the Secretary-General. Given that public funds are expended in translating some of the treaties included, in preparing certain explanatory footnoting, incorporating references to previous relevant agreements and in other editorial work needed to reproduce the *Treaty Series* in a convenient format, and that the entirety of *Multilateral Treaties* consists of original work by the United Nations Secretariat, it appears to be legitimate to prevent commercial firms from depriving the Organization, by publishing copies, of sales revenue from these publications. Furthermore, copies produced by those firms may be inaccurate or misleading. The copyrighting of *Multilateral Treaties* and the *Treaty Series* is therefore in our view appropriate. However, bearing in mind the fact that the texts of the treaties were supplied by Governments, it would be appropriate to provide in the copyright notice that Governments are permitted to copy the publications.

8. In regard to the *Treaty Series*, we wish to add that the copyrightable subject matter is not the text of the treaties, but the layout and format of publication. In this connection, we note that the United Nations has taken out a copyright in the publication *United Nations Convention on the Law of the Sea with Index and Final Act of the Third United Nations Conference on the Law of the Sea*[7], although it is clear that both the Convention and the Final Act are in the public domain.

3 October 1989

Personnel issues

7. Legal status of individuals under special service agreements — Section 26 of the Convention on the Privileges and Immunities of the United Nations — experts on mission

Memorandum to the Senior Legal Officer, United Nations Office at Geneva

1. This is in response to your 19 January 1989 note to this Office concerning the status of the [State's] military personnel participating in the multinational demining missions to be undertaken in connection with "Operation Salam", in which you ask for our advice on (*a*) the use of the proposed standard special service agreements (type SSA-P.106) and (*b*) the intended issuance of certificates in accordance with section 26 of article VII of the Convention on the Privileges and Immunities of the United Nations ("General Convention")[8].

2. In this connection, we have reviewed the additional information received from the Office of the Coordinator for Afghanistan, forwarded under 21 February note to this Office, which addresses the queries presented in our 27 January memorandum to you. We note that (*a*) the Coordinator's Chief of Mission in Islamabad was informed, during a 2 February meeting with a [host State's] Foreign Ministry official, that the "Government of the host State had decided

that the 1946 Convention and the [State's] related Act of 1948 should apply to the Office of the Coordinator ... [and] ... that the demining personnel would be considered as 'experts' as defined in that legislation" and (*b*) his 17 January memorandum to the Coordinator "summariz[ing] the understanding reached through oral consultations between the Office of the Coordinator and [the State's] Ambassador to the United Nations".

3. It would therefore appear that the Organization could enter into a contractual relationship with the [State's] military participants by means of the proposed standard "special service agreement for an individual contractor" (United Nations form P.106). Insofar as it is stated, in a memorandum to the Coordinator, that the "[State's] authorities have in effect agreed to detach the military personnel and place them at the disposal of the Coordinator for a specific period of time", these personnel would then seem to be free agents who could contract directly with the Organization. In this respect, we would refer to the "Conditions of Service" enumerated on the back of the special service agreement form, which include the following provision concerning legal status:

> "Individuals engaged under a special service agreement as individual contractors serve in their personal capacity and not as representatives of a Government or of any other authority external to the United Nations. Individual contractors are neither 'staff members' under the Staff Regulations of the United Nations nor 'officials' for the purpose of the Convention of 13 February 1946 on the Privileges and Immunities of the United Nations. Individual contractors may, however, be given the status of 'experts on mission' in the sense of section 22 of article VI of the Convention. If individual contractors are required to travel on behalf of the United Nations, they may be given a United Nations certificate in accordance with section 26 of article VII of the Convention." (para. 1)

Insofar as this provision would require that the [State's] military personnel so contracted serve strictly in a personal (and not a governmental representative) capacity, we would suggest that before the United Nations enters into any such agreements the Coordinator should, as a matter of caution, confirm that these detached personnel will not remain under the direction of the [State's] Government during their period of service in the demining operation (even though they are under the day-to-day administrative supervision of the Coordinator's Office).

4. As for the possibility of issuing certificates to the [State's] military participants pursuant to section 26 of the General Convention, it should be noted that the contemplated special service agreement provides that the holder thereof may be accorded the status of an "expert on mission" within the meaning of section 22 of the Convention. Furthermore, independent of the status provided to the [State's] participants under the governing contractual arrangement, the Government of the host [State] has indicated that they will consider the demining personnel as "experts" as defined in the General Convention and in the related 1948 Act of the host [State]. Insofar as experts on mission are among the categories of personnel eligible to be issued United Nations certificates ..., it is our opinion that the [State's] military personnel may accordingly be granted certificates for traveling on official United Nations business.

1 March 1989

8. EXEMPTION FROM EXCISE DUTIES AND TAXES — SECTION 8 OF THE CONVENTION ON THE PRIVILEGES AND IMMUNITIES OF THE UNITED NATIONS

Memorandum to the Director, United Nations Information Centres Division, Department of Public Information

1. This is in reply to your memorandum dated 6 December 1988 concerning the sales tax exemption in [State].

2. As requested, we have reviewed the provisions of both the [State's] United Nations (Privileges and Immunities) Regulations (Statutory Rules 1986, No. 66) and a letter from the Assistant Commissioner, Taxation Office, dated 15 June 1988, addressed to the United Nations Children's Fund (UNICEF).

3. According to regulation 7 of the First Schedule, United Nations institutions in [State] are generally exempted "from the liability to pay or collect taxes other than duties on the importation or exportation of goods and of income, property, assets and transactions of the Organization from such taxes". Application of this regulation is clarified in the letter of 15 June 1988 which, in particular, stipulates that "this provision has the effect of exempting from sales tax purchases from manufacturers and wholesalers, those being the transactions on which sales tax is ordinarily imposed". However, it is further specified that exemption is not available in respect of purchases from retailers; nor will act-of-grace payments be available for the amount of tax included when goods are purchased at the retail level.

4. In our view, the procedure set forth by [State's] Government does not violate its relevant obligations under the Convention on the Privileges and Immunities of the United Nations, to which [State] is a party as from 1949. Namely, the non-availability of exemption for goods purchased from retailers should be considered in the light of section 8 of the Convention, which stipulates that "the United Nations will not, as a general rule, claim exemption from excise duties and from taxes on the sale of movable and immovable property which form part of the price to be paid ..." However, this clause should be read in conjunction with the following provision of the same section 8. "... nevertheless when the United Nations is making *important* purchases for official use of property on which such duties and taxes have been charged or are chargeable, Members will, *whenever possible,* make appropriate administrative arrangements for the remission or return of the amount of duty or tax" (emphasis added).

5. Accordingly, United Nations institutions in [State] when making important purchases from retailers could claim, from the governmental authorities, tax exemption. However, if the authorities take a decision that tax exemption is not possible, which apparently is the case, there seems to be no legal remedy to avoid the taxation in question.

30 January 1989

9. Payment of employment injury contributions and contributions under the national pension scheme — Section 7(a) of the Convention on the Privileges and Immunities of the United Nations

Note verbale to the Permanent Mission of a Member State to United Nations

The Office of Legal Affairs of the United Nations presents its compliments to the Permanent Mission of [State] to the United Nations, and has the honour to refer to the note verbale dated 7 October 1988 addressed to the heads of diplomatic missions and international organizations by the Ministry of Foreign Affairs of [State]. This note has only recently been brought to the attention of the Office of Legal Affairs.

In the above-mentioned note verbale, the Ministry of Foreign Affairs informs us that, in accordance with the Social Security legislation of [State], which took effect on 1 July 1988, all employers (including United Nations bodies based in [State]) should (*a*) "pay employment injury contributions at the rate of 1.75 per cent. of (their) employees' gross monthly earnings" and (*b*) "pay contributions under the National Pension Scheme at the rate of 6 per cent. of each employee's gross monthly earnings ..."

The Ministry of Foreign Affairs stated further in the note verbale that the exemption clause in the legislation concerning "embassies, consulates and international organizations relates to and applies to persons who were engaged outside [State]." The obligation incumbent upon employers to make the payments referred to in paragraph 2 above exists, according to the note verbale, "in respect of any employee engaged in [State], whether [a national of the country or not]".

