*Extract from:*

# UNITED NATIONS JURIDICAL YEARBOOK

## 1999

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

*Page*

Retroactive conversion to regular staff and reinstatement—Issue of receivability—Question of deciding merits of claim before examining issue of jurisdiction—Issue of exercising jurisdiction in order to prevent escaping a judicial review—*Audi alteram partem*—Question of remedies ..... 376

2. Judgement No. 1999-2 (13 August 1999): Mr. "V" v. International Monetary Fund

Alleged violation of a retirement agreement—Meaning of placing documents under seal—Question of creating future records of former staff member's performance after a negotiation for deletion of performance rating from electronic database—Boundaries of a "confidential clause"— Importance of Tribunal's enforcement of negotiated settlement and release agreements—Elements of such an agreement—"Strictly confidential" versus "secret"—Lack of sensitivity does not amount to gross negligence—Question of where Fund is liable for actions of Staff Association Committee—Issue of damage to reputation—Effect of Grievance Committee's recommendation before the Tribunal—Question of costs awarded to Respondent for alleged frivolous claims brought by Applicant ..... 379

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

A. LEGAL OPINIONS OF THE SECRETARIAT OF THE UNITED NATIONS (ISSUED OR PREPARED BY THE OFFICE OF LEGAL AFFAIRS)

*Contracts*

1. Implementing instruments—Convention on Long-range Transboundary Air Pollution of 13 November 1979—Financial regulation 10.5 and financial rules 110.10 to 110.24 ... 387

*Liability issues*

2. Pilot project with internships of graduate students in peacekeeping operations—Legal status of students in the host countries under the status-of-forces agreements—Liability of the Organization ..... 389

3. Death and disability claims—Contributory negligence ..... 392

*Personnel*

4. Outside employment and activities—Staff regulation 1.2—Staff rules 101.2 (*p*), (*q*), (*r*) and (*s*) ..... 393

5. Meaning of the term "administrative decision"—Staff regulation 11.1 ..... 396

*Page*

6. Report to the General Assembly on management irregularities—Procedures for determining "gross negligence"—Recovery procedures ..... 398

*Privileges and immunities*

7. Privileges and immunities of UNICEF and its officials ..... 405

*Procedural and institutional issues*

8. Authority for the establishment of United Nations awards—Awards in the field of drug use prevention and control—Nansen Award ..... 406
9. Legal status of the Permanent Observer Mission of the Organization of the Islamic Conference—Privileges and immunities of non-State entities invited to participate as observers in United Nations meetings ..... 408
10. Consideration of agenda items in numerical order ..... 409
11. Confidentiality—Rules of procedure of the Commission on the Limits of the Continental Shelf ..... 411
12. Appointment of the Secretary-General of the World Meteorological Organization—Voting procedures ..... 415
13. Possibility of States not members of the Commission on Sustainable Development holding office in an open-ended intergovernmental group of experts—Rule 15 of the rules of procedure of the functional commissions of the Economic and Social Council ..... 417

*Procurement*

14. Participation of organizations of the United Nations system in competitive bidding exercises conducted by Governments 418

*Treaty issues*

15. Certain aspects of United Nations current treaty practice ... 423

B. LEGAL OPINIONS OF THE SECRETARIATS OF INTERGOVERNMENTAL ORGANIZATIONS RELATED TO THE UNITED NATIONS 426

**Part Three. Judicial decisions on questions relating to the United Nations and related intergovernmental organizations**

CHAPTER VII. DECISIONS AND ADVISORY OPINIONS OF INTERNATIONAL TRIBUNALS ..... 431

CHAPTER VIII. DECISIONS OF NATIONAL TRIBUNALS

United States of America

United States Court of Appeals for the District of Columbia Circuit

International Bank for Reconstruction and Development v. District of Columbia

## Chapter VI

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

## A. Legal opinions of the Secretariat of the United Nations
(Issued or prepared by the Office of Legal Affairs)

### CONTRACTS

1. IMPLEMENTING INSTRUMENTS—CONVENTION ON LONG-RANGE TRANSBOUNDARY AIR POLLUTION OF 13 NOVEMBER 1979—FINANCIAL REGULATION 10.5 AND FINANCIAL RULES 110.10 TO 110.24

*Memorandum to the Chairman of the Headquarters Committee on Contracts*

1. This is in reference to your memorandum dated 9 July 1998, requesting our advice on what the role of the United Nations Office at Geneva Contracts Committee should be in respect of the "implementing instruments", concluded each year since 1990, between the Economic Commission for Europe (ECE) and, respectively, the Chemical Coordinating Centre, located at the Norwegian Institute for Air Research, Lillestrom; the Meteorological Synthesizing Centre-East, located at the Institute of Applied Geophysics, Moscow; and the Meteorological Synthesizing Centre—West, located at the Norwegian Meteorological Institute, Oslo. We also refer to our subsequent discussion with representatives of ECE, and the additional information provided to us on 24 March 1999 by the Deputy Director, ECE Environment Body for the Convention on Long-range Transboundary Air Pollution.

*Background*

2. The Convention on Long-range Transboundary Air Pollution ("the Convention") was adopted on 13 November 1979, within the framework of ECE, and entered into force on 16 March 1983. Its objectives are, inter alia, "to reinforce active international cooperation to develop appropriate national policies and, by means of exchange of information, consultation, research and monitoring, to coordinate national action for combating air pollution including long-range transboundary air pollution".

3. The Executive Secretary of ECE carries out secretariat functions for the Executive Body of the Convention (article 11).

4. A "Cooperative programme for the monitoring and evaluation of the long-range transmission of air pollutants in Europe" ("EMEP") is carried out as part of the activities under the Convention (article 9).

5. A Protocol to the Convention for "the long-term financing of EMEP" was adopted by the Contracting Parties to the Convention on 28 September 1984 and

entered into force on 28 January 1988 ("the 1984 Protocol"). The 1984 Protocol specifically refers to the three centres as "the international centres of EMEP", responsible for coordinating the monitoring of long-range air pollution in the area covered by EMEP (article 1, para. 4).

6. The 1984 Protocol contains the following provisions relating to the financing of EMEP:

(*a*) Article 2 provides that "the financing of EMEP shall cover the annual costs of the international centres cooperating within EMEP for the activities appearing in the work programme of the Steering Body of EMEP";

(*b*) Article 3 provides that the annual costs of the work programme of EMEP shall be covered by the mandatory contributions, supplemented by voluntary contributions subject to approval of the Executive Body. A "General Trust Fund" was established by the Secretary-General of the United Nations to receive such mandatory and voluntary contributions (articles 1 and 3);

(*c*) Article 5 provides that "an annual budget for EMEP shall be drawn by the Steering Body of EMEP, and shall be adopted by the Executive Body ... (article 5).[1]

7. You enclosed with your memorandum a copy of "Terms of Reference for the International Centres of the Cooperative Programme for Monitoring and Evaluation of the Long-range Transmission of Air Pollutants in Europe". It is stated in paragraph 1 of the three samples of implementing instruments which you provided to us that these terms of reference were "approved by the Executive Body of the Convention at its fourth session (EB.AIR/GE.8, annex IV)". The three centres are specifically referred to in paragraph 5 of the terms of reference, which set out in detail the terms and conditions under which they are "to carry out the technical and scientific functions assigned to them in accordance with the present terms of reference" (para. 6).

8. We understand from the 27 May 1998 memorandum addressed to you by the Chief, Purchase and Transportation Section of UNOG, that ECE has presented to the UNOG Committee each year since 1990, for information, a report concerning the extension of the implementation instruments, and that the UNOG Committee has only taken note of the extension, without taking any decision.

9. In the 3 April 1998 "Information Note to the Committee on Contracts", prepared by ECE and enclosed with your memorandum, it is stated, inter alia, that "the ECE secretariat has sought and received authority from the Office of the Controller, United Nations Headquarters (memorandum of 14 June 1990), to conclude annual implementing instruments for the EMEP programme on the understanding that all expenditures will be fully covered by assessed contributions from the parties to the EMEP Protocol" (para. 3).

*Analysis and advice*

10. According to United Nations financial rule 110.17, United Nations Headquarters and local Committees on Contracts are established to render written advice to the United Nations officials designated in the rules (in this case, the head of the UNOG office) on all contracts for the purchase or rental of services, supplies, equipment and other requirements exceeding a specified amount, all proposals for modification or renewal of contracts previously reviewed by the Committees,[2] and such other matters as may be referred to them by the designated officials.

11. The principal function of the Committees on Contracts is to examine and provide advice as to whether proposed contracts are in accordance with the Financial Regulations and Rules of the United Nations and the related procedures, administrative issuances and instructions.

12. The United Nations financial regulations and rules involved are financial regulation 10.5 and financial rules 110.16 to 110.24, on "Contracts and purchases". Their purpose is, essentially, to ensure that United Nations contracts which exceed amounts specified in the Rules and which do not fall under the exceptions also specified in the Rules are awarded through competitive bidding and are made in writing.

13. In our view, the implementing instruments concluded with the centres do not fall within the category of the contracts to be reviewed by the Contracts Committee under the Financial Regulations and Rules of the United Nations, for the reasons explained below.

14. Indeed, we note that each of the implementation instruments enclosed with your memorandum provides, essentially, that the centres will continue to perform their functions for the implementation of the Convention in accordance with the work plan, terms of reference and budget approved by the Executive Body of the Convention, all annexed to the implementation instrument, and will be reimbursed by ECE for such work in accordance with the Financial Regulations and Rules of the United Nations (articles 1 through 4).[3] As we understand it, ECE, as the secretariat for the Executive Body of EMEP, has been authorized by the United Nations Controller to sign the implementing instruments.

15. Under the circumstances, it is our opinion that the implementation instruments do not fall within the purview of the UNOG Contracts Committee.

26 April 1999

## LIABILITY ISSUES

### 2. PILOT PROJECT WITH INTERNSHIPS OF GRADUATE STUDENTS IN PEACEKEEPING OPERATIONS—LEGAL STATUS OF STUDENTS IN THE HOST COUNTRIES UNDER THE STATUS-OF-FORCES AGREEMENTS—LIABILITY OF THE ORGANIZATION

*Memorandum to the Chief of Personnel Management and Support Services, Field Administration and Logistics Division, Department of Peacekeeping Operations*

1. This refers to the above-mentioned pilot project which was transmitted to us by the Internship Coordinator in the Office of Human Resources Management. It also refers to subsequent correspondence between representatives of the Field Administration and Logistics Division and the Office of Legal Affairs and the meeting held some time ago with representatives of a school or university.

2. We have been informed that some peacekeeping missions have requested the Field Administration and Logistics Division to analyse the possibility of establishing an internship programme in the field. In this context, the school ("the University") has been approached by the Division regarding its possible participation in a pilot project which would be carried out during the summer of 1998. We understand that, pursuant to the project, some three to five graduate students, between the first

and second year of a Master's programme at the University, would be selected to serve unpaid internships in peacekeeping operations for a period of 10 to 12 weeks. The Division has indicated that the functions to be carried out by the interns would be limited to functions in the areas of political, civil and humanitarian affairs and information/media relations. The Division also indicated that such internships would be useful in preparing interns for possible careers in peacekeeping operations.

3. You have requested our views on the project and assistance in drafting appropriate arrangements with the University that would set out the respective obligations and rights of the United Nations and the University in respect of the project.

4. A project of this nature involves many issues that may need to be considered by the appropriate offices, e.g., the political repercussions that might accrue on the Organization vis-à-vis host Governments and international public opinion in general if students are injured or die in peacekeeping operations, or the financial responsibility that the Organization may incur under the project.[4] This memorandum will not address such policy and financial matters, but will limit itself to addressing the following legal issues: (*a*) the legal status of the students in the host countries under the status-of-forces agreements (SOFAs); (*b*) the liability of the Organization in the event the students sustain injuries or die in the performance of their functions in peacekeeping operations; and (*c*) the arrangements with the University.