The United Nations respectfully draws the attention of the Permanent Mission of [State] to the United Nations to the inapplicability of the provisions of the [State's] Social Security legislation to the United Nations requiring it to make payment contributions to injury and pension schemes with respect to its staff members working in [State] for the following legal and practical reasons:

(*a*) Under section 7(a) of the Convention on the Privileges and Immunities of the United Nations, to which [State] became a party on 14 March 1947, the United Nations, its assets, income and other property are exempt from all direct taxes. Mandatory employment injury contributions and contributions under the National Pension scheme are considered by the United Nations to be a form of direct tax on the United Nations and therefore contrary to the Convention. United Nations practice in this regard has been constant and uniform for more than four decades.

(*b*) The United Nations provides its own accident compensation and staff pension schemes for all staff members, other than those locally recruited and paid hourly rates, in accordance with staff regulations approved by the General Assembly.

10 April 1989

10. United Nations Commission on International Trade Law Arbitration Rules — Section 2 of the Convention on the Privileges and Immunities of the United Nations

Memorandum to the Director, Division of Refugee Law and Doctrine, Office of the United Nations High Commissioner for Refugees

1. Further to your memorandum dated 6 April 1989 with regard to the above-mentioned subject, we would like to advise you as follows:

2. In the light of our previous experience with [name of nationality] solicitors and their expressed unfamiliarity with the UNCITRAL Arbitration Rules and United Nations privileges and immunities, we decided to call "Mr X", the [name of city] solicitor representing the landlord of the premises in which UNHCR is interested. In that conversation the following points were made:

(*a*) The UNCITRAL Arbitration Rules have been accepted by [State] and are used worldwide without difficulty. Nevertheless, in order to find a practicable resolution to the matter, we suggested that the rules of the Chartered Institute of Arbitrators be applied and that the sole arbitrator be appointed by the President of the [name of city] Chamber of Commerce. Experience has shown that this solution is satisfactory to [name of nationality] landlords and their solicitors. The solution is also acceptable to the United Nations as it does not refer to the [State] Arbitration Act, nor does it in any way imply a waiver of the immunity of the United Nations or submission to [the State's] courts. In fact, [State's] courts have held that agreement to arbitrate is not per se a voluntary or implied submission to the courts.

(*b*) The privileges and immunities of the United Nations, provided for in the Charter of the United Nations (Articles 104 and 105) and contained in the Convention on the Privileges and Immunities of the United Nations ("General Convention") to which [State] became a party in 1949, were incorporated into the [State's] law by the International Organizations Act 1968 and the United Nations and International Court of Justice (Immunities and Privileges) Order 1974/1261, as amended by Order 1975/1209. These immunities cannot be waived in advance by a lease agreement, for the following reasons:

(i) Section 2 of the General Convention provides: "The United Nations, its property and assets wherever located and by whomsoever held, shall enjoy immunity from every form of legal process except *insofar as in any particular case, it has expressly waived its immunity*. It is, however, understood that no waiver of immunity shall extend to any measure of execution" (emphasis added). (Section 6 of the [State] Order 1974/1261 is in similar terms.) The phrase in italics has been interpreted restrictively: (*a*) the power to waive is vested only in the Secretary-General and such power has not been delegated; and (*b*) the waiver may only be made at the time a court is considering a particular case and the Secretary-General determines that waiver of

immunity is desirable in the interest of justice. Such waiver is not possible in advance by agreement, because this would be tantamount to a waiver *in futuro*. This position has been upheld by [State's] courts, where the court held that "a sovereign cannot waive in future, but only in a particular instance when he is about to be brought before the Courts".

(ii) In any case, even if such waiver were possible, it cannot extend to any measure of execution and therefore even if the United Nations waived its immunity from legal process [name of nationality] landlords could not enforce court judgements or orders obtained against the United Nations.

(iii) [State] is a State Member of the United Nations and should the United Nations default, which is unlikely, a representation to the Secretary-General by the [State's] Foreign Secretary is always possible on behalf of an aggrieved [name of nationality] national. Such representation would most probably be more effective than recourse to [State's] courts.

3. We trust that further to our discussion with Mr. X the matter will be resolved soon. Should you, however, face any other difficulties, we would be ready to talk to him by phone again or send an officer from this Office to [name of city] to discuss the matter directly.

27 April 1989

11. Exemption from customs duty for a National Committee for UNICEF — Section 7 of the Convention on the Privileges and Immunities of the United Nations — Relationship between a National Committee for UNICEF and UNICEF

Memorandum to the Director, Office of Administrative Management, United Nations Children's Fund

1. This is in reply to your memorandum dated 18 May 1989 requesting our observations and comments on the exemption from the [State's] customs duties for the Greeting Card Operation (GCO) articles imported into [State] for sale by the [name of nationality] Committee for UNICEF.

2. From correspondence provided, we note that the [name of nationality] Committee for UNICEF in August 1988 requested the Customs Board of [State] to grant exemption from customs duties for UNICEF products. However, that request was rejected by the Customs Board on grounds of its inconsistency with the relevant provisions of article II, section 7, of the 1946 Convention on the Privileges and Immunities of the United Nations. The Customs Board came to the conclusion that articles "imported by the [name of nationality] Committee for UNICEF do not appear to be of such nature that they should be considered as imported by UNICEF" and therefore the Committee was not "entitled to exemption from customs duties and taxes" under the Convention.

3. The relationship between UNICEF and [name of nationality] Committee is governed by the Recognition Agreement of 1977 and the Supplementary Agreements. Pursuant to paragraph 8 of the Recognition Agreement, the Committee could, subject to a supplementary agreement, "act as sales agent or distributor for the marketing, distribution and sale of products such as greeting cards and calendars available through UNICEF Greeting Card Operation". By virtue of paragraph 5 of the 1984 Supplementary Agreement II, the Committee became responsible for "the sales of GCO products" as well as for "development, organization of distribution and sales channels". It should be taken into consideration that the later Agreement, in paragraph 6, unequivocally specified that "UNICEF owns all GCO products until sold and the Committee acts as an agent for UNICEF, the principal, which enjoys the protection of the privileges and immunities of the United Nations".

4. Accordingly, the [name of nationality] Committee should be a considered sales agent acting for UNICEF, which is an organ of the United Nations. Therefore, the provisions of section 7 of the Convention on the Privileges and Immunities of the United Nations are applicable in the present case, i.e., products under GCO operations, until sold, are to be considered property of the Organization.

5. It should be recalled that section 7 of the Convention provides, in subparagraph (b), for exemption from customs duties on articles imported for United Nations official use, and, in subparagraph (c), for exemption from customs duties for all United Nations publications. To date, Governments in countries where cards are sold have generally recognized that it would be inappropriate for a Member State to impose customs duties on GCO projects, as a matter of principle as well as law, which are internationally determined and financed by contributions from Governments and from private sources. In most cases, where the issue has been raised at all, the term "official use" has been interpreted to include UNICEF fund-raising activities, so as to exempt the cards and calendars under section 7(b); or such materials have been treated as "publications" under section 7(c) of the Convention.

6. For these reasons and in the light of the foregoing, we would suggest that the Ministry of Foreign Affairs of [State] be approached in order to obtain exemption from customs duties on the sales of GCO products. If required, this Office could assist you in drafting the appropriate communication.

15 September 1989

12. Commercial rent tax imposed by the City of New York on rents paid — Section 7 of the Headquarters Agreement

Memorandum to the Officer-in-Charge, Commercial, Purchase and Transportation Service, Office of General Services

1. This refers to your memorandum of 28 September 1989 concerning the question of commercial rent tax imposed by the City of New York on rents paid by the Travel Service to the United Nations for office space provided by the Organization.

2. From the documents transmitted for our comments, we note that the Travel Service has filed with the City of New York an appeal entitled "Grounds for Filing Petition" in which, on the basis of its interpretation of sections 8 and 9 of the Headquarters Agreement, the assessment in question is qualified as "invalid". The Travel Service further asserts that in the absence of any specific agreement between the United Nations and the City of New York, as required in section 9 of the Headquarters Agreement, "New York city had exceeded their legal authority by imposing a tax upon rent" paid to the United Nations. Cancellation of the assessment of this tax is requested.

3. We are unable to share the interpretation by the Travel Service of the above referenced provisions of the Headquarters Agreement. According to paragraphs (b) and (c) of Section 7, "the federal, state and local law" of the host country is applicable within the Headquarters district and the United States courts at all levels do have jurisdiction over acts done and transactions taking place in the Headquarters district, subject, however, to the exception that it is not otherwise provided in the Headquarters Agreement or the Convention on the Privileges and Immunities of the United Nations (the General Convention).

4. In this connection, it may be recalled that pursuant to Section 7 of the General Convention of the United Nations, its assets, income and other property are exempt from all direct taxes. In the present case, the assessment of tax is imposed not on the United Nations property per se but on the rent paid by the Travel Service (which is qualified in the contract as "an independent contractor whose employees shall not be considered as employees of the United Nations") to the United Nations for use of the latter's premises.

5. Furthermore, we do not find the stipulations of the Commercial Rent or Occupancy Tax itself, as amended on 31 December 1988 (Chapter 7 of New York City Charter and Administrative Code), to be inconsistent with or contradictory to the provisions of the Headquarters Agreement or the General Convention. In fact, the law defines as "taxable premises" any premises in the city occupied or used for "the purpose of carrying on or exercising any ... business, profession, vocation or commercial activity" (para. 11-701.5). It should be emphasized that the law clearly stipulates that the United Nations shall be exempt from the payment of the tax. However, it does not provide the same exemption for an entity such as the Travel Service, a contractor with the United Nations.

6. In the light of the foregoing observations, please be advised that, absent any specific arrangement with the United States competent authorities within the meaning of sections 7(b) and (c) of the Headquarters Agreement, the commercial rent tax assessment in our view is valid and applicable to the Travel Service.

12 October 1989

13. Accreditation of diplomatic status — Article 37(2) of the Vienna Convention on Diplomatic Relations — Distinctions between career and non-career administrative and technical staff of permanent missions

Memorandum to the Senior Legal Officer, United Nations Office at Geneva

1. This is with reference to your facsimile of 17 October 1989.

2. According to the Vienna Convention on Diplomatic Relations,[9] the members of the diplomatic staff of a mission are "the members of the staff of the mission having diplomatic rank" (article 1(d)). In principle, the sending State had the right to assign its personnel to diplomatic posts (article 7). On the other hand, the receiving State has the right to "refuse to accept officials of a particular category" (article 11(2)). Therefore, the receiving State has the right to verify that the staff who are accredited as diplomats do in fact perform diplomatic functions. If the receiving State believes that the functions performed do not justify diplomatic status, it may deny the request for the diplomatic accreditation (or eventually declare the individual concerned *persona non grata* (article 9(1)). Among the States which verify accreditation of members of embassies or missions on a regular basis are the United States of America, the United Kingdom of Great Britain and Northern Ireland and Switzerland.

3. The legal status of the administrative and technical staff of permanent missions also is covered by the Vienna Convention (article 37(2)). However, the said Convention did not provide for the distinction between the career and the non-career administrative and technical staff, nor did it regulate all the practical consequences deriving from the legal status of mission personnel. The distinction made within the category of administrative and technical staff of permanent missions to the United Nations Office at Geneva seems to establish regulations regarding some practical matters concerning which the Convention leaves to the receiving States a wide discretion. Under such circumstances, the receiving State is also competent to grant privileges and immunities it deems appropriate.

4. In this connection, it should be recalled that by a decision of 31 March 1948 as amended by a decision of 20 May 1958, the Swiss Federal Council accorded to permanent missions to the United Nations Office and other international organizations in Geneva the same privileges, immunities and facilities as those accorded to diplomatic missions in Berne. Therefore, should the distinction between career and non-career administrative and technical staff of the permanent missions to the United Nations Office at Geneva and the restrictive privileges and immunities granted to the non-career staff as a result of this distinction apply also to the diplomatic missions in Berne, such a distinction and its effects should not be considered as a violation of the host country legal obligations.

30 October 1989

14. INTERPRETATION OF THE TERM "PUBLIC UTILITY" — EXEMPTION FROM WHARFAGE CHARGES

Memorandum to the Director of Field Operations, Office of General Services

1. I wish to refer to the memorandum dated 14 June 1989 on wharfage charges. Our Office has also received another memorandum dated 12 October 1989.

2. We note with concern the difficulties the United Nations Peacekeeping operation has been experiencing in persuading the [name of State] authorities to grant it exemption from or reimbursement of the wharfage charges levied on the United Nations consignments arriving through [name of city] port. The re-imposition of wharfage charges levied on the United Nations in accordance with the [State's] Port Authority Council Resolution of 30 March 1989 at the maximum rate of 2 per cent. on the value of the goods imported compounds the difficulties already encountered in clearing United Nations shipments through [name of city] port.

3. The Office of Legal Affairs has previously expressed its views and concern about the [State's] port authority wharfage charges in its memoranda dated 29 October 1979 and 2 July 1980 respectively.

4. We maintain our position and confirm that, as far as the meaning of the expression "public utility service" is concerned, the legal position taken by the United Nations is set out in studies prepared by the Secretariat in 1967 on relations between States and intergovernmental organizations (*Yearbook of the International Law Commission, 1967*, vol. II, the *United Nations Juridical Yearbook, 1973*, and United Nations document A/CN.4/L.383/Add.1 of 24 May 1985. The interpretation of the term "public utility" is as follows:

> "The term 'public utility' has a restricted connotation applying to particular supplies or services rendered by a Government or a corporation under government regulation for which charges are made at a fixed rate according to the amount of supplies furnished or services rendered ... As a matter of principle and as a matter of obvious practical necessity charges for actual services rendered must relate to services which can be specifically identified, described and itemized."

Therefore, the United Nations approach is to pay only those charges which relate to actual services rendered and which can be specifically identified, described and itemized. The arguments used [by the State's] authorities in describing the wharfage charges as specific port dues levied for the general running expenses of the port do not fall within the meaning of a charge for public utility services as described above and as provided for in the 1946 Convention on the Privileges and Immunities of the United Nations.

5. On the basis of the foregoing, the claim for exemption from wharfage charges should be maintained and a refund claim should be requested on the payments already made in accordance with the full wharfage charge levied on the United Nations.

6. However, if the exemption is not granted, the proposal "for a lesser charge" made by the Legal Adviser at the Ministry of Foreign Affairs of [the State] should not be disregarded. This proposal should be used on the basis of the precedent arrangements that have prevailed and whereby [the State's] port authorities levied on the United Nations only a minimal wharfage charge. Since there is a precedent, [State's] authorities may find it easier to accept a request for a minimal charge.

7. If a reduction of these charges to a minimum can be obtained again, a confirmation to that effect from [the State's] authorities would be necessary in order to avoid any future misunderstanding. Such arrangement, if all else fails, would be acceptable to the Nations since the wharfage charges are, according to our files on the subject matter, levied in [State] on all users of the port, including [the State's] Government and all other national bodies with the exception of the navy.

7 November 1989

15. Exemption from taxes relating to the purchase of aviation gas — Sections 7 and 8 of the Convention on the Privileges and Immunities of the United Nations

Letter to the Permanent Representative of a Member State to the United Nations

The Legal Counsel of the United Nations presents his compliments to the Permanent Representative of [State] to the United Nations and has the honour to refer to the question of the exemption from or reimbursement of taxes relating to the purchase of aviation gas by the United Nations peacekeeping operation for the official use of the Cessna aircraft 421C. The Legal Counsel has been informed that this matter has been the subject of lengthy consultations between the peacekeeping operation and the Government of [State], but that the peacekeeping operation continues to encounter difficulties in obtaining the exemption from or reimbursement of the taxes on aviation gas. After careful review, the Legal Counsel wishes to provide the following information regarding the legal aspects of this matter in order to obtain the settlement of this long-standing request.