### A. *Legal status*

5. As regards the legal status of the students in a peacekeeping operation and the privileges and immunities to be accorded to them under the SOFA, please be advised that "students" do not fit any of the categories foreseen in the 1946 Convention on the Privileges and Immunities of the United Nations (the General Convention), or in any of the categories set out in the model SOFA. The students cannot be considered as officials, or as military personnel, or experts on mission for the United Nations. Therefore, in order for the students to be accorded the privileges and immunities necessary for them to function in a peacekeeping operation, a policy determination would need to be made on the scope of the protection that would be necessary for the students, which would then need to be negotiated with the host Government. We would emphasize that the host Governments are under no obligation to grant to the students *any* privileges and immunities. Under such circumstances, any privileges and immunities which the United Nations would consider granting to the students, or to any other category of personnel not provided for in the General Convention, will have to be subject to the agreement of the host Government concerned and expressly provided for in the SOFA with the host country.

6. At a minimum, we consider that the students would need to be accorded functional immunity and facilities for their entry into and departure from the host country, including for repatriation in times of international crisis. As you can appreciate, it may not be easy or at all possible to obtain the consent of the host Government to granting functional privileges and immunities to the students. Without such consent, however, the students would have no legal status in the host country and should not be deployed there.

### B. *Liability of the Organization for death/injury*

7. Although certain peacekeeping missions may appear to have a more stable or predictable environment than others, for example, those which mainly involve observation functions, there is always an inherent element of risk in all of them. Ac-

cordingly, the United Nations could be exposed to claims for compensation from the students, or their dependants, if they sustain injuries or die during their internship. Such claims for compensation would be based on the fact that the students sustained the injury while they were performing functions under the direct supervision and control of the Organization, and for its benefit.

8. In addition, the activities of the students might expose the Organization to potentially significant liabilities for third-party claims arising from personal injury or property loss or damage caused to third parties. In view of the fact that the students would be performing functions for the United Nations, third parties would assimilate them to employees or agents of the Organization and hold the Organization liable in respect of loss, damage or injury caused by the students. It would therefore be necessary that the University fully indemnify, defend and hold harmless the United Nations from and against all third-party claims arising from the acts or omissions of the students supplied by it. In addition, the University would have to be requested to back up those indemnity obligations with appropriate financial guarantees, e.g., insurance.

9. In addition to the above, the United Nations would have a degree of responsibility for the safety and security of the students during their internship in a peacekeeping operation. To avoid liability, the United Nations should ensure that, from a safety and security standpoint, it extends to all personnel in peacekeeping operations, including the students, the same degree of care and responsibility, including the same evacuation and emergency medical assistance in periods of danger.

### C. *Arrangements with the University*

10. In the light of the above considerations, if it is decided to proceed with the pilot project, the arrangements to be concluded with the University would seek to insulate the United Nations from exposure to liability. In addition to the provisions on third-party claims (see para. 8, above), such arrangements would make clear, inter alia, that the students will not be considered as staff or officials of the United Nations, but will remain the responsibility of the University; that while the United Nations may not be directly involved in the selection of the students, it will have the right to accept or reject any student that the University may have selected; and that the United Nations should have the right to terminate the internship of any of the students at its discretion and at any time, without incurring any liability of any nature, including the expenses associated with the repatriation of the student(s).

11. In addition to concluding appropriate arrangements with the University, the students would have to sign an undertaking, confirming, inter alia, that they have insurance covering their personal injury or death, including insurance for damage or loss of their personal effects, and releasing the United Nations from responsibility in the event they incur injury or die during the period of their internship. In addition, the students would agree, inter alia, to follow the Organization's instructions, comply with local law and customs, maintain the highest standard of conduct and integrity, always act with independence, impartiality, objectivity and tolerance, and keep confidential any information obtained by virtue of their functions which is not released to the public.

12. However, we would emphasize that, notwithstanding any provisions to the contrary in the arrangements with the University and the students, the Organization would still carry a certain degree of responsibility in case the students are injured or die during their internship in a peacekeeping operation, since they would

be discharging functions for the benefit of the United Nations and under its direct supervision and control.

24 February 1999

### 3. DEATH AND DISABILITY CLAIMS—CONTRIBUTORY NEGLIGENCE

*Memorandum to the Director of Field Operations and Logistics Division, Department of Peacekeeping Operations*

1. Your memorandum of 4 March 1999 on the above subject requested our advice on the issue of contributory negligence as it relates to compensation claims for death and disability sustained by members of military contingents in United Nations peacekeeping missions. In that connection, you forwarded files containing board of inquiry reports on injuries suffered by two soldiers, and the death of another soldier, while they were serving in United Nations peacekeeping missions in the former Yugoslavia. We note that the two soldiers were injured in separate incidents in 1994, whereas the death of another was a result of a traffic accident on 27 July 1997.

2. As you are aware, on 17 June 1997, the General Assembly adopted a system of self-insurance and established uniform and standardized rates for the payment of awards in cases of death or disability sustained by troops serving in United Nations peacekeeping operations (resolution 51/218 E), to be applied to cases arising from incidents after 30 June 1997. In its resolution 52/177 of 18 December 1977, the Assembly adopted the detailed procedures for the implementation of the new system. Thus, the Russian soldier's death would be handled under the new system, while the other two cases would be dealt with under the old system.

3. Under the old system, Governments were reimbursed for payments made to members of their peacekeeping contingents for service-incurred death or injury in accordance with national legislation as certified by the Government's Auditor-General or an official of equivalent position. However, compensation was not payable where the death resulted from the contingent member's gross negligence or wilful misconduct. Under the new system, the United Nations pays a one-time lump-sum award for service-incurred injury calculated as a percentage of the award for death according to the degree of loss of function (resolution 51/218 E). In paragraph 7 of resolution 52/177, the General Assembly requested the Secretary-General "to continue, in the new system, to take into account, when considering all mission-related death and disability claims, that such injury or death should be compensable, unless such injury or death was caused by the gross negligence or wilful misconduct of the injury or deceased member of the contingent". The Assembly further requested the Secretary-General "to include this notion in the aide-mémoire for troop-contributing countries".

4. Accordingly, under both the old and the new systems, once a determination has been made that the death or injury was service-incurred (and was not due to the victim's gross negligence or wilful misconduct), the full amount of compensation is payable. Under neither scheme does ordinary negligence reduce or preclude the payment of compensation.

5. As you have requested our advice only on the question of whether contributory negligence reduces the amount of compensation which would otherwise be payable, we assume that you have concluded that in all three cases the death or

injury was service-incurred. However, in one of the Board of Inquiry reports, which were prepared under the new system, the Board made no findings as to whether or not the death was service-incurred.[5]

6. We also note that none of the boards of inquiry mentioned above found gross negligence or wilful misconduct by the victim to have been a contributory factor in the injury or death. Thus, in all three cases (and subject to the comments in para. 6, above), we believe that full compensation would be payable.

6 April 1999

## PERSONNEL

### 4. OUTSIDE EMPLOYMENT AND ACTIVITIES—STAFF REGULATION 1.2—STAFF RULES 101.2 (*p*), (*q*), (*r*) AND (*s*)

*Memorandum to the Assistant Secretary-General for Human Resources Management*

1. This is with reference to your request for advice of 9 February 1999, in connection with a letter of 2 December 1998, addressed to the Chef de Cabinet, Executive Office of the Secretary-General, by the Executive Secretary, United Nations Framework Convention on Climate Change. The Executive Secretary seeks approval to accept an invitation to become a founding member for LEAD[6]-Europe, a not-for-profit association under German law, dedicated to the promotion of sustainable development in industrialized and developing countries through educational programmes.

2. I note that, on 7 December 1998, the Office of Human Resources Management provided advice on the matter and identified a number of issues relating to the request which required further clarification. The Executive Secretary has produced a number of arguments in support of his participation in the project. He has also provided the draft Articles of Association of LEAD-Europe, a document which was not available when the Office gave its views.

*LEAD-Europe: brief overview of draft Articles of Association*

3. Pursuant to its draft Articles of Association, LEAD-Europe is a non-profit non-governmental association to be incorporated under German law for the purpose of promoting sustainable development in industrialized and developing countries by means of educational programmes (article 2). The specific activities of the Association would be as follows:

—To conduct further education seminars and provide computer-aided learning programmes in Europe;

—To cooperate with LEAD-International[7] and other national and regional LEAD chapters;

—To establish an international network to support sustainable development;

—To raise funds within and outside Europe for this purpose (article 2).

4. The association "shall directly and exclusively pursue non-profit purposes as defined in the section on 'Tax-favoured Purpose' of the Fiscal Code (*Abgabenordnung*)". It "shall act altruistically and shall not primarily pursue its own commercial interests" (ibid.). Members of the Association's Board are elected for a period

of three years. The Board appoints the Director of the Association, confirms the appointment, by the Director, of the Association's staff, considers and approves the Association's programmes of activities, approves budget estimates and carries out some other functions (article 8). The members of the Association "shall not receive any payments or profit shares whatsoever" (article 12).

5. I understand from your memorandum and the attached documentation that there exists a close association between LEAD-Europe and the German Government. I note in this respect that the above-mentioned draft Articles of Association do not contain any reference to such ties. Also, it is not entirely clear from the documentation made available to the Office of Legal Affairs whether the Executive Secretary merely would like to participate in the establishment of LEAD-Europe. I assume that he would also wish to participate in its activities by becoming a member of the Board of the Association. The advice set forth below is provided on this assumption.

*Applicable administrative rules*

6. I understand that the participation of the Executive Secretary in the establishment and work of LEAD-Europe would be in his personal capacity and should be viewed, therefore, as an "outside activity". Staff regulation 1.2[8] contains a separate section governing outside activities of the staff members of the United Nations, which reads as follows:

"*Outside employment and activities*

(*o*) Staff members shall not engage in any outside occupation or employment, whether remunerated or not, without the approval of the General.

(*p*) The Secretary-General may authorize staff members to engage in an outside occupation or employment, whether remunerated or not, if:

(i) The outside occupation or employment does not conflict with the staff member's official functions or the status of an international civil servant;

(ii) The outside occupation or employment is not against the interest of the United Nations; and

(iii) The outside occupation or employment is permitted by local law at the duty station or where the occupation or employment occurs."

7. The Staff Rules contain the following provisions regarding outside activities of staff:

"*Outside activities*

*Rule 101.2 (*p*)*

Staff members shall not, except in the normal course of official duties or with the prior approval of the Secretary-General, engage in any of the following acts, if such act relates to the purpose, activities or interests of the United Nations:

(i) Issue statements to the press, radio or other agencies of public information;

(ii) Accept speaking engagements;

(iii) Take part in film, theatre, radio or television productions;

(iv) Submit articles, books or other material for publication.

*Rule 101.2 (q)*

Membership in a political party is permitted, provided that such membership does not entail action, or an obligation to take action, by the staff member contrary to staff regulation 1.2 (*h*). The payment of normal financial contributions to a political party shall not be construed as an activity inconsistent with the principles set out in staff regulation 1.2 (*h*).

*Rule 101.2 (r)*

The Secretary-General shall establish procedures whereby staff may seek in confidence clarification as to whether proposed outside activities would conflict with their status as international civil servants.

*Travel and per diem for outside activities*

*Rule 101.2 (s)*

Staff members who are authorized by the Secretary-General to participate in activities organized by a Government, intergovernmental organization, non-governmental organization or other private source may receive from the Government, intergovernmental organization, non-governmental organization or private source accommodation and travel and subsistence allowance generally in line with those payable by the United Nations. In such cases the travel subsistence allowance that may otherwise be payable by the United Nations shall be reduced as envisaged by staff rule 107.15 (*a*)."

*Legal analysis*

8. As a preliminary observation, I note that the Articles of Association of LEAD-Europe appear to be contradictory as to its status. On the one hand, article 2 of the document speaks about the Association's exclusive "non-profit purpose". On the other hand, in the same article, it is indicated that the Association "shall not **primarily** pursue **its own commercial interests**". (emphasis added) This may mean that LEAD-Europe indeed has "its own commercial interests", and that it may pursue them not "primarily" but as a secondary objective. Furthermore, article 12 indicates, inter alia, that members "shall not receive any payments or **profit shares** whatsoever" (emphasis added), indicating that there may be some "profit shares" involved in the activities of LEAD-Europe which would not benefit members but would perhaps be used for financing the Association's activities.