The United Nations exemption from or reimbursement of taxes derives from sections 7 and 8 of the Convention on the Privileges and Immunities of the United Nations of 1946, to which [State] is a party. Under that Convention, the parties agree to exempt the United Nations from all direct taxes (section 7); with respect to excise duties and indirect taxes, Member States agree whenever possible to make appropriate administrative arrangements for the remission or return of the duties or taxes when the United Nations is making important purchases for official use. The Convention on the Privileges and Immunities of the United Nations, including sections 7 and 8 cited above, is intended to give effect to Article 105, paragraph 1, of the Charter of the United Nations by which "the Organization shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfilment of its purposes".

The taxes paid on aviation gas by the peacekeeping operation would normally be considered as indirect taxes and would fall within the meaning of section 8 of the Convention. There can be no doubt that the purchase of aviation gas constitutes an "important purchase" for the official use of the Organization. The use of aircraft, and, for that matter, of vehicles, is a normal operational necessity for the peacekeeping operation. Section 8 of the Convention, therefore, places an obligation on the Government of [State] "whenever possible" to make appropriate administrative arrangements for the remission or return of the duties or taxes in question. The United Nations has consistently enjoyed the cooperation of Member States in the implementation of this provision. In this context, I would refer you to paragraph 23 of the latest report of the Secretary-General concerning the administrative and budgetary aspects of the financing of United Nations peacekeeping operations (document A/44/605 of 11 October 1989), in which the Secretary-General states: "The United Nations normally buys petrol, oil and lubricant products for its peacekeeping operations ... free of all duties and taxes."

Finally, the Legal Counsel has been informed that the argument has been raised that the exemption from or reimbursement of these taxes cannot be granted because of conflicting laws or regulations [of the State]. However, it must be pointed out that by virtue of section 34 of the Convention on the Privileges and Immunities of the United Nations, the Government of [State] has undertaken to be "in a position under its own law to give effect to the terms of this Convention." Consequently, in the event of a conflict between domestic law and the Convention, the Convention must prevail.

The Legal Counsel would be grateful if renewed consideration could be given to this matter by the competent authorities with a view to making appropriate administrative arrangements for the remission or return of the taxes in question.

29 December 1989

Procedural and institutional issues

16. Meaning of the term "subsidiary body" — Question whether the Governing Council of the United Nations Development Programme is a subsidiary body of the General Assembly or the Economic and Social Council

Letter to the Associate Administrator, United Nations Development Programme

This is in response to the second question raised in your letter of 19 January 1989, and further to my letter to you of the same date.

The second question raised in your letter was whether the Governing Council of UNDP is a subsidiary body of the General Assembly or a subsidiary body of the Economic and Social Council.

As will be noted, the General Assembly in its resolution 2029 (XX) of 22 November 1965 decided, on the recommendation of the Economic and Social Council, to combine the United Nations Expanded Programme of Technical Assistance and the United Nations Special Fund into a single programme, the United Nations Development Programme, which the Assembly then created in resolution 2029 (XX). The Assembly, in the same resolution, established the Governing Council of UNDP and requested the Economic and Social Council to elect the members of the Governing Council.

The term "subsidiary body" is not defined either in the Charter of the United Nations or in General Assembly resolutions, or in the rules of procedure of the General Assembly. However, the Office of Legal Affairs has always advised that one body is a "subsidiary" of another if it has in fact been "established" by the other body: the regional commissions, for example, were established by the Economic and Social Council and are thus "subsidiary bodies" of the Council.

As we understand it, the above is also the sense in which the term "subsidiary body" is used in United Nations practice. You will note, for example, that the Governing Council of UNDP is listed as a subsidiary body of the General Assembly in the 1972 *Repertory of Practice of United Nations Organs* (Supplement No. 3, vol. I, p. 458) which covers the period from 1959 to 1966.

Thus, notwithstanding the fact that UNDP was established on the recommendation of the Economic and Social Council and the fact that elections to the Governing Council of UNDP are conducted in the Economic and Social Council, it is the view of the Office of Legal Affairs that, as UNDP and its Governing Council were "established" by the General Assembly, UNDP and its Governing Council are subsidiary bodies of the General Assembly and not subsidiary bodies of the Economic and Social Council.

This having been said, I would like to add the following: the General Assembly in resolution 2029 (XX), paragraph 4, when establishing the Governing Council of UNDP provided that the Governing Council "shall meet twice a year and shall submit reports and recommendations ... to the Economic and Social Council for consideration by the Council at its summer session". Hence, notwithstanding the fact that the Governing Council is a subsidiary body of the General Assembly, there is ground for the view that the reports of the Governing Council should be placed before the Economic and Social Council, at its summer session, in such a manner as to enable the latter body to study and consider the Council's report in a timely and meaningful way. However, since UNDP and its Governing Council are subsidiary bodies of the General Assembly and not of the Economic and Social Council, and since, therefore, General Assembly decision 43/432 of 20 December 1988 [endorsing Economic and Social Council resolution 1988/77] does not apply, the eight-weeks rule provided for in [Council resolution 1988/77] does not apply to UNDP.

25 January 1989

17. Constitution of appointment and promotion bodies — Role of the staff unions

Memorandum to the Assistant Secretary-General for Human Resources Management

1. You have asked for my comments on a letter dated 27 January 1989 from the President of the United Nations Staff Union complaining that the appointment and promotion bodies are improperly constituted. The issue arises because the Staff Union has failed to make one final nomination to the Appointment and Promotion Committee. The Union states that this means that the appointment and promotion bodies, and in particular the Committee, cannot commence work. You take a contrary view.

2. You also ask whether it is proper for the Staff Union to direct members and alternates appointed to the appointment and promotion bodies by the Secretary-General not to attend meetings of those bodies, a position with which you took issue in your memorandum of 27 January 1989 to those who failed to attend the first meeting of the appointment and promotion bodies.

Constitution of appointment and promotion bodies

3. Staff rule 104.14 deals with the constitution of the appointment and promotion bodies while subparagraph (c)(i) deals with the constitution of the Appointment and Promotion Committee. It provides that the Committee shall consist of seven members and 14 alternates appointed "after consultation with the appropriate staff representative body" and that "three members and seven alternates are appointed from nominees submitted by the appropriate staff representative body". You informed us that such consultation took place and that in fact 31 out of 32 positions in the appointment and promotion bodies have been filled. All 16 positions appointed by the Secretary-General have been filled and 15 of the 16 positions to be appointed on Union nomination have been filled. The one missing nomination is for the position of a member of the Committee. You indicated to us that discussions relating to the issue of membership of the appointment and promotion bodies started in mid-November 1988.

4. It seems clear that the consultations envisaged by the rules have taken place in that 31 out of 32 positions have been filled. The question thus resolves into whether the functions of the appointment and promotion bodies have to be delayed until the remaining position is filled. It is clear that this would be an unreasonable result. The Staff Regulations envisage that the fullest regard be given to internal candidates for promotion and the Staff Rules require that in giving such consideration, the Secretary-General must consider the advice of the appointment and promotion bodies. It is simply unacceptable that the Staff Union can prevent this process by failing to provide adequate nominations on a timely basis.

5. This Office has previously advised that if a United Nations organ has not been fully constituted after considerable efforts to so do have taken place, then that body must be able to function, even if it does not have a totally constituted membership for its initial meetings.

Role of the Staff Union

6. The role of the Staff Union is to consult with the Secretary-General on the membership of the appointment and promotion bodies and to provide nominations for the consideration of the Secretary-General for appointment to those bodies. Once such persons are appointed to those bodies, their role is to advise the Secretary-General on promotions. The Staff Union has no mandate to interfere with the functioning of those bodies by giving advice to its members, let alone giving instructions which result in the non-functioning of those bodies. Equally, those appointed to the appointment and promotion bodies by the Secretary-General cannot act upon the instructions of the Staff Union, nor can they properly act upon the advice of the Union. This is a cardinal foundation of the advisory nature of the appointment and promotion bodies. Their role is to advise the Secretary-General. That is not the role of the Union. To argue that the Union is involved in the promotion process, other than to nominate members, would make the whole process pointless since if the Secretary-General were to deal with the Union it would be in the context of the Joint Advisory Committee or the Staff Management Consultative Committee and there would be no need for the appointment and promotion bodies.