9. The participation of a United Nations staff member in commercial activities of an outside body would clearly be inconsistent with his or her status as an international civil servant. It is possible, however, that the contradictions noted in the preceding paragraph may, perhaps, have resulted from imprecise translation into English of the Articles of Association, which, I assume, were drafted in the German language (the original version was not provided to this Office). I would advise that this matter be clarified.

10. On the assumption that LEAD-Europe does not engage in commerce, there are still a number of potential concerns which should be addressed in connection with possible participation of the Executive Secretary in the activities of that body.

11. First, as correctly indicated in your memorandum, the positions taken in the future by LEAD-Europe on issues dealing with environment and development

may differ from those of the United Nations, thus creating an embarrassing situation for the Executive Secretary of the United Nations Framework Convention on Climate Change and for the Organization as a whole. The related concern is that the appropriateness of his direct involvement in the Association's activities might be questioned by some Member States.

12. Second, as explicitly indicated in article 2 of the Association's founding act, LEAD-Europe will engage in fund-raising. This Office has consistently advised against United Nations staff being involved in third-party fund-raising in view of the risk of jeopardizing the Organization's privileges and immunities. The underlying concern is that, should problems arise during the course of fund-raising activities (for example, the improper solicitation of funds, the management of funds, third-party claims or difficulties with the taxation authorities), the staff member involved would be exposed to the risk of litigation, which might indirectly implicate the privileges and immunities of the Organization.

*Advice*

13. As advised by this Office on many similar occasions in the past, the decision of the Secretary-General whether to grant the Executive Secretary's request is a policy decision that will involve consideration of the relevant provisions of staff regulation 1.2, and corresponding staff rules, taking into account the concerns set out above.

25 February 1999

## 5. MEANING OF THE TERM "ADMINISTRATIVE DECISION"— STAFF REGULATION 11.1

*Letter to the Executive Secretary of the Joint Inspection Unit in Geneva*

I refer to your letter of 28 June 1999, requesting an "official definition" by the Organization of the term "administrative decision". You requested that, if there is no official definition, we provide a definition which could be used officially by the Joint Inspection Unit (JIU).

I note that your request is made in the context of a JIU report on the administration of justice in the Organization. Accordingly, the views set out below concern administrative decisions within the context of United Nations staff regulation 11.1, i.e., the administrative decision which may be appealed. Obviously, national legal systems, as well as legal systems of other international organizations, may have definitions of the term "administrative decision" which may differ from the one offered below.

There is no "official definition" of the term "administrative decision" within the meaning of staff regulation 11.1. However, we believe that the Staff Regulations and Rules, the statute of the Administrative Tribunal and the jurisprudence of the Tribunal would assist us in interpreting the meaning of the term.

Staff regulation 11.1 provides that:

> "The Secretary-General shall establish administrative machinery with staff participation to advise him in case of any appeal by staff members against *an administrative decision alleging the non-observance of their terms of appointment, including all pertinent regulations and rules.*" (emphasis added)

Thus, the administrative decision must concern a staff member's terms of appointment, including all pertinent regulations and rules. Staff rule 111.2 (*a*) provides that:

> "A staff member wishing to appeal an administrative decision, pursuant to staff regulation 11.1, shall, as a first step, address a letter to the Secretary-General requesting that the administrative decision be reviewed; such letter must be sent within two months from the date *the staff member received notification of the decision in writing*". (emphasis added)

Thus, an administrative decision must be communicated to the staff member in writing.

The meaning of "terms of appointment" is elaborated in the statute of the Administrative Tribunal which provides, in article 2.1, that:

> "The Tribunal shall be competent to hear and pass judgement upon applications alleging non-observance of *contracts of employment* of staff members of the Secretariat of the United Nations or of the *terms of appointment* of such staff members. The words "contracts" and "terms of appointment" include all pertinent regulations and rules in force at the time of alleged non-observance, including the staff pension regulations." (emphasis added)

A number of judgements of the Administrative Tribunal elucidate what would constitute an "administrative decision". The Tribunal has held that in order for an appeal to be receivable, an administrative decision must be of an "individual character", i.e., an appeal is premature unless the decision is personally applied to the Applicant and, thus, has actual effects on his or her terms of appointment; see Judgement No. 402, *Katz* (1987). In that judgement, the Tribunal found that the appeal by the Applicant against a decision by the General Assembly concerning the suspension of cost-of-living adjustments for the deferred pension adjustment system was premature until the Applicant reached the age when she would commence receiving pension benefits (para. X). Similarly, in another judgement, the Tribunal found that the Applicant, a project coordinator, had no authority to appeal two administrative decisions which were addressed directly to the Applicant's two supervisees in the project and which concerned their terms of appointment (Judgement No. 432, *Lackner* (1988), para. III). The Tribunal also noted in that in order to be appealable, there must be "the presence of imminent or actual injury to the staff member as a result. Mere speculation as to the possibility of future events that might cause injury would ordinarily lead to the rejection of an appeal" (ibid., para. XIV).

The Tribunal has also pronounced on what would not constitute an administrative decision. For example, the Tribunal held that an exchange of information between two senior officials concerning the delay in issuance of a certificate of service to the Applicant could not be regarded as an "administrative decision" (Judgement No. 433, *Ziegler* (1988), paras. XI-XIII). In *Lackner*, referred to above, the Tribunal found that the Applicant's job description and the project document were not part of his terms of employment and, therefore, any changes in those two documents did not, in itself, constitute non-observance of his terms of employment (Judgement No. 432, para. XIII). The Tribunal therefore found that such changes were not appealable under staff regulation 11.1 (ibid.).

In other judgements, the Tribunal found that the appraisal of the report of the Rebuttal Panel on the performance evaluation report made in respect of the Applicant was an "administrative decision" (see Judgement No. 458, *Silveira* (1989),

and Judgement No. 457, *Anderson* (1989), para. I). Similarly, the Tribunal found that non-acceptance of the recommendation of the Rebuttal Panel in its report constituted an administrative decision falling within the jurisdiction of the Tribunal (Judgement No. 446, *San José* (1989), para. III).

In the light of the above, we are of the view that an "administrative decision" within the meaning of staff regulation 11.1 is a decision by the Administration concerning a staff member's terms of appointment, including all pertinent regulations and rules, which must be communicated to the staff member in writing and which must be personally applied to him or her, thus causing imminent and actual effects on the staff member's terms of appointment.

You may wish to refer to the above definition in the JIU reports. However, I would note that the Office of Legal Affairs has no authority to promulgate "official" definitions of various terms used in the Staff Regulations and Rules or in United Nations administrative issuances, and the above definition is not offered as an "official" definition as such. As it appears from this letter, the question of what is an administrative decision is subject to constant development and is ultimately determined by the Administrative Tribunal in the application of the law in the particular case.

20 August 1999

## 6. REPORT TO THE GENERAL ASSEMBLY ON MANAGEMENT IRREGULARITIES—PROCEDURES FOR DETERMINING "GROSS NEGLIGENCE"—RECOVERY PROCEDURES

*Memorandum to the Director, Management Policy Office, Department of Management*

1. I refer to your memorandum of 22 September 1999, requesting our advice concerning the preparation of a Secretary-General's report to the General Assembly on management irregularities causing financial losses to the Organization.

2. Firstly, we wish to note that the issues covered by the Secretary-General's report, dated 3 March 1999, entitled "Management irregularities causing financial losses to the Organization" (A/53/849), the report thereon by the Advisory Committee on Administrative and Budgetary Questions of 11 May 1999 (A/53/954), the reports mentioned in the Advisory Committee report (A/AC.243/1994/L.3 and A/49/418), as well as other reports referred to in those documents are broad and touch upon a wide spectrum of issues relating to the subject matter in question. I trust, therefore, that you are seeking comments on this matter from the relevant offices, including the Office of Internal Oversight Services (OIOS), the Office of the Controller, the Rules and Regulations Unit, the secretariat of the Administrative Tribunal and the secretariat of the United Nations Joint Staff Pension Fund. We will, however, set forth our comments on certain issues that we believe might have a bearing on the draft report.

*Background*

3. At the fifty-third session of the General Assembly, the Secretary-General submitted a report dated 3 March 1999, entitled "Management irregularities causing financial losses to the Organization" (A/53/849). That report "provides an overview of the meaning of management irregularities causing financial losses to the Organization, distinguishes between the different categories of such irregularities and sets

out the applicable procedures for disciplinary actions and recovery" (see the summary on page 1 of the document).

4. The Advisory Committee examined the Secretary-General's report, and its comments thereon are set out in its report to the General Assembly dated 11 May 1999 (A/53/954). The Advisory Committee report provides, inter alia, that:

> "4. In the opinion of the Advisory Committee, the document [A/53/849] is a preliminary report. For example, it does not show clearly what developments have taken place since 1994, when the report on the comprehensive overview by the Secretariat of alleged cases of fraud in the United Nations: study of the possibility of the establishment of a new jurisdictional and procedural mechanism or of the extension of mandates and improvement of the functioning of existing jurisdictional and procedural mechanism (A/AC.243/1994/L.3) was issued. In this connection, the Committee draws the attention of the General Assembly to the report of the Ad Hoc Intergovernmental Working Group of Experts established pursuant to General Assembly resolution 48/218 A (A/49/418)."[9]

5. In its resolution 53/225 of 10 June 1999, the General Assembly, after examination of the above reports:

> "*Request*[ed] the Secretary-General to submit a detailed report to the General Assembly at its fifty-fourth session, through the Advisory Committee, on management irregularities causing financial losses to the Organization, taking into account the reports (A/AC. 243/1994/L.3 and A/49/418) mentioned in paragraph 4 of the report of the Committee, including procedures for determining gross negligence and the financial and other responsibilities to be incurred by those who have committed such negligence, and preventive measures to identify the risk factors that expose the Organization to management irregularities and measures to improve internal control and accountability." (para. 2)

6. As we understand it, your Office is preparing the report which the General Assembly requested in its resolution 53/225 (hereinafter "the new report"). For that purpose, you have requested this Office to "review the documents A/AC.243/1994/L.3 and A/49/418 in conjunction with the report A/53/849 ..." You also requested our comments on the issue of gross negligence, and any other comments in connection with the preparation of the new report. In addition, you asked that we designate a focal point from this Office in connection with the preparation of the new report by your Office.

*The report of the Secretary-General* (A/53/849)

7. The Secretary-General's report identifies the following three instances leading to financial losses to the Organization: (*a*) "mistakes"; (*b*) "gross negligence"; and (*c*) "fraud".

8. With respect to the three instances leading to financial losses, we agree with the statements made in paragraphs 5 to 7 of the Secretary General's report that the Organization should not seek recovery from staff members for financial losses to the Organization resulting from their "mistakes" and that, in the absence of gross negligence or wilful misconduct, mistakes should be addressed in the context of performance management. This position is in line with the Organization's policy since 1969, as set out in various legal opinions,[10] that proof of gross negligence or wilful misconduct would be required to justify a staff member being held accountable for

losses to the Organization.[11] This policy was also communicated to the Advisory Committee by the Under-Secretary-General for Management, in 1995.

9. In addition, the Administrative Tribunal has opined on the definition of "gross negligence". In Judgement No. 742, *Manson* (1995), the Tribunal held that:

> "Gross negligence involves an *extreme and reckless* failure to act as a reasonable person would with respect to a reasonably foreseeable risk. Thus, to establish gross negligence, a far more aggravated failure to observe the 'reasonable person' standard of care must be shown than in the case of ordinary negligence." (para. XIV, emphasis in original)

*(a) Procedures for determining "gross negligence"*

10. Paragraph 8 of the Secretary-General's report (A/53/849) indicates that "procedures need to be established for determining (i) whether there was 'gross negligence' in a specific instance and (ii) what financial responsibility, if any, should be incurred by those who have committed 'gross negligence'." In its resolution 53/225, the General Assembly has requested that such procedures be established.

11. In our view, procedures for determining gross negligence are already in place. Acts of gross negligence could be construed to constitute misconduct under staff rule 110.1. They would thus be handled in accordance with the rules and procedures set out in chapter X of the Staff Rules, on "Disciplinary measures and procedures", further elaborated in administrative instruction ST/AI/371 of 2 August 1991.[12] Those procedures include provisions on the due process rights of staff members under disciplinary proceedings. In this connection, it should also be noted that OIOS, whose mandate includes conducting investigations of possible misconduct or fraud by staff, has its own procedures for carrying out investigations, which are set out in the OIOS Investigations Section manual.

12. We are of the view that it would not be possible or even practical to establish new standards to be applied to cases of alleged gross negligence, and therefore no new procedures for the determination of gross negligence should be proposed in the new report. This is because what constitutes gross negligence is fact-specific and requires a case-by-case analysis of the particular circumstances involved. In this connection, I refer to an opinion of this Office to the Assistant Secretary-General, Office of Financial Services, dated 30 June 1981, published in the *United Nations Juridical Yearbook 1981*, which states, inter alia, that:

> "We have examined the concept of 'gross negligence' and the equivalent concepts as they appear in various legal systems. The various legal systems concur in this description of 'gross negligence'. Few legal systems go into much more detail in the definition, and the determination in each case is reached by the 'fact finder', i.e., jury or judge (analogous to the Property Survey Board in the United Nations administrative context)." (See footnote 31 to the opinion, in *United Nations Juridical Yearbook 1981*, p. 165.)

*(b) Recovery procedures*

13. The General Assembly has requested that the new report include procedures for determining financial and other responsibility to be incurred by staff members who have committed gross negligence.

14. It is our understanding that, as indicated in the Secretary-General's report (A/53/489), under the existing mechanisms, "virtually all cases of recovery are

achieved" in accordance with staff rule 103.18 (*b*) (ii) (ibid., para. 13). That rule provides that:

> "(*b*) Deductions from salaries, wages and other emoluments may also be made for the following purposes:
>
> ...
>
> (ii) For indebtedness to the United Nations".

As it appears, staff rule 103.18(*b*)(ii) would assume that the amount of indebtedness has already been established, and that the staff member has not yet separated from service, and that the salary and other emoluments of the staff member would be sufficient to obtain full recovery. Therefore, the rule would be effective to seek recovery only once the indebtedness has been established, and only if the staff member is still in service, which may not be the case in instances of gross negligence. (In this connection, see A/53/849, para. 15; A/AC.243/1994/L.3, para. 53; Secretary-General's report of 9 November 1993, entitled "Recovery of misappropriated funds from staff members and former staff members" (A/48/572, para. 5). In addition, as noted in, inter alia, the Secretary-General's report (A/53/849), the rule would not be effective to ensure full recovery if the indebtedness exceeds the amount of salaries and other emoluments.

15. The Secretary-General's report (A/53/849) indicates that there are other rules of the Organization which provide "the statutory regime for the recovery of financial losses caused to the Organization" (para. 2). Those rules are financial rule 114.1 and staff rule 112.3. Financial rule 114.1 states that:

> "Every official of the United Nations is responsible to the Secretary-General for the regularity of the actions taken by him or her in the course of his or her other official duties. Any official who takes any action contrary to these Financial Rules, or to the administrative instructions issued in connection therewith, may be held personally responsible and financially liable for the consequence of such action."

Staff rule 112.3 states that:

> "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."

16. However, no procedures or mechanisms have been established to implement these rules. Notably, the General Assembly has requested that such procedures be established. In section II, paragraph 3, of its resolution 51/226 of 3 April 1997, the Assembly:

> "*Also request*[ed] the Secretary-General to issue specific administrative instructions to establish clearly the responsibility and accountability of programme managers for proper use of human resources, *as well as sanctions in accordance with staff rule 112.3 for any financial loss suffered by the United Nations as a result of gross negligence, including improper motivation, wilful violation of or reckless disregard for the Staff Regulations and Rules and established policies regulating recruitment, placement and promotion*". (emphasis added)

More recently, in section IV, paragraph 7, of its resolution 53/221 of 7 April 1999, the Assembly:

"*Reiterate*[d] that every staff member of the United Nations shall be responsible and accountable to the Secretary-General, in accordance with financial rule 114.1 and staff rule 112.3".

17. The Administrative Tribunal has also expressed the view that staff rule 112.3 be implemented. In a case in which a staff member had, inter alia, defrauded the United Nations Environment Programme by appropriating more than US$ 40,000 in rental subsidies to which he was not entitled (Judgement No. 358, *Sherif* (1985)), the Tribunal held:

"XIII. If ... the deductions made did not completely settle the Applicant's indebtedness, the Administration may, inter alia, *consider invoking the financial responsibility of those staff members still serving who, through their negligence or complicity, enabled the Applicant fraudulently to appropriate the amounts in question.* It rests with the Secretary-General to decide, in accordance with staff rule 112.3, to require those staff members to reimburse the amounts owed by the Applicant and to deduct them, under the provisions of staff rule 103.18, from their salaries, wages and other emoluments." (emphasis added)

18. In a more recent case also concerning overpayments of rental subsidies, the Tribunal, referring to staff rule 112.3, stated that:

"The Tribunal fully endorses the recommendations of the [Joint Appeals Board] that the negligence of those responsible for these overpayments should be investigated and punished. *The Tribunal finds that the degree of negligence by the Administration manifest in this case is truly appalling and outrageous.* However, it believes that requiring the negligent party to reimburse the loss should not be considered as an alternative remedy to enforcing reimbursement of the United Nations' loss against a staff member who could not, under any reasonable standard, be deemed an 'innocent' recipient of overpayments. To do so, would misconstrue the purpose of staff rule 112.3. Its invocation is a remedy open to the Organization and should not be viewed as relieving the Applicant of his obligation to reimburse what he certainly must have known were overpayments. The Respondent had already determined to recoup only four years of overpayments rather than to seek repayment for the entire six-year period because the Applicant had pointed out that there might have been a 'mistake'. The Tribunal considers that, in the circumstances of this case, it was an appropriate and reasonable exercise of the Secretary-General's discretion and that the decision should stand. Perhaps *it might be appropriate to invoke staff rule 112.3, insofar as the Respondent has agreed to forgo two years of overpayments, to seek the balance against those responsible for the negligent overpayments, if such persons can be identified.*" (Judgement No. 887, *Ludvigsen* (1998), para. VIII (emphasis added))

19. In view of General Assembly resolutions 51/226, 53/221 and 53/225 and the language in the Tribunal's judgements, it would be desirable to evaluate the ways in which financial rule 114.1 and staff rule 112.3 could be implemented, taking into account the due process rights of staff members which will have to be protected in respect of such implementation. You may therefore wish to refer to this issue in the new report.

20. It would appear that the implementation of financial rule 114.1 and staff rule 112.3 as a means of seeking recovery from staff members who have committed gross negligence and/or fraud would be preferable to referring such cases to national

courts. Several issues, such as the assistance of outside counsel which would be required to institute proceedings before the national courts, subjecting the Organization to national provisions on procedure, and the issue of the cost involved in such proceedings in relation to the amount that the Organization can reasonably expect to recover, have already been addressed in paragraph 16 of the Secretary-General's report (A/53/849), in paragraph 57 of A/AC.243/1994/L.3, and in paragraphs 12 to 18 of the Secretary-General's report (A/48/572). In addition, referring cases to national courts for recovery would have serious ramifications for the privileges and immunities of the United Nations. By initiating such proceedings before the national courts, the Organization could allow its internal regulations and rules and policies to be examined by the courts, which might question whether the rights of the person from whom recovery has been sought have been observed. Further, the courts might apply standards to the Organization that are germane to that judicial system.

21. With respect to the issue of recovery, we also note that there was a proposal by the Secretary-General to amend the statute of the Administrative Tribunal to extend its jurisdiction to consider claims of the Organization against staff members (see A/AC. 243/1994/L.3, paras. 49-50, and A/48/572, paras. 6-10). However, as we understand it, no action was taken by the General Assembly on the matter.

22. In addition, attachment of the pension benefits of the individuals was mentioned in paragraph 10 of the Secretary-General's report (A/48/572), as a means of recovery from staff. However, as already noted in that report, such a proposal would require amending the Pension Fund Regulations and raise serious policy questions concerning the independence of the Pension Fund and its assets.

*(c) Preventive measures to improve internal control and accountability*

23. The General Assembly requested in its resolution 53/225 that the new report also include "preventive measures to identify the risk factors that expose the Organization to management irregularities and measures to improve internal control and accountability".

24. In this connection, you may wish to mention in the new report that the revised article I of the Staff Regulations and chapter I of the 100 Series of the Staff Rules, which came into effect as of 1 January 1999, pursuant to General Assembly resolution 52/252 of 8 September 1998, include certain provisions relating to its subject matter. (Revisions to chapter I of the 200 and 300 Series of the Staff Rules have also been made, to bring them in line with the revisions to article I of the Staff Regulations.) Those regulations and rules, together with the commentary thereto, are set out in the Secretary-General's bulletin ST/SGB/1998/19 of 10 December 1998, entitled "Status, basic rights and duties of United Nations staff members". The relevant provisions are staff regulation 1.2 (*r*), staff rule 101.2 (*a*), staff regulation 1.3 (*a*) and staff rule 101.3 (*a*). Staff regulation 1.2 (*r*) provides that:

> "Staff members must respond fully to requests for information from staff members and other officials of the Organization authorized to investigate possible misuse of funds, waste or abuse."

This regulation "seeks to ensure that staff members clearly understand that they must cooperate with official investigations by the Organization and must supply information on their official actions to, for example, the internal or external auditors". (See the commentary to regulation 1.2 (*r*), set out in the Secretary-General's bulletin ST/SGB/1998/19, p. 23.)

25. Staff rule 101.2 (*a*) provides that:

"Disciplinary procedures set out in article X of the Staff Regulations and chapter X of the Staff Rules may be instituted against a staff member who fails to comply with his or her obligations and the standards of conduct set out in the Charter of the United Nations, the Staff Regulations and Rules, the Financial Regulations and Rules, and all administrative issuances."

This provision "will ensure that staff are held accountable through disciplinary procedures for failure to comply with their obligations and the standards of conduct, set out in the Charter of the United Nations, the Staff Regulations and Rules, the Financial Regulations and Rules and all related issuances". (See the commentary to rule 101.2 (*a*), ibid., p. 24.)

26. Staff regulation 1.3 (*a*) provides that:

"Staff members are accountable to the Secretary-General for the proper discharge of their functions. Staff members are required to uphold the highest standards of efficiency, competence and integrity in the discharge of their functions, and their performance will be appraised periodically to ensure that the required standards of performance are met."

It should be noted that this provision, inter alia, "now explicitly places on managers the duty to make proper appraisals of performances" and that "an integral part of the performance of managers is to properly manage the human, financial, and other resources entrusted to them". (See the commentary to regulation 1.3 (*a*), ibid., p. 32.)

27. Finally, staff rule 101.3 (*a*) provides that:

"Staff members shall be evaluated for their efficiency, competence and integrity through performance appraisal mechanisms that shall assess the staff member's compliance with the standards set out in the Staff Regulations and Rules for purposes of accountability."

This rule "makes explicit that the efficiency, competence and integrity required of staff by the Charter and staff regulation 1.3 (*a*) will be evaluated and that they will be held accountable to maintain the required standards". (See the commentary to the rule, ibid., p. 33.) In addition, the commentary also provides that "it should be emphasized that supervisors will be assessed not only on their technical competence but also on the way in which they utilize the staff placed under their direction." (See ibid., p. 34.)

28. You may also wish to mention in the new report that the 1954 Report on the Standards of Conduct in the International Civil Service, which provides discussions of standards expected of international civil servants, will be updated and revised by the International Civil Service Commission and that the first working group to review the matter will be meeting in Geneva in late October 1999.

*Developments since the issuance of A/AC.243/1994/L.3*

29. The Advisory Committee commented in its report (A/53/954) that the Secretary-General's report has not addressed "what developments have taken place since 1994", when A/AC.243/1994/L.3 was issued. In that connection, in addition to the comments set out above, we note the following.