7. We therefore think that your letter of 27 January 1989 to members and alternates of the appointment and promotion bodies who did not attend the first meetings of those bodies on the instructions of the Union was proper from a legal point of view.

2 February 1989

18. Subcommission on Prevention of Discrimination and Protection of Minorities — Conditions of participation of States — Observers

Memorandum to the Senior Legal Officer, Legal Liaison Office

1. With reference to your memorandum dated 26 May 1989 addressed to the Legal Counsel, we have examined the question of the right of States to participate in the deliberations of the Subcommission on Prevention of Discrimination and Protection of Minorities and have the following comments which may be transmitted to the Centre for Human Rights.

2. As you know, the Subcommission is a subsidiary organ of the Commission on Human Rights, a functional commission of the Economic and Social Council. According to rule 24 of the rules of procedure of the functional commissions of the Economic and Social Council, "the rules of procedure of the commission shall apply to the proceedings of its subsidiary organs insofar as they are applicable". Thus, the rules of procedure of the functional commissions apply to the proceedings of the Subcommission.

3. Concerning the participation of States in the deliberations of the Subcommission, paragraphs 2 and 3 of rule 69 of the rules of procedure of the functional commissions provide:

> "2. A subsidiary organ of the commission shall invite any State that is not one of its own members to participate in its deliberations on any matter of particular concern to that State.
>
> "3. 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."

4. That rule 69(2) is applicable to bodies composed of experts, such as the Subcommission, is readily evident by the footnote to that provision, which states: "The expression 'that is not one of its own members' does not apply to subsidiary organs composed of experts serving in their individual capacity."

5. Thus, a State has a right to be invited by the Subcommission to participate in its deliberations on any matter of particular concern to that State. That right may be exercised irrespective of any "objection" on the part of any member of the Subcommission. It would appear that the rule is intended precisely to allow a State which is the subject of a draft resolution before the Subcommission to participate, if it so desires, in the Subcommission's deliberations on that draft resolution.

6. It should be pointed out, however, that participation in the deliberations on a draft resolution does not imply participation in the explanation-of-vote period (either before or after the vote). Once the explanation-of-vote period begins, the debate on the particular proposal has, explicitly or implicitly, been closed. Thus, at that stage, only explanations of vote by members of the Subcommission are allowed. Observer States may speak during the period of debate on the draft resolution, but not in the explanation-of-vote period.

7. The Secretariat should distinguish in its list of speakers between those wishing to speak in the debate (either general debate or debate on a particular proposal) and those wishing to speak in explanation of vote. As indicated in rule 44, when there are no more speakers in the debate (which may include State observers), the Chairman should, with the consent of the Subcommission, declare the debate closed. The Chairman should then turn to the list of speakers indicating those members of the Subcommission wishing to explain their vote before the vote (obviously only members of the Subcommission may explain their vote).

8. Such a procedure is in accordance with the practice followed by ECOSOC itself:

> "... observers wishing to make statements on the recommendations contained in the reports of the sessional Committees are requested to indicate their intention to do so before statements in explanation of vote are made by members of the Council." (E/1989/L.16, para. 14)

9. There have been occasions in some United Nations bodies when observers have been allowed to make statements following the end of explanations of vote after the vote. The debate has, of course, been closed and a decision already taken. This practice is not mentioned in rules of procedure but the Chairman may permit it with the consent of the body concerned.

23 June 1989

19. Interpretation of rules of procedure by the Subcommission on Prevention of Discrimination and Protection of Minorities — Rule 69 — Right of reply of observer States

Facsimile to the United Nations Legal Liaison Office at Geneva

This is in response to your telephone call of today forwarding three questions raised in the Subcommission on Prevention of Discrimination and Protection of Minorities upon which legal advice is sought. Absent a written text of those questions, our replies are based upon questions transmitted orally.

The first question is whether the Subcommission is authorized to interpret rules of procedure governing its proceedings (the rules of procedure of the functional commissions of the Economic and Social Council), in particular rule 69 (Participation of non-member States). The standard practice of United Nations bodies is that each body may interpret the rules of procedure applicable to it, to the extent such an interpretation does not constitute an amendment or suspension of the rules, which may only be done pursuant to relevant rules governing method of amendment and method of suspension.

The second question is whether the phrase in rule 69 "the Commission shall invite ... any other State, to participate in its deliberations on any matter of particular concern to that State" can be considered to mean that such a State should refer in the context of item 6 to issues related to its domestic situation and not to situations in other countries. We understand item 6 to be entitled "Question of the violation of human rights and fundamental freedoms, including policies of racial discrimination and segregation and of apartheid, in all countries, with particular reference to colonial and other dependent countries and territories: report of the Subcommission under Commission on Human Rights resolution 823". From the title of item 6, it is clear that the item relates to the question of the violation of human rights and fundamental freedoms in all countries. Rule 69 makes it equally clear that observer States have the right to participate in the deliberations of the Subcommission on any matter of particular concern to that State. The observer State determines itself what is a matter of particular concern to it and under item 6 could decide to speak on human rights violations in countries other than its own. By its resolution 1982-12, the Subcommission decided to "express the view" that observers for States "should in future, when invited to participate on the agenda item ... not implicate other States in a deliberately abusive manner". Obviously it is for the Subcommission itself to decide if an observer for a State has so implicated other States in the manner described.

The third question is whether, assuming that the answer to the second question is negative, the observer of a State may reply to remarks made by the observer of another State. According to standard and accepted United Nations practice, presiding officers routinely afford observers the opportunity to make statements in reply to remarks made previously by other speakers (whether members or observers). Of course, whatever rules and practices apply to members' rights of reply (number of interventions, time limit, etc.) apply equally as well to observers' statements in reply.

18 August 1989

20. Status of the United Nations Institute for Training and Research — Designation of an executing agency of the United Nations Development Programme regarding eligibility for support cost flexibility arrangements

Memorandum to the Deputy Assistant Administrator, Bureau for Finance and Administration, United Nations Development Programme

1. This is in reference to an inquiry as to whether the United Nations Institute for Training and Research, if designated an executing agency of UNDP, can be regarded as an autonomous institution within the United Nations system for purposes of the application of Governing Council decision 81/40 of 30 June 1981, on eligibility for support cost flexibility arrangements for executing agencies.

An autonomous body

2. In general, an autonomous institution is one that possesses the following characteristics: (*a*) legal capacity for carrying into effect its functions; (*b*) capacity to conclude agreements and to incur responsibility; (*c*) capacity to acquire and dispose of movable and immovable property; (*d*) special resources different and distinct from those of the parent organization; (*e*) an independent budget; and (*f*) its own administrative organization and governing body.

Background of decision

3. The Governing Council in its decision 81/40 provides, in article 4, that "only autonomous organizations within the United Nations system shall be eligible for support cost flexibility arrangements". That decision was adopted on the basis of the recommendations of the Administrator contained in his Report DP/556 of 31 March 1981. The salient provisions of that Report are as follows:

(*a*) In paragraph 16, the Administrator recommended that the flexibility arrangements be extended to "(a) organizations of the United Nations system and (b) organizations whose total regular budget resources are limited and whose total level of technical cooperation delivery is inadequate to establish minimum programme support capacity ..."

(*b*) In paragraph 17 of the Report, which elaborates on the points raised in paragraph 16, the Administrator points out that "executing agencies would *not* be considered eligible for flexibility arrangements if they are component parts of the United Nations, *financed under the United Nations regular budget* ..." (emphasis added).

(*c*) Subparagraphs (a) and (b) of paragraph 19 of the report contain the specific proposals of the UNDP Administrator and lay down two conditions for the determination of eligibility for such flexibility arrangements: "(a) Eligibility for support cost flexibility arrangements will be limited to

executing agencies which are autonomous organizations within the United Nations; and (b) support cost flexibility arrangements may be granted to eligible executing agencies whose levels of annual delivery do not exceed $20 million ..."