30. With respect to paragraph 48 of A/AC. 243/1994/L.3 on the Administrative Tribunal, it should be noted that the Committee on Applications for Review of Administrative Tribunal Judgements was abolished by the General Assembly in its resolution 50/54 of 11 December 1995. Therefore, no recourse may now be had to the International Court of Justice requesting a review of the judgements rendered by the Tribunal.

31. In addition, the Ad Hoc Intergovernmental Working Group of Experts established pursuant to General Assembly resolution 48/218 A in its report (A/49/418) made a number of recommendations to improve and strengthen the financial administration of the Organization and the accountability and responsibility of staff (ibid., sect. IV). You may wish to ascertain the action of the General Assembly in that regard.

*Conclusion*

32. As we understand it, the existing procedures set out in the Staff Rules and the relevant administrative instructions provide sufficient procedures to determine instances of gross negligence. However, it would appear that the mechanisms to recover from individuals who have committed gross negligence would have to be strengthened and further developed, to comply with the request of the General Assembly. This is a complex and time-consuming task which would, at a minimum, require the establishment of a working group within the Organization, with representatives of the relevant offices, in order to carefully evaluate the policy implications of the implementation of such mechanisms and set guidelines and formulate proposals, before any action could be taken.

14 October 1999

## PRIVILEGES AND IMMUNITIES

### 7. PRIVILEGES AND IMMUNITIES OF UNICEF AND ITS OFFICIALS

*Memorandum to Senior Adviser, Office of the Executive Director, United Nations Children's Fund*

1. This is with reference to your memorandum of 22 July 1999, concerning enquiries from the [Member State] police authorities arising from a complaint of criminal force and assault lodged by a former staff member (Ms. A.) against a UNICEF staff member (Mr. X.) and two security guards (Messrs Y. and Z.). Our comments are as follows.

2. We note that by its letter of 20 July 1999, UNICEF has asserted its own immunity from legal process. In response thereto, the [Member State] police have, in their letter of the same date, confirmed that the case is not against UNICEF but against members of the staff of UNICEF. The UNICEF office in [Member State] should therefore be advised to bring the following privileges and immunities to the attention of the police authorities through the Ministry of Foreign Affairs of [the Member State].

3. Pursuant to article IX of the Standard Basic Cooperation Agreement between UNICEF and the Government (hereinafter "the Basic Cooperation Agreement") signed on 2 December 1997, the Convention on the Privileges and Immunities of the United Nations (hereinafter "the Convention") shall be applicable mutatis mutandis to UNICEF and its officials and experts on missions in the country. Article XIII, paragraph 1(*a*), of the Basic Cooperation Agreement, provides that UNICEF officials shall "be immune from legal process in respect of words spoken or written and all acts performed by them in their official capacity". Article XIV, paragraph 1, of the Agreement, further provides that "experts on mission shall be granted the privileges and immunities specified in article VI, sections 22 and 23, of the Convention".

4. Article V, section 18 (*a*), of the Convention on the Privileges and Immunities of the United Nations, to which [the Member State] has been a party since 1961, provides that the officials of the United Nations shall "be immune from legal process in respect of words spoken or written and all acts performed by them in their official capacity". Pursuant to article VI, section 22 (*a*), experts on mission shall be accorded immunity from personal arrest or detention. Section 22 (*b*) further provides that they shall also be accorded, "in respect of words spoken or written and acts done by them in the course of the performance of their mission, immunity from legal process of every kind".

5. As UNICEF staff member, Mr. X. is immune from legal process in respect of words spoken or written and all acts performed by him in his official capacity. If Mr. X. is a national of [the Member State], it should be noted that General Assembly resolution 76 (I) of 7 December 1946 provides "the granting of the privileges and immunities referred to in article V ... to all members of the staff of the United Nations, with the exception of those who are recruited locally and are assigned to hourly rates". Thus, Mr. X enjoys such immunity regardless of his nationality.

6. United Nations security guards are deemed to be experts on mission within the meaning of article VI of the Convention. Accordingly, Messrs Y and Z are immune from personal arrest or detention. They also enjoy immunity from legal process of every kind in respect of words spoken or written and acts done by them in the course of the performance of their mission.

7. Under Section 34 of the Convention, [the Member State] has an obligation to be "in a position under its own law to give effect to the terms of this Convention". It would thus be for the Ministry of Foreign Affairs to request the police authorities to resolve the present matter in a manner consistent with the privileges and immunities of UNICEF and its officials and experts on missions and in accordance with the Government's obligations under the Basic Cooperation Agreement and the Convention.

8. As a former staff member, Ms. A should be advised to pursue any complaints she might have against UNICEF or its officials and experts on mission in accordance with her contract and the UNICEF internal rules and regulations. We note that UNICEF had extended Ms. A's contract from 30 August to 30 September 1998, without any services being rendered, in response to her lawyer's submission that she had not been given one month's notice. Upon her acceptance of the latter arrangement, she gave up any claims she might have with respect to her employment with UNICEF.

29 July 1999

## PROCEDURAL AND INSTITUTIONAL ISSUES

### 8. AUTHORITY FOR THE ESTABLISHMENT OF UNITED NATIONS AWARDS—AWARDS IN THE FIELD OF DRUG USE PREVENTION AND CONTROL—NANSEN AWARD

*Memorandum to the Senior Legal Liaison Officer, United Nations Office at Vienna*

1. This is with reference to your memorandum of 4 February 1999 on the above-captioned subject. Having referred to my original advice on that subject,[13]

you inquired whether, "in view of the extensive authority" granted to the Executive Director of the United Nations International Drug Control Programme (UNDCP), who is also Director-General of UNOV, by the financial rules of the Fund of UNDCP and in view of General Assembly resolution 45/179 of 21 December 1990, entitled "Enhancement of the United Nations structure for drug abuse control", "an exception cannot be made to the requirement of authorization by the General Assembly for the establishment of awards." In this respect you referred to the Nansen Award established by the United Nations High Commissioner for Refugees and inquired whether the mandate of the Executive Director of UNDCP in the area of drugs might be considered as "sufficient basis for an award in the area of drugs".

2. I note that your original request for advice, dated 1 February 1999, referred to the intention of the Director-General of the United Nations Office at Vienna "to establish civil awards to be granted annually to individuals who have made outstanding contributions to the fight against drug abuse **or in the area of crime prevention**" (emphasis added). Your current request for advice refers only to "an award in the area of drugs" and does not mention crime prevention. Accordingly, the advice below will concern the "fight against drugs" award.

*General Assembly resolution 45/179 and financial rules of the UNDCP Fund*

3. We have reviewed both General Assembly resolution 45/179, entitled "Enhancement of the United Nations structure for drug abuse control", and the financial rules of the Fund of UNDCP to which you referred. While I share your view that those two documents grant extensive responsibilities to the Executive Director of UNDCP, they do not in our view indicate that, in approving them, the relevant legislative bodies intended to delegate to the Executive Director the authority to establish United Nations awards in the field of drug use prevention and control.

*Nansen Award*

4. In connection with your reference to the Nansen Award, I note that it was established in 1954, in the early years of the Organization, in the absence of any policy or practice established by the General Assembly. As we understand, it has been the consistent policy and practice of the Organization since the late 1950s, following the episode with the "Nansen Medal", that while the United Nations has the authority to establish awards, such an authority is that of the Organization, as opposed to that of the Secretariat. This authority has been understood to be vested in the General Assembly and the Security Council as the legislative bodies of the Organization, and not in the Secretary-General.[14]

5. Examples of that practice whereby United Nations awards were established by the United Nations legislative bodies are as follows: prizes for scientific research works in the causes and control of cancerous diseases (General Assembly resolution 1398 (XIV) of 20 November 1959); the prize to individuals in the field of human rights (General Assembly resolution 2217 (XXI) of 19 December 1966); the United Nations Population Fund (UNFPA) award for contributions to the awareness of population questions or to their solutions (General Assembly resolution 36/201 of 17 December 1981); and the "Sasakawa/Department of Humanitarian Affairs Disaster Prevention Award" (General Assembly resolution 51/194 of 17 December 1996).[15] Most recently, a "Dag Hammarskjöld Medal" was established by the Security Council in its resolution 1121 (1997) of 22 July 1997.

*General considerations*

6. The creation of United Nations civil awards, like the one under review, is ultimately a policy decision to be taken by the Secretary-General. However, in view of the risks involved, in almost all cases in the past it was decided that the interests of the Organization would be better served and safeguarded if the establishment of an award was directly effected by a United Nations legislative body. Apart from other issues involved (e.g., financial aspects), perhaps the most serious concern is that the criteria and mechanisms for selecting awardees should be determined and approved by the relevant United Nations legislative body, not the Secretariat, so that if subsequently a particular selection were not supported by such body, the Secretary-General would not become vulnerable to criticism.

*Possible course of action*

7. The preceding considerations, however, should not mean that it is necessarily the General Assembly itself that must initiate action concerning the establishment of an award for individual achievements in the area of drug control. One way of initiating the process of establishing such an award would be to consider the proposal at the session of the Commission on Narcotic Drugs, a central intergovernmental body responsible for dealing with all drug-related matters within the United Nations system.

8. Should the Commission support the initiative, it, being a functional commission of the Economic and Social Council, would then make an appropriate recommendation[16] to the Council. If the Council agrees with the idea, it would report it to the General Assembly which, for example, by taking note of the relevant report of the Council, would formally approve the establishment of the award.

16 February 1999

9. LEGAL STATUS OF THE PERMANENT OBSERVER MISSION OF THE ORGANIZATION OF THE ISLAMIC CONFERENCE—PRIVILEGES AND IMMUNITIES OF NON-STATE ENTITIES INVITED TO PARTICIPATE AS OBSERVERS IN UNITED NATIONS MEETINGS

*Letter to the Permanent Representative of a Member State*

I wish to refer to your letter of 8 March 1999 addressed to the Secretary-General seeking his good offices in order to regularize the status of the Permanent Observer Mission of the Organization of the Islamic Conference (OIC) "both at the United Nations and also vis-à-vis the host country". In particular, you seek that "the necessary facilities and privileges conducive to the unhindered discharge of its functions be extended to [the OIC Permanent Observer Mission]". Your letter has been referred to this Office for response.

The international legal status of the OIC Permanent Observer Mission derives from General Assembly resolution 3369 (XXX) of 10 October 1975, entitled "Observer status for the Islamic Conference at the United Nations". In accordance with the resolution, the Assembly decided "to invite the Islamic Conference to participate in the sessions and the work of the General Assembly and of its subsidiary organs in the capacity of observer", and requested "the Secretary-General to take the necessary action to implement the present resolution". The resolution did not address the scope of privileges, immunities and facilities to be accorded to the Mission.

In the absence of any specific international legal regulation of the privileges and immunities of non-State entities invited to participate as observers in United Nations meetings at Headquarters, United Nations practice has been to consider such issues principally in the light of the pertinent provisions of the Charter of the United Nations and the 1947 Agreement between the United Nations and the United States of America regarding the Headquarters of the United Nations ("the Headquarters Agreement"). It has been the consistent view of the Organization that a permanent observer delegation, as an invitee to meetings of United Nations organs, is entitled to enjoy in that capacity certain functional immunities necessary for the performance of official functions vis-à-vis those organs. These immunities flow by necessary intendment from Article 105 of the Charter of the United Nations. The United Nations has consistently maintained that a permanent observer delegation would enjoy functional immunity from legal process in respect of words spoken or written and all acts performed by members of the observer delegation in their official capacity before relevant United Nations organs. In addition to that functional immunity, a permanent observer delegation would also enjoy inviolability for official papers and documents relating to their relations with the United Nations. If such inviolability is to have any meaning, it necessarily extends to the premises of the Mission.

In addition, observer delegations benefit from the following provisions of the Headquarters Agreement. Namely, section 11 of the Headquarters Agreement provides that "the federal, state or local authorities of the United States shall not impose any impediments to transit to or from the headquarters district of ... persons invited to the headquarters district by the United Nations", and that "the appropriate American authorities shall afford any necessary protection to such persons while in transit to or from the headquarters district." Furthermore, according to section 12, the facilities referred to in section 11 "shall be applicable irrespective of the relations between the Governments of the persons referred to in that section and the Government of the United States". Section 13 further provides that the host State shall grant visas "without charge and as promptly as possible" to the persons in question and also exempts such persons from being required "to leave the United States on account of any activities performed by [them] in [their] official capacity".

Neither the Headquarters Agreement nor any legislation in the host State confers diplomatic privileges and immunities to observer delegations. At the same time, observers who form a part of the diplomatic staff of Member States' missions accredited to the United Nations may enjoy diplomatic immunities in the host State provided for them in the latter capacity. Of course, diplomatic status may be extended to the observer delegation by virtue of a special arrangement with the host State. However, this is a matter for negotiation between the host State and the intergovernmental organization concerned.

15 March 1999

## 10. CONSIDERATION OF AGENDA ITEMS IN NUMERICAL ORDER

*Facsimile to the Deputy High Commissioner for Human Rights, Geneva*

1. This is with reference to your facsimile of 17 March addressed to the Legal Counsel seeking, on behalf of the Chairperson of the Commission on Human Rights, our advice on the two following questions concerning the draft provisional agenda for the fifty-fifth session of the Commission.

"First, having regard to the fact that the Commission adopted, in its resolution 1998/84, its agenda based on the presentation by its Chairperson on 24 April 1998 that items would be considered in numerical order, how should the Chairperson deal with a proposal to cluster items that would result in the numerical sequence not being followed?"

Our comments are set out below.

2. At the outset, it should be noted that, in its resolution 1998/84, the Commission adopted a draft provisional agenda for the fifty-fifth session. Therefore, neither the content nor the format of the agenda will be final until such time as the agenda is adopted by the Commission itself at the fifty-fifth session. This fact was acknowledged by the President of the Commission at the fifty-fourth session when he stated that "both of these matters", referring to the numerical sequencing and the shortening of the agenda, "are, of course, properly the business of the Bureau of the fifty-fifth session".

3. Based on the foregoing, while due consideration should be given to the draft provisional agenda adopted by the Commission at the fifty-fourth session and the understanding reached thereon, it is entirely within the discretion of the fifty-fifth session to adopt its own agenda. Thus, if a proposal to cluster items were to be made by any member of the Commission, the Chairperson should put such proposal to a vote.

4. In accordance with rule 56 of the rules of procedure of the functional commissions of the Economic and Social Council, each member of the Commission shall have one vote. Rule 57 provides that "a proposal or motion before the commission for decision shall be voted upon if any member so requests". Rule 58 further provides that "decisions of the commission shall be made by a majority of the members present and voting." Thus, if a majority of those present and voting vote in favour of the proposal, it would be adopted.

"Secondly, should the Bureau present a programme of work for consideration by the Commission, giving effect to the principle of numerical sequence in the consideration of items, and should this be contested by a delegation, how should the Chairperson steer the issue, having regard to the rules of procedure?"

5. We note that it has been the practice of the Commission for the Bureau to present a timetable for the consideration of agenda items and that such timetable is usually approved or used de facto as the basis for the Commission's programme of work during the session. As such, the Bureau should present for the approval of the Commission a timetable/programme of work in accordance with the established practice of the Commission. As the draft provisional agenda for the fifty-fifth session is based on the principle of numerical sequence, the Bureau should prepare such timetable/programme of work reflecting the numerical sequence of agenda items.

6. Ultimately, it is for the Commission to decide whether to approve the timetable/programme of work proposed by the Bureau. Thus, if a member or members of the Commission were to raise an objection to the proposed timetable/programme of work, the Chairperson could put the proposed timetable/programme of work to a vote in the manner described in paragraph 4 above.

18 March 1999

## 11. CONFIDENTIALITY—RULES OF PROCEDURE OF THE COMMISSION ON THE LIMITS OF THE CONTINENTAL SHELF

*Letter to the Chairman of the Commission on the Limits of the Continental Shelf, United Nations Convention on the Law of the Sea*

I am writing in response to your letter of 15 March 1999. In the letter you informed me that, as pursuant to annex II ("Confidentiality") to the rules of procedure of the Commission on the Limits of the Continental Shelf (hereinafter "the Commission"), a coastal State may classify any data and other materials included in its submission to the Commission as confidential. At its fourth session, held in New York from 31 August to 4 September 1998, the Commission decided to seek my legal opinion as to which procedure would be the most appropriate in cases where it might be necessary to institute proceedings following an alleged breach of confidentiality. In this connection you refer, in particular, to rules 4 and 5 of annex II to the rules of procedure of the Commission (CLCS/3/Rev.2).

Rule 4, which relates to duty to preserve confidentiality, stipulates that:

"1. The members of the Commission shall not disclose, even after they cease to be members, any confidential information coming to their knowledge by reason of their duties in relation to the Commission.

"2. The duty of the members of the Commission not to disclose confidential information constitutes an obligation in respect of the individual's membership in the Commission."

Rule 5, concerning enforcement of rules of confidentiality, provides:

"1. The Secretary-General shall provide the Commission with all necessary assistance in enforcing the rules concerning confidentiality.

"2. The Commission may institute appropriate proceedings and shall make known its findings and recommendations."

*General observations*

The United Nations does not have any standard procedure that could be recommended to the Commission for its consideration as a model to be applied in cases of an alleged breach of confidentiality. However, in instituting, pursuant to paragraph 2 of rule 5 of the annex, appropriate proceedings for dealing with this type of situation, the Commission may take into account the following considerations.

In accordance with rule 3 of the annex, access to confidential material submitted by the coastal State or States shall be confined to the members of the Commission or its relevant subcommissions that have been requested to examine the submission, and to staff members of the United Nations Secretariat designated to assist the concerned members of the Commission or its subcommissions.

*Staff of the United Nations Secretariat*

Pursuant to Article 97 of the Charter of the United Nations, the Secretary-General of the United Nations is the chief administrative officer of the Organization. Article 101 of the Charter provides that the Secretary-General appoint the staff of the Organization under regulations established by the General Assembly. Thus, the staff of the United Nations performs their duties under the administrative authority of the Secretary-General.

*(a) Requirement to observe confidentiality*

Staff members of the United Nations Secretariat who are assigned to assist the Commission and have access to confidential material are bound to preserve the confidentiality of that information in accordance with the applicable staff regulations and rules, and administrative instructions issued in their furtherance.

In his Bulletin dated 9 August 1994 the Secretary-General drew the attention of all staff to their obligations in regard to security of information under the Staff Regulations, and to their personal responsibility for the proper protection of information which they may be called upon to handle in the course of their duties (ST/SGB/272). The Secretary-General referred, in this regard, to staff regulation 1.5 providing that staff members are required to "exercise the utmost discretion in regard to all matters of official business. They shall not communicate to any person any information known to them by reason of their official position that has not been made public, except in the course of their duties or by authorization of the Secretary-General. Nor shall they at any time use such information to private advantage. These obligations do not cease upon separation from the Secretariat."

Staff regulation 1.2 (1) of the revised text of article I of the Staff Regulations, adopted by the General Assembly in its resolution 52/252 of 8 September 1998, which is based on the ideas of staff regulation 1.5, further stipulates that "staff members shall exercise the utmost discretion with regard to all matters of official business. They shall not communicate to any Government, entity, person or any other source any information known to them by reason of their official position that they know or ought to have known has been made public, except as appropriate in the normal course of their duties or by authorization of the Secretary-General. These obligations do not cease upon separation from service."

*(b) Disciplinary proceedings and measures*

A breach of confidentiality constitutes non-compliance with the aforementioned obligations and may be qualified as misconduct on the part of that staff member. In accordance with the Staff Regulations and Rules, staff are held accountable through disciplinary measures for failure to comply with their obligations and the standards of conduct.

Staff regulation 10.2 stipulates that the Secretary-General may impose disciplinary measures on staff members whose conduct is unsatisfactory and that he may dismiss a member of the staff for serious misconduct.

Rule 101.2 of the revised text of chapter I of the 100 series of the Staff Rules, noted[17] by the General Assembly in its resolution 52/252 of 8 September 1998, states in this regard:

> "Disciplinary procedures set out in article X of the Staff Regulations and chapter X of the Staff Rules may be instituted against a staff member who fails to comply with his or her obligations and the standards of conduct set out in the Charter of the United Nations, the Staff Regulations and Rules, the Financial Regulations and Rules, and all administrative issuances."

Staff rule 110.1 further provides that failure by a staff member to comply with his or her obligations under the Charter and the aforementioned regulatory instruments may amount to unsatisfactory conduct within the meaning of staff regulation 10.2, leading to the institution of disciplinary proceedings and the imposition of the disciplinary measures referred to in staff rule 110.3.

In order to provide guidance and instruction on the application of chapter X of the Staff Rules and outline the basic requirements of due process to be afforded a staff member against whom misconduct is alleged, the Secretary-General on 2 August 1991 issued an administrative instruction (ST/AI/371) which addresses such issues as initial investigation and fact-finding, due process rights, and referral to and procedures of a Joint Disciplinary Committee etc.

(c) *Privileges and immunities and their waiver*

It should also be noted that, although pursuant to section 18 (*a*) of the Convention on the Privileges and Immunities of the United Nations, staff members as officials of the Organization are immune from legal process in respect of words spoken or written and all acts performed by them in their official capacity, according to section 20 of that Convention, privileges and immunities are granted to officials in the interests of the United Nations and not for the personal benefit of the individuals themselves. Therefore, under the Convention, the Secretary-General has the right and the duty to waive the immunity of any official in any case where, in his opinion, the immunity would impede the course of justice and could be waived without prejudice to the interests of the United Nations.

(d) *Conclusions*

It follows from the above that, as pursuant to the Charter of the United Nations, the staff of the United Nations are under the administrative authority of the Secretary-General, in cases of an alleged breach of confidentiality by a staff member assisting the Commission, the matter will be dealt with in accordance with the aforementioned United Nations procedures applicable to the staff of the Organization.

*Members of the Commission*

The members of the Commission are elected for five years in accordance with article 76 and annex II to the United Nations Convention on the Law of the Sea by a Meeting of States Parties convened pursuant to article 319, paragraph 2 (*e*), of that Convention. They serve on the Commission in their personal capacity and are eligible for re-election (annex II, article 2, para. 4). The rules of procedure of the Commission require that each member of the Commission shall solemnly declare, before assuming his or her duties, that he or she will perform these duties honourably, faithfully, impartially and conscientiously.

The Law of the Sea Convention is silent on the question of what actions should be taken if a member of the Commission is accused of being involved in activities inconsistent with his or her duties as a member of the Commission. An alleged breach of confidentiality will constitute such an activity because the members of the Commission are under the obligation not to disclose any confidential information obtained in the course of their duties as members of the Commission (rule 4 of annex II to the rules of procedure of the Commission). The Convention also does not provide any guidance on the question of who will have the authority to undertake an investigation of the accusations against a member of the Commission and to make a determination, on the basis of such an investigation, as to whether those accusations are valid.

You will recall that, on the question of the applicability of the Convention on the Privileges and Immunities of the United Nations to the members of the Commission, this Office was of the view that, "by established precedent in respect of similar treaty organs, the members of the Commission on the Limits of the Continental

Shelf can be considered to be experts on mission covered by article VI of the General Convention."[18]

*(a) Experts on mission—requirement to observe confidentiality*

There are currently no special regulations or rules applicable to experts on mission. In paragraph 9 of its resolution 52/252, the General Assembly requested the Secretary-General to expedite the submission to the Assembly, by its fifty-fourth session, of appropriate regulations and rules governing, inter-alia, the status, basic rights and duties of experts on mission. The legislative basis for the adoption of the proposed regulations will be Article 105, paragraph 3, of the Charter of the United Nations, which empowers the Assembly to make recommendations with a view to determining the privileges and immunities of "officials" of the Organization and to propose conventions to Member States for that purpose. The Assembly did so by adopting in 1946 the Convention on the Privileges and Immunities of the United Nations, which in its article VI defines the privileges and immunities of experts on mission. The proposed regulations, a draft of which is being currently finalized by the Secretariat, are modelled on the revised text of article I of the Staff Regulations referred to above.