4. The Governing Council in its decision 81/40 adopted the recommendation contained in subparagraph (a) of paragraph 19 of the report, thereby extending the eligibility status for flexibility arrangements to executing agencies which are autonomous organizations within the United Nations system. It did not, however, adopt the recommendations contained in subparagraph (b), which proposed that the said flexibility arrangements may be granted to eligible executing agencies whose levels of annual delivery do not exceed $20 million.

UNITAR

5. UNITAR was established pursuant to General Assembly resolutions 1934 (XVIII) of 11 December 1963 and 42/197 of 11 December 1987 as "an autonomous institution within the framework of the United Nations" and possesses the following characteristics:

(*a*) The Institute has its own governing body — the Board of Trustees — which, *inter alia*, and as provided by paragraph 2(a) of article III of UNITAR's statute, formulates "principles and policies to govern the activities and operations of the Institute". According to paragraph 4 of the same article, the Board of Trustees also considers the methods of financing the Institute with a view to ensuring "the Institute's autonomous character within the framework of the United Nations".

(*b*) Paragraphs 2 and 3 of article VIII of the statute stipulate that "the expenses of the Institute shall be met from voluntary contributions made by Governments, intergovernmental organizations and from foundations and other non-governmental sources" and that the Institute "shall operate on the basis of paid-in voluntary contributions and such other additional resources as may be available". Furthermore, pursuant to paragraph 11 of article VIII, UNITAR's funds "shall be held and administered solely for the purposes of the Institute". Paragraph 10 of the same article provides that "the funds of the Institute shall be kept in a special account to be established by the Secretary-General".

(*c*) The Institute has its own staff, the salaries and emoluments of which are paid from the funds of the Institute (statute article IV, paras. 1-4).

(*d*) According to paragraph 2 of article X of the Statute, the Institute may "enter into contracts with organizations, institutions or firms for the purpose of carrying out its programmes. The Institute may acquire and dispose of real and personal property and may take other legal action necessary to the performance of its functions."

6. In the light of the above, it seems to us that UNITAR meets the criteria of an autonomous body and the requirements of the Governing Council Decision that the eligible executing agency be an "autonomous organization within the United Nations system". We would, however, wish to add one qualification to this conclusion, and that is that, from a purely legal viewpoint, UNITAR, like all other organs of the United Nations, and unlike the specialized agencies, does not possess separate legal capacities under international law from the United Nations. But we do not read the Governing Council Decision as being so restrictive in its application.

24 October 1989

Secretariat

21. Toponym "Persian Gulf" — Practice of the Secretariat on terminology issues

Cable to the Legal Adviser of the United Nations Industrial Development Organization

United Nations practice in documents and publications of the Secretariat is to use what has been the historically accepted toponym "Persian Gulf" to indicate that international body of water. The Secretariat is aware of the fact that there are differences of terminology in this respect but, since it is desirable to have a certain measure of conformity in geographical references in United Nations documents, the Secretariat has felt that the term "Persian Gulf" should be used in documents, maps, etc., prepared by it on its own responsibility, thereby following the most accepted historical usage.

It should be noted, however, that when a representative in an intervention in a United Nations body refers to the international body of water by another name, the Secretariat uses the speaker's terminology in the records of the meeting in which the reference is made. Similarly, when a delegation requests the circulation of a communication including reference to that body of water or to any geographical area for which there are varying toponyms, the Secretariat makes no change in the terminology used by the originator of the communication. Also, when a resolution or decision adopted by a deliberative body of the United Nations uses a particular terminology, the Secretariat in dealing with that resolution or decision is guided by that terminology.

On occasion, the use of neutral terms such as "the Gulf" and "Gulf States" is authorized in documents emanating from the Secretariat that deal with matters affecting specifically States that do not themselves find acceptable the term "Persian Gulf" and employ a different toponym.

Should you wish to make references in the further handling of this matter to the Office of Legal Affairs, please check that reference with us.

29 March 1989

22. SIGNATURES AFFIXED TO THE ORIGINAL OF A TREATY DEPOSITED WITH THE SECRETARY-GENERAL ELSEWHERE THAN THE PLACE PROVIDED FOR UNDER THE PROVISIONS OF THE TREATY — DISCRETION OF DEPOSITARY

Memorandum to the Director and Deputy to the Under-Secretary-General in charge of the Office of Legal Affairs

1. The United Nations Office at Vienna has recently communicated its desire to be allowed to keep the original of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, adopted a Vienna on 19 December 1988[10] until 6 March 1989, since it is anticipated that a number of Ministers for Foreign Affairs will be at that time in Vienna to attend the European Conference on Disarmament and would like to take that opportunity to sign the Convention.

2. It is recalled that article 26 of the Convention provides as follows:

> "This Convention shall be open for signature at the United Nations Office at Vienna, from 20 December 1988 to 28 February 1989, and thereafter at the Headquarters of the United Nations at New York, until 20 December 1989."

3. On that basis, I had originally replied to United Nations Office at Vienna that the original had to be returned to Headquarters on 29 February 1989.

4. However, the Director-General of United Nations Office at Vienna has now personally insisted, in a cable addressed to the Legal Counsel, on the desirability of allowing for such signatures.

5. I have accordingly reviewed our practice and have ascertained that, at least on one occasion, the original of a treaty, which was open for signature at Headquarters in New York in accordance with its provisions, was taken to another city where signatures were then affixed. This exception was made in the case of the Convention on the Elimination of All Forms of Discrimination against Women,[11] which originally was transferred to Copenhagen in order to allow for signatures to be affixed on the occasion of the World Conference of the United Nations Decade for Women (14-30 July 1980). Although the situation here is slightly different, the principle involved — signature during a certain time period at a place other than that provided — is the same.

6. On two other occasions, a different procedure, but to the same effect, was used to allow such signatures: the originals were kept at Headquarters, as provided for in the agreements, but separate signature pages (for those States that had not yet signed at the time) were attached to a certified true copy, so as to form a "neo-original". Signatures of the Agreement establishing the Common Fund for Commodities were thus allowed to be affixed at Paris for the duration of the United Nations Conference on Least Developed Countries (1-14 September 1981), and at Belgrade for the duration of the sixth United Nations Conference on Trade and Development (6-30 June 1983).

7. My concerns, in connection with the retention of the original in Vienna, are the following:

(*a*) In principle, the depositary should perform his functions strictly as provided for in the treaty;

(*b*) In general, the more exceptions are made, the more difficult it is to perform satisfactory depositary functions;

(*c*) The depositary might find himself at Headquarters in the position of having to advise a potential signatory that, to accommodate others, his own signature will have to be deferred, even though, under the clear provisions of the Convention, the original should not have been left in Vienna;

(*d*) In previous cases, the signatures were allowed on the occasion of a meeting convened within the framework of a conference related to the subject matter of the treaty concerned. Here, the treaty concerns narcotics, and the conference concerns disarmament. Multiplying the practice might result in "travelling" originals which would follow United Nations conferences all over the world.

8. However, it may of course conversely be maintained that the depositary always has some discretion in the performance of his duties and that, if he determines that the earlier implementation of the treaty concerned may be obtained by facilitating its signature, he then may use the procedures he may deem fit for the purpose.

9. Therefore, and under the special circumstances indicated by the Director-General of the United Nations Office at Vienna, and taking into account that the action envisaged would only result in a slight delay in the transfer of the original and that no additional risks of loss of the original would be entailed, an exception could perhaps also be made in the present case. If a potential signatory came forward in New York, we would first suggest that he defer the signature. If there were an urgency to have the signature affixed, we could as a last resort apply, in reverse, the procedure outlined in the paragraph above and have the signature affixed on a page which would be attached, under the depositary's responsibility, to a copy of the agreement.

10. Finally, with reference to your suggestion of having an announcement published in the *Journal of the United Nations*, perhaps we could word the announcement in such a way as not to underline the difficulty. The announcement, for example, could read:

"Opening for signature in New York as at ... March 1989 (until that date the Convention remains open for signature at Vienna)."

11. In conclusion, if it were felt that it was indeed desirable to go along with the Director-General's suggestion, there are precedents for the practice involved, and practical solutions could be found to remedy difficulties that could occur in that connection.