Draft regulation 2 (*f*) relating to the disclosure of information provides the following:

> "Officials and experts on mission shall exercise the utmost discretion in regard to all matters of official business. Officials and experts on mission shall not communicate to any Government, entity, person, or any other source any information known to them by reason of their official position that they know or ought to have known has not been made public, except as appropriate in the normal course of their duties or by authorization of the Secretary-General. If they are not appointed by the Secretary-General, such authorization shall be by the body that appointed them. These obligations do not cease upon the cessation of their official functions."

In the commentary to the draft regulations prepared by the Secretariat to assist the General Assembly in deliberating on this matter, with reference to regulation 2 (*f*), it is observed that it may be difficult to enforce the last sentence, but at the very last, if a former expert on mission ignores the obligation in the draft regulation, a notation could be made in his or her official file to prevent re-engagement of that person.

*(b) Disciplinary proceedings and measures*

The United Nations does not have established procedures for dealing with cases of non-observance of their obligations by experts on mission appointed by intergovernmental bodies. The newly proposed draft regulations, referred to above, do not contain any provisions regarding such procedures either.

*(c) Privileges and immunities and their waiver*

As the members of the Commission are considered, in accordance with the legal opinion noted above, as experts on mission, they enjoy the privileges and immunities accorded to such experts pursuant to article VI of the Convention on the Privileges and Immunities of the United Nations, including immunity from legal process of any kind. Section 23 of that article states that the privileges and immunities are granted to experts on mission in the interests of the United Nations and not for the personal benefit of the individuals themselves and that the Secretary-General

shall have the right and the duty to waive the immunity of any expert in any case where, in his opinion, the immunity would impede the course of justice and it could be waived without prejudice to the interests of the United Nations.

Draft regulation 1 (*e*) of the proposed regulations in this regard stipulates that in any case where an issue arises regarding the application of the privileges and immunities enjoyed by experts on mission, an expert on mission shall immediately report the matter to the Secretary-General, who alone may decide whether such privileges and immunities exist and whether they shall be waived, in accordance with the relevant instruments.

*Recommendations*

As there are no model procedures that could be recommended to the Commission, the latter may wish to consider elaborating its own procedures which correspond to the special nature of the Commission as a body whose members are experts acting in their personal capacity.

It appears that the special nature of the Commission may require that any allegations of a breach of confidentiality by a member of the Commission needs to be investigated by the Commission itself. Such an investigation may be conducted either by the Commission as a whole or by a panel consisting of three or five members appointed by the Commission for that purpose (the investigating body). It is of paramount importance that under the procedures approved by the Commission, a member of the Commission who is accused of a breach of confidentiality be afforded due process. Therefore, the concerned member of the Commission should have the right to have access to all the documentation related to the allegations of a breach of confidentiality and to submit written or oral observations to the investigating body within a specified time. Investigation of allegations should be conducted in strict confidentiality to avoid tarnishing the reputation of the member concerned during that process. Having completed the examination of the case, the investigating body should prepare a report on its findings. The report should contain the following:

(*a*) Allegations of a breach of confidentiality;

(*b*) Statement of the concerned member of the Commission;

(*c*) Synopsis of the evidence and the evaluation of it by the investigating body;

(*d*) Findings, indicating which of the allegations, if any, appear to be supported by the evidence;

(*e*) Conclusions of the investigating body;

(*f*) Dissenting or separate opinion, if any.

Since the Commission is a body which is elected by the Meeting of States Parties, a report of the investigating body should be forwarded to the Meeting.

30 April 1999

## 12. APPOINTMENT OF THE SECRETARY-GENERAL OF THE WORLD METEOROLOGICAL ORGANIZATION—VOTING PROCEDURES

*Letter to the Secretary-General of the World Meteorological Organization*

1. This refers to your memoranda of 10 and 11 May 1999 to the Legal Counsel of the United Nations, in which you sought our advice on the voting procedures

of the Secretary-General of WMO. In your memorandum of 10 May, you requested our advice on the voting procedure in the event of indecisive votes under regulation 196 (*f*) and (*g*) of the General Regulations. In your memorandum of 11 May, you requested our advice on whether successive votes might be interrupted or whether the voting must continue until a new Secretary-General is appointed.

(a) *Voting procedure in the event of successive indecisive votes*

2. Regulation 196 (*f*) provides that in the event that the two final candidates receive the same number of votes "a further vote" shall take place. Similarly, paragraph (*g*) of the same regulation provides that if a proposal that a preferred candidate be declared appointed is not supported by a two-thirds majority, "a further vote" shall take place. If the further votes referred to in these paragraphs remain indecisive, Congress, under paragraph (*h*) of the regulation, shall decide on whether "further voting shall take place, whether a new procedure shall be followed or whether its decision shall be withheld".

3. Our advice was sought on:

(i) Whether Congress can decide on repeated voting until a two-thirds majority is obtained;

(ii) Whether a decision of Congress to follow a "new procedure" includes a presentation of a new candidate; and

(iii) Whether in deciding to withhold its decision, Congress can adjourn the decision to another meeting, or to the next Congress, and if so, who will be the Secretary-General to the organization in the meantime.

(i) *Further voting—an additional voting or repeated voting*

4. Although the United Nations has examples of procedural rules which require continual voting until a result is reached (for example, rule 142 of the rules of procedure of the General Assembly, which deals with the election of non-permanent members of the Security Council), regulation 196 itself envisages breaks in the voting process (see paragraph (*h*)), and thus does not require repeated or continued voting until such time as a two-thirds majority is obtained, or one of the two final candidates receives a higher number of votes. Since the purpose of rules of procedure is to enable a body to discharge its mandate, particularly in the event of a deadlock, it would appear that the ordinary meaning of the words "further voting shall take place" in regulation 196 (*h*), seen in the context of the regulation as a whole, and particularly paragraphs (*f*) and (*g*), indicates that only one more vote for the deadlocked candidates should take place. However, as the master of its own procedures, Congress may interpret the procedural rule in other ways if it so decides, for example, by having further votes if there was some movement indicating that the deadlock might be resolved. If the additional vote is indecisive, paragraph (*h*) gives Congress a number of options to break the deadlock.

(ii) *A "new procedure"—and whether it includes a new candidate*

5. A decision to follow a "new procedure" in case of an indecisive vote does not necessarily compel Congress to open the process to include the presentation of a "new candidate". The "new procedure" envisaged in regulation 196 (*h*) could aim at breaking the deadlock between the two candidates who obtained the same number of votes. The question of what constitutes a "new procedure" is a matter for Congress to decide.

(iii) *The meaning of a decision to withhold a decision*

6. In deciding to withhold its decision, Congress may postpone the decision to the next meeting, or to the next Congress. In either case it will have to specify the time limit of the postponement and indicate that, in the meantime, the incumbent would continue his functions until a new Secretary-General is appointed. The extension of the term of office of the incumbent Secretary-General would seem to be the only available option, as Congress does not have the legislative authority to appoint another candidate as an Acting Secretary-General pending the appointment of a new one.

*(b) Breaking the successive votes or conducting uninterrupted voting*

7. In seeking our advice on whether successive votes should be conducted until the appointment of a new Secretary-General, you refer in your memorandum of 11 May 1999 to regulation 107 which provides that, after the Presiding Officer has announced the commencement of voting, no one may interrupt the voting, except on a point of order concerning the manner of conducting the vote.

8. Regulation 107 is a common procedural provision based on rule 88 of the rules of procedure of the United Nations General Assembly. This type of provision is designed to protect the actual voting process, i.e., its successive ballots, from the time that the Presiding Officer announces the start of the ballot to the time that he/she announces its result. This type of protective provision does not in and of itself prevent Congress from dealing with another matter between ballots, if Congress so wishes. Whether the process of electing the Secretary-General may be interrupted depends on the terms of regulation 196. Paragraph (*h*) of that regulation envisages that there may be breaks in the voting process because, in the event of a deadlock, the Congress has to decide on various alternatives. It would seem to us that if Congress were to reach that point it could properly decide that it needed an interruption in the process so that its members could consult prior to choosing between the alternatives set out in regulation 196.

12 May 1999

13. POSSIBILITY OF STATES NOT MEMBERS OF THE COMMISSION ON SUSTAINABLE DEVELOPMENT HOLDING OFFICE IN AN OPEN-ENDED INTERGOVERNMENTAL GROUP OF EXPERTS—RULE 15 OF THE RULES OF PROCEDURE OF THE FUNCTIONAL COMMISSIONS OF THE ECONOMIC AND SOCIAL COUNCIL

*Letter to the Chairman of the Commission on Sustainable Development*

At its seventh session, on 30 April 1999, the Commission on Sustainable Development recommended to the Economic and Social Council for consideration at its substantive session of 1999 a draft resolution entitled "Preparations for the ninth session of the Commission on Sustainable Development on the issue of energy". In that context, the Commission invited the Economic and Social Council to consider "on an exceptional basis and without creating a precedent and without prejudice to other bodies the possibility of States that are not members of the Commission on Sustainable Development holding office in the Ad Hoc Open-ended Intergovernmental Group of Experts on Energy and Sustainable Development". The Commission also requested the Office of Legal Affairs "to submit its legal opinion on that matter to the Chairman of the Commission [on Sustainable Development] for

transmission to the President of the [Economic and Social] Council".[19] Inasmuch as the Commission on Sustainable Development has requested the opinion of this Office, the Office of Legal Affairs can only address issues of a legal nature, including questions of procedure. Our comments on the legal aspects of the question are as follows.

Rule 15 of the rules of procedure of the functional commissions of the Economic and Social Council, which rules apply to the Commission, provides that at the commencement of a regular session "the commission shall elect, from among the representatives of its members, a Chairman, one or more Vice-Chairmen and such other officers as may be required." Thus, the basic rule is that the Bureau is elected from the membership of the body conducting the elections.

The first legal issue is the extent of the membership of the "Ad Hoc Open-ended Intergovernmental Group of Experts on Energy and Sustainable Development". In particular, does "open-ended" refer to a group limited to (*a*) the membership of the Commission on Sustainable Development; (*b*) all States Members of the United Nations; or (*c*) all Member States. The General Assembly did not in terms specify its intent when it decided that the Group of Experts should be "open-ended". Unfortunately, the established practice of the United Nations encompasses all three options and the terminology to distinguish between those options is not uniform and thus it is not possible to choose between those options by legal analysis. Obviously, the Assembly could interpret its resolution, but this is impractical since the Economic and Social Council must act at its forthcoming session.

The next legal issue is whether the Council could interpret the resolution. We think that in the circumstances where the General Assembly entrusted the implementation of these Agenda 21 tasks to the Commission on Sustainable Development, it is reasonable to assume that, if the terms of the procedural rules which are applicable to the Commission by virtue of its status as a subsidiary organ of the Economic and Social Council cause a difficulty, the Council could interpret the intent of the General Assembly in order to effectively implement the resolution.

If the Council were to decide that the Group is open-ended to all Members of the United Nations, or to all States, the Bureau can be selected from States not members of the Commission on Sustainable Development. If the Council decides that the intention was that it was open-ended to members of the Commission, the Council would have to decide, by a specific decision or resolution, to make an exception to rule 15 to enable non-members of the Commission to nominate their nationals to the Bureau. That exception could, of course, be "on an exceptional basis and without creating a precedent".

3 June 1999

## PROCUREMENT

### 14. PARTICIPATION OF ORGANIZATIONS OF THE UNITED NATIONS SYSTEM IN COMPETITIVE BIDDING EXERCISES CONDUCTED BY GOVERNMENTS

*Note prepared by the General Legal Division of the Office of Legal Affairs*

*Background*

1. We understand that the question of United Nations system organizations participating as bidders in procurement exercises conducted by Governments was raised on various occasions in the past 15 years, in connection with the assistance

provided by such organizations to Governments for the execution of projects funded from World Bank loans or IDA credits. The question was discussed, in particular, in consultations in 1994-1995 between the Bank and United Nations system organizations regarding the conditions and modalities for the organizations' participation in the execution of such projects.

2. At that time, private firms, which were in competition with United Nations system organizations to provide similar services, apparently complained to the Bank that it was according special status to the United Nations organizations. As a result, as we understand, the Bank proposed, inter alia, that the United Nations system organizations compete among themselves and with private firms for the provision of assistance or services to Bank borrowers. The Office of Legal Affairs cautioned against the United Nations and its funds and programmes participating in such competitive bidding.