28 February 1989

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

UNITED NATIONS INDUSTRIAL DEVELOPMENT ORGANIZATION

(Legal opinions issued or prepared by the Legal Service)

1. Membership in UNIDO — Possible request by Palestine

Memorandum to the Director-General

1. You have requested advice on the legal implications of a possible request by Palestine for membership in UNIDO. In the following I shall refer to and comment on the applicable provisions of the Constitution of UNIDO and of the rules of procedure of the General Conference.

2. The basic provision is contained in article 3 of the Constitution, which reads as follows:

"*Article 3*

Members

Membership in the Organization is open to all States which associate themselves with the objectives and principles of the Organization:

(*a*) States Members of the United Nations or of a specialized agency or of the International Atomic Energy Agency may become members of the Organization by becoming parties to this Constitution in accordance with article 24 and paragraph 2 of article 25;

(*b*) States other than those referred to in subparagraph (*a*) may become members of the Organization by becoming parties to this Constitution in accordance with paragraph 3 of article 24 and subparagraph 2(*c*) of article 25, after their membership has been approved by the Conference, by a two-thirds majority of the members present and voting, upon the recommendation of the Board."

3. It is seen that there are two alternative procedures for obtaining membership. If the requesting State is already a member of either the United Nations, a specialized agency of the United Nations or of the International Atomic Energy Agency, such a State may become a member of UNIDO when it accedes to the Constitution by depositing its instrument of ratification with the despositary,[12] namely, the Secretary-General of the United Nations.[13] The depositary functions of the Secretary-General are discharged by the Legal Counsel assisted by the Treaty Section of the Office of Legal Affairs of the United Nations Secretariat.

4. In the event that there should be a difference of view between the depositary and one or more States Members of UNIDO regarding an action taken, or to be taken, by the depositary of the Constitution, it is the duty of the depositary to notify the States parties to the Constitution, as well as the Director-General, of the matter.[14]

5. In the event that the requesting State is not already a member of one of the organizations of the United Nations referred to in article 3(*a*) of the Constitution, it follows from article 3(*b*) that accession to the Constitution requires the prior approval of membership by a two-thirds majority of the members of the General Conference present and voting, upon recommendation of the Industrial Development Board. The recommendation by the Industrial Development Board requires a simple majority of the members of the Board present and voting.[15] The more detailed procedural requirements are addressed in rules 105 and 106 of the rules of procedure of the General Conference. It is seen, *inter alia*, that the request shall be made in the form of an application submitted to the Director-General and that the application shall be accompanied by a formal declaration of acceptance of the Organization's objectives and principles, as well as its Constitution. The application (and the Board's recommendation on it) shall be considered by the General Conference at its next regular or special session. If the Board's recommendation is made during a session of the General Conference, the application shall be considered at that session.

6. Whether in case of the procedure under article 3(*a*) or the procedure under article 3(*b*) of the Constitution, the question of an applicant's eligibility for membership in UNIDO will ultimately be decided by the members of UNIDO. As some members may hold the view that Palestine does not presently have all the attributes required by international law for an entity to constitute a sovereign State, it is relevant to recall the precedent set by the admission of Namibia, represented by the United Nations Council for Namibia, to membership in UNIDO even though several members held (and continue to hold) the view that "Namibia is not a State". Namibia, represented by the Council for Namibia, being already a full member of ILO, UNESCO, FAO, IAEA and ITU and an associate member of WHO, was admitted under article 3(*a*) of the UNIDO Constitution.

18 April 1989

2. Commercialization of UNIDO's technologies

Memorandum to the Chairman of the Operational Task Force

1. I wish to refer to your memorandum of 15 February 1989, requesting the information on certain legal aspects connected with the possible commercialization of environmental technologies developed by UNIDO. The delay in replying to your requests is attributable to the pressure of work, which leaves little time for the consideration of future strategies.

2. Generally speaking, if a programme were to be started by UNIDO, which has as an essential component the generation of substantial income to the Organization from the sale or licensing of technology developed by the Organi-

zation, this would constitute a departure from the general policies and practices followed so far by UNIDO. Whether or not such a departure would require endorsement by the policy-making organs of UNIDO, and in which form, is a matter that may need consideration.

3. Although the files of the Legal Service indicate that the old UNIDO held a patent to an industrial process jointly with the Government of India, no income was received from the patent. As the following will show, the general policy of UNDP and of UNIDO is to ensure that technology developed on projects executed by UNIDO is freely available for anyone to use. Therefore, applications for patents are not filed, but the technology or know-how is ceded to the public domain.

4. Most of the technical cooperation projects executed by UNIDO are funded by UNDP and, therefore, governed by the legal arrangements made by UNDP and the Governments receiving assistance and with executing agencies of UNDP (such as UNIDO). The policy of UNDP with regard to inventions or know-how resulting from work on projects funded by UNDP is set out in article III, paragraph 8, of the UNDP Standard Basic Assistance Agreement with Governments, as well as in the Basic Agreements with executing agencies. The former reads:

> "8. Patent rights, copyrights and other similar rights to any discoveries or work resulting from UNDP assistance under this Agreement shall belong to UNDP. Unless otherwise agreed by the parties in each case, however, the Government shall have the right to use any such discoveries or work within the country free of royalty or any charge of similar nature."

It follows from this clause that UNDP must agree to any application for a patent and in this connection UNIDO would have to negotiate all aspects with UNDP on an ad hoc basis if and when a patentable discovery has been made. In practice, UNIDO does not pursue such possibilities with UNDP. There may be a variety of reasons for this, including lack of interest of the recipient Government (which in any case has the rights inside the country) and the considerable cost of filing applications and obtaining patents worldwide.

5. If a project is funded by UNIDO (Industrial Development Fund or trust fund) the applicable policy established by the Industrial Development Board and the General Conference is stated in article IV, paragraph 10, of the Standard Basic Cooperation Agreement between UNIDO and Governments receiving assistance from UNIDO, adopted on 12 December 1985, by General Conference decision GC.1/Dec.40. The provision reads:

> "10. Patent rights, copyrights and other similar rights to any discoveries or work resulting from UNIDO assistance under this Agreement shall belong to UNIDO. Unless otherwise agreed by the Government and UNIDO in each case, however, the Government shall have the rights to any such discoveries or work within the country free of royalty or any charge of similar nature."

It is seen that the basic principle in the case of UNIDO-funded projects is the same as for UNDP-funded projects. In the former case, however, UNDP's agreement is not required before UNIDO files a patent application. Nevertheless, no such application has been filed for the same variety of reasons that UNDP has not been approached by UNIDO on the matter of filing for patents.

6. If it were to be determined in a concrete case that UNIDO should protect the know-how on technology developed by it by holding patent rights in one or more countries, it would for legal and practical reasons be necessary to retain specialized patent attorney(s) in one or more countries and to charge the — not insignificant — legal costs to the project concerned. The Legal Service of UNIDO would be in a position to instruct and guide the patent attorney(s) concerned and in this manner safeguard UNIDO's legal interests in the matter.

7. The comments under paragraph 6 above also apply to the projects being executed by UNIDO for the establishment in New Delhi and Trieste of the International Centre for Genetic Engineering and Biotechnology. In this connection legal assistance also will be required for the formulation of agreements with non-UNIDO research institutions on the modalities for so-called collaborative research programmes, including the approach to and disposition of eventual intellectual property rights in the work resulting from the collaborative research programmes.

5 May 1989

3. Question of attributing authorship to staff members — Ranking system of the rules of UNIDO — Authority to amend the rules and the form of such amendment

Memorandum to the Chairman of the Publications Board

1. It has been brought to my attention that the Publications Board at its meeting to be held on 8 August 1989 will review the varying practice in the United Nations system concerning whether and in which cases authorship of publications may or should be attributed to staff members. In view of the wide implications of this issue both from a policy and a legal viewpoint, I wish to offer the following observations for your consideration.

2. The informal note (Pub 21 — item 4, Attribution of authorship), distributed in advance of the meeting of the Publications Board, first recalls the applicable United Nations rule, namely that attribution to individual staff members may not be made in papers, documents or publications of the United Nations. Then the note makes the following untrue statement:

> "While UNIDO was part of the United Nations, the rule quoted above applied also to its publications. When UNIDO became a specialized agency, however, it was no longer bound by United Nations rules."

In fact, this matter is expressly dealt with by article 26.2 of the Constitution of UNIDO, which reads:

> "2. The rules and regulations governing the organization established by United Nations General Assembly resolution 2152 (XXI) shall govern the Organization and its organs until such time as the latter may adopt new provisions."

Upon reflection, it is obvious that the new UNIDO at first necessarily had to function under the system of internal rules of the former UNIDO; to have

abandoned all internal rules would have been tantamount to decreeing anarchy. Consequently, the above-quoted United Nations rule continues to apply to UNIDO, notwithstanding that the Languages and Documentation Division admits to having had difficulty in maintaining consistent practice in this respect.

3. In fact, the United Nations rule on attribution of authorship is only one of many rules making up the body of rules, which was applicable to the old UNIDO between 21 June 1985, when the Constitution entered into effect, and 31 December 1985, when the old UNIDO was abolished, and which continues to apply to the present Organization, unless replaced by a different rule duly adopted by the appropriate authority of the new UNIDO.

4. The foregoing considerations lead to the question of which is the authority in the new UNIDO that is competent to amend the United Nations rule on attribution of authorship? And what is the appropriate form? The answers to these questions may be prefaced by noting that the United Nations rule was in the form of an administrative instruction issued under the authority of the Secretary-General of the United Nations in his capacity of Chief Administrative Officer of the Organization.[17] In the practice of the United Nations Secretariat, an administrative instruction is used for rules that are normative and binding on the staff and which in the hierarchy of such norms rank below staff and financial rules. Staff and financial rules also are issued by the Secretary-General and therefore rank below the Staff Regulations and Financial Regulations since the latter are adopted by the General Assembly. UNIDO has a similar ranking system:

Level 1: *The Constitution*

Level 2: *Rules of procedure of the policy-making organs; Financial and Staff Regulations*

(*a*) The General Conference adopts its own rules of procedure (Const. art. 8.5)

(*b*) The Industrial Development Board adopts its own rules of procedure (Const. art. 9.5)

(*c*) The Programme and Budget Committee adopts its own rules of procedure (Const. art. 10.5)

(*d*) The General Conference approves Financial Regulations (Const. art. 8.3(c))

(*e*) The General Conference, upon recommendation of the Board, establishes Staff Regulations. (Const. art. 11.5).

Level 3: *Headquarters Regulations*: Based on article III, section 8, of the 1967 Headquarters Agreement and pursuant to rule 60 of its rules of procedure, the General Conference, upon recommendation of the Board, may establish regulations operative within the headquarters seat of UNIDO.

Level 4: *Financial and Staff Rules*

(*a*) Financial rules are issued by the Director-General pursuant to financial regulation 12.1 and they are applied subject to the Financial Regulations.

(*b*) Staff rules are issued by the Director-General pursuant to financial regulation 12.4 (of the United Nations: see GC.2/Dec.29) and they are applied subject to the Financial Regulations.

Level 5: *Administrative instructions*

(*a*) Administrative instructions may be issued by the Deputy Director-General for Administration in consultation with the Director-General to amplify the Financial Rules (Fin. Rule 112.4).

(*b*) Administrative instructions may be issued by the Director, Personnel Services Division, in consultation with the Deputy Director-General for Administration, or the Director-General, as appropriate (staff rule 113.2). Such administrative instructions amplify the Staff Rules.

Level 6: *Director-General's bulletins*

A considerable number of bulletins have been issued by the Director-General in his capacity of Chief Administrative Officer. The contents range from binding rules such as financial and staff rules, over guidelines and model legal texts, to the establishment of intra-Secretariat committees, including their terms of reference and membership. Administrative instructions have not been issued as bulletins of the Director-General.

Level 7: *Directives and instructions with limited circulation*

While the rules at levels 1 to 6 are given general circulation to all staff, personnel directives were issued by the United Nations Assistant Secretary-General for Personnel Services only to Personnel Officers. The United Nations Administrative Tribunal has held that such personnel directives are binding, can be invoked by a staff member before the Tribunal and may constitute a valid basis for a claim. Financial Services instructions are issued by the Head, Financial Services Division of UNIDO, and are distributed only to relevant staff in that division.[18]

Not included in any of the foregoing seven categories are numerous other circulars which predominantly contain information or are of a limited duration or scope.

5. Having set out the general ranking order of the internal rules of UNIDO,[19] which must be observed when applying the rules, I wish to turn again to the question of how the currently applicable United Nations rule on the attribution of authorship might appropriately be amended. An examination of the

terms of reference of the Publications Board shows that it does not have the authority to amend or issue binding rules at the level of the administrative instruction, or at a higher level. It is, however, clear that a change that would allow attribution of authorship involves not only a policy issue appropriate for consideration by the Publications Board, but also would affect the employment relationship between staff members and the Organization.

In fact, there are two staff rules that directly affect the substance of the matter, namely rule 101.05 on proprietary rights and rule 101.02 on communication of information. Rule 101.05 provides that:

> "All rights, including title, copyright and patent rights, in any work performed by a staff member as part of his or her official duties, shall be vested in the Organization."

Rule 101.02 provides, *inter alia*:

> "Except in the normal course of official duties, staff members shall be required to seek prior approval of the Director-General for performance of any of the following acts, if such acts relate to the purpose, activities or interests of the Organization:
>
> (iv) Submit articles, books or other material for publication."

In addition to being an aspect of the employment relationship that is important for at least some of the staff at the Professional level, the question whether authorship may be attributed has policy implications for all departments of the Secretariat as well as for the Office of the Director-General, and it therefore might be helpful to circulate contemplated new rules in draft to all concerned for written comments and, if necessary, to recirculate a revised draft based on the comments. Considering, finally, that the new rules may be considered to amplify the staff rules and that authority to issue administrative instructions has not been delegated to a greater extent than in the Financial and Staff Rules mentioned above, it would seem to be the most appropriate approach for the Publications Board to take up the matter initially with the Deputy Director-General for Administration and the Director for Personnel Services, as well as at a later stage with the Director-General himself, with a view to preparing the issuance of an administrative instruction pursuant to staff rule 113.02(c).

3 August 1989

Notes

[1]United Nations, *Treaty Series*, vol. 555, p. 132.

[2]See United Nations Administrative Tribunal Judgements Nos. 230, 233, 255, 281 and 298.

[3]United Nations, *Treaty Series*, vol. 11 (1947), p. 11.

[4]"Mention of firm names and commercial products does not imply the endorsement of the United Nations."

[5]"Inclusion in the 'World Aid' supplement to *Development Business* does not necessarily imply the endorsement of any firm or product by the United Nations or its specialized agencies."

[6]E.g., the word "necessarily" should be deleted if the disclaimer set forth in the second footnote to para. 9 continues to be used.

[7]United Nations publication, Sales No. E.83.V5.

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

[9]Ibid., vol. 500, p. 95.

[10]E | CONF.82 | 15, Corr.1 and 2. English only.

[11]United Nations, *Treaty Series*, vol. 1249, p. 13.

[12]UNIDO Constitution, Article 24.3.

[13]Article 28.1.

[14]Article 28.2 of the Constitution provides: "In addition to notifying the States concerned, the depositary shall notify the Director-General of all matters affecting this Constitution."

[15]Rule 51.4 of the rules of procedure of the Industrial Development Board.

[16]Administrative instruction ST/AI/189/Add.6/Rev.2.

[17]Charter of the United Nations, Article 97.

[18]In view of the issuance by the Director-General of new financial and staff rules for UNIDO, the continued validity of these Personnel Directives and Financial Services Instructions is legally questionable, in particular, as far as issuances after the entry into force of the financial and staff rules are concerned and in case of inconsistency with a financial or staff rule.

[19]It is an interesting comment on the complexity created by the multitude of rules issued at divergent levels of authority that at the present time no Office in the Secretariat appears to have responsibility for streamlining the system and coordinating the issuance of new rules.