3. In June 1996, following negotiations on the matter between several United Nations organizations and the Bank, a Standard Agreement between Bank Borrower and United Nations Agencies was eventually issued by the Bank, for use when a United Nations system organization is selected on a "sole source" basis (as opposed to a competitive basis) to provide services to Bank borrowers. Although United Nations representatives were involved in the negotiation of the draft Standard Agreement, they were not given an opportunity to review and agree to the final text before it was issued by the Bank.[20] In his covering letter dated 12 June 1996 transmitting to the Office of Legal Affairs a copy of the Standard Agreement, the Acting Director of the Operations Policy Department of the Bank stated that "the Standard Agreement was issued to the staff under the joint signatures of the two Managing Directors for Operations and the Senior Vice-President and General Counsel", and that the Agreement "will be applied whenever an agency is selected on a sole-source basis to provide services".

4. We understand that, in practice, the Standard Agreement is used mainly by specialized agencies; the United Nations Office for Project Services (UNOPS) uses the Management Services Agreement negotiated with the Bank; and the United Nations Development Programme (UNDP) uses either the Management Services Agreement or a Cost-Sharing document annexed to the relevant project document signed with Bank borrowers. We are informed that the United Nations Children's Fund (UNICEF) is still negotiating with the Bank the text of a standard agreement for use with Bank borrowers.

5. We understand from UNDP and UNOPS that the Bank has recently adopted a more restrictive position and has sought to oblige United Nations system organizations to compete with private companies in order to provide assistance or services to Bank borrowers relating to the execution of their projects financed from Bank loans. This seems to have been confirmed by the General Counsel of the Bank at the last meeting of Legal Advisers, when he stated that "United Nations agencies may be hired if they are competitive" (see para. 12 of the report on the 5-6 March 1998 meeting of Legal Advisers of the United Nations system).[21]

6. Finally, as we understand, three entities of the United Nations system participate in competitive bidding exercises conducted by Bank borrowers: United Nations Industrial Development Organization (UNIDO), International Labour Organization (ILO) and UNOPS. It is not clear to us on what basis UNIDO and ILO participate. It appears that UNOPS has developed an occasional practice of participating in competitive bidding in recent years.

*Analysis*

7. While the long-standing and consistent practice of the organizations of the United Nations system has been not to engage in competitive bidding, we are not aware of any express prohibition to their doing so. Under the circumstances, the question of whether or not they should be allowed to participate in competitive bidding seems essentially to be a policy matter.

8. In any event, we believe that there are important considerations that should be taken into account in making a decision on the matter. These considerations relate to:

(*a*) The fundamental differences between United Nations organizations and private companies, and between their respective activities;

(*b*) The implications for the interests of the United Nations organizations in allowing them to compete with private companies.

For the reasons set out below, while the question is essentially one of policy, it is unclear why the "unfair competition" argument should be determinative in any decision regarding the modalities for United Nations system organizations, in accordance with their respective mandates, to provide services to Governments, including bank borrowers.

*Difference between United Nations system organizations and private companies*

9. Firstly, we believe that competitive bidding assumes that the competition will be between comparable institutions engaging in comparable activities. In this respect, we believe that there are fundamental differences between United Nations system organizations and private companies, and between their respective activities. The Bank's position does not seem to recognize such fundamental differences. Rather, it seems to equate United Nations system organizations to private companies.

10. While private companies offer their services on a commercial basis, for profit, United Nations system organizations are intergovernmental organizations which provide their assistance, within specific mandates set by their governing bodies, on a not-for-profit basis. As regularly stated by the General Assembly, their assistance involves other fundamental characteristics that differentiate such assistance from services obtainable from private companies or other sources, inter alia: (*a*) the assistance is of a universal, voluntary, neutral, multilateral and grant nature, and is provided at the specific request of recipient countries, in accordance with such countries' own policies and priorities for development;[22] (*b*) the assistance is provided based on an agreed division of responsibilities among United Nations system organizations, normally within the framework of the country's programme of cooperation with the United Nations system and under the team leadership and the coordination of the United Nations resident coordinator. Thus, a Government's decision to obtain assistance from a United Nations system organization should not be necessarily weighed using the same criteria that would be used to evaluate the suitability of private firms.

11. It seems clear from the General Assembly resolutions concerning operational activities for development of the United Nations system that participation of United Nations system organizations in competitive bidding was not contemplated. As we understand, except for the relatively recent practices of a few entities of the United Nations system noted in paragraph 4 above, the long-standing and consis-

tent practice between United Nations system organizations and countries receiving their assistance has been that the countries made their own determination, based on their own policies and priorities, as to whether they want to implement a particular project by obtaining the necessary inputs commercially from private companies, or by requesting the assistance of a United Nations system organization.

12. We believe that Bank borrowers should similarly be allowed to continue to make their own determination of whether it is in their best interest to request the assistance of a United Nations system organization or to obtain the required services commercially from a private company. This would be consistent with the General Assembly resolutions referred to above[23] and with the long-established policies and practice of the United Nations system organizations.

13. In any event, it is unclear why the "unfair competition" argument presented by private companies should be a determinative factor in deciding on the modalities according to which United Nations system organizations provide their assistance to Governments in executing or implementing their projects funded from Bank loans, since the United Nations system organizations have been established by their member States, in significant measure, expressly for the purpose of assisting States.

14. In the case of those United Nations system organizations which participate in competitive bidding, we agree that their privileges and immunities and their not-for-profit nature, combined with their accumulated expertise, may give them an advantage over their private competitors that enables them to provide States with the required assistance at a lower economic cost. Since this is consistent with the mandates of those organizations and the interests of the recipient Governments, it is unclear why this should be a basis for excluding those entities from seeking to provide such assistance.

*UNDP, UNICEF and UNOPS*

15. UNDP and UNICEF have indicated that it is not their policy to participate in competitive bidding, and that it would in their view not be appropriate. In their view, participation in competitive bidding would not be consistent with the established framework for their cooperation with Governments, which reflects the concept of a partnership between them and such Governments for the realization of the Governments' development objectives, based on the respective mandates set by their governing bodies, the agreements concluded with such Governments to establish the basic conditions of their cooperation (i.e., the Basic Cooperation Agreement in the case of UNICEF and the Basic Assistance Agreement in the case of UNDP) and the instruments agreed with such Governments for the coordination and integration of their cooperation (the Master Plan of Operations in the case of UNICEF and the Country Cooperation Framework in the case of UNDP).

16. On the other hand, UNOPS has explained that as a self-financing entity created to provide services in a competitive environment, it is obliged, as a practical matter, to compete with private companies providing similar services. UNOPS, therefore, has engaged in competitive bidding in a few instances where it was requested to submit proposals in response to Requests for Proposals issued by Governments.

17. In this respect, we note that UNOPS was established by the General Assembly in its decision 48/501 of 19 September 1994, as a separate and self-financing entity, to provide services related to project management, implementation of project

components executed by Governments or other organizations, project supervision and loan administration, and management services.[24] One singularity of UNOPS as compared to other organizations of the United Nations system is that it is self-financing, i.e., it is not funded from assessed or voluntary contributions, and derives its funding from the fee that it charges for its services. Another singularity is that a significant part of its activities, pursuant to its governing instruments, consists in the direct provision of project management, project supervision, loan administration and other services to Governments or international organizations, which place it in direct competition with private companies offering the same services. Notably, however, UNOPS, as a part of the United Nations, is accorded certain privileges and immunities.

*The risk of challenge to the immunity of United Nations system organizations*

18. Over the past few decades, the restrictive theory of State immunity has developed in response to the increasing involvement of States and State-owned entities in commercial activities that were previously conducted by the private sector. Under that theory, immunity would not apply to activities of a State that are commercial in nature. For example, section 1605 (*a*) (2) of the United States Foreign Sovereign Immunities Act of 1976, P.L. 94-583, 90 Stat. 2891 (1976), provides that a foreign State shall be immune from the jurisdiction of the courts of the United States, except for actions based upon a commercial activity of the foreign State. Another example can be found in article 7 of the European Convention on State Immunity of 16 May 1972, which provides as follows:

> "1. A Contracting State cannot claim immunity from the jurisdiction of a court of another Contracting State if it has on the territory of the State of the forum an office, agency or other establishment through which it engages, in the same manner as a private person, in an industrial, commercial or financial activity, and the proceedings relate to that activity of the office, agency or establishment.
>
> "2. Paragraph 1 shall not apply if all the parties to the disputes are States, or if the parties have otherwise agreed in writing."[25]

19. Attempts have been made to apply the restrictive theory to international organizations, including the United Nations, based on a similar distinction between non-commercial and commercial activities. In United States courts, such attempts have been based on the Foreign Sovereign Immunities Act and on the provision in the United States International Organizations Immunities Act that "international organizations ... shall enjoy the same immunity from suit and every form of judicial process as is enjoyed by foreign Governments". As far as we are aware, no attempt to apply the restrictive theory to the United Nations has been successful.[26] In this respect, we would note that the United States Government, in briefs submitted to the courts in cases involving the United Nations, has supported the United Nations position that the restrictive theory of State immunity does not apply to the United Nations, inter alia, because the United Nations derives its immunity from international obligations based on treaties to which the United States is a party, i.e., the Charter of the United Nations and the Convention on the Privileges and Immunities of the United Nations, which do not recognize any difference between non-commercial and commercial acts. As we understand, the United States Government has recognized the application of the restrictive immunity theory to other international organizations with which it does not have agreements similar to those it has with the United Nations.

20. If the practice of United Nations system organizations competing with private companies for business were to be pursued, it cannot be a priori excluded that the immunity of such organizations might be challenged in court. Whether this would occur and the possible results are difficult to predict. Even if the United Nations system organizations were to prevail in such legal actions, the institution of such actions conceivably could have other implications. For example, Member States, as a matter of policy, might be called upon to consider prohibiting those organizations from engaging in activities that would be in competition with private companies.

*Conclusion*

21. While it appears that the traditional policies and practices of United Nations system organizations have been not to engage in competitive bidding for the provision of assistance or services to Governments, we are not aware of any express prohibition to their doing so. While it is difficult to evaluate, it also appears that engaging in competitive bidding by United Nations system organizations may entail a risk of challenges to their immunity or adverse reactions from Member States.

22. If the issue raised by the Bank relates not to an abstract policy but to pragmatic economic concerns, the Bank may wish to consider means other than competitive bidding to evaluate the economic costs of the sole-source approach. Recourse to market surveys, for example, could be employed to verify that the costs of the United Nations system organizations providing the assistance or services are competitive with market prices.

23. In any event, in case it should be deemed necessary or desirable to depart from the long-standing policies and practices of the United Nations system organizations, in view of the importance and sensitivity of the issues involved, those organizations may wish to consider submitting the issue to their competent policy-making bodies.

1 March 1999

## TREATY ISSUES

### 15. CERTAIN ASPECTS OF UNITED NATIONS CURRENT TREATY PRACTICE

*Memorandum to the Legal Adviser, United Nations Conference on Trade and Development, Geneva*

1. This is in reference to your facsimile of 29 January 1999, inquiring about certain trends in the United Nations current treaty practice. We have the following observations on the matter.

2. *Titles of legal instruments.* The titles of legal instruments executed between the United Nations or by United Nations bodies on behalf of the Organization with intergovernmental organizations do not have any particular significance, provided such instruments are concluded in written form and governed by international law. This approach is reflected in the 1969 Vienna Convention on the Law of Treaties (article 2, para. 1 (*a*)) and in the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (not yet in force). Article 2 of the latter Vienna Convention reads as follows:

"1. For the purposes of the present Convention:

(*a*) "treaty" means an international agreement governed by international law and concluded in written form:

(i) between one or more States and one or more international organizations; or

(ii) between international organizations,

whether that agreement is embodied in a single instrument or in two or more related instruments and whatever its particular designation".

3. All legal instruments referred to above require registration in accordance with Article 102 of the Charter of the United Nations.

4. In recent years, there has been a growing tendency for certain offices, departments and subsidiary organs of the United Nations to enter into international agreements *in their own name* constituting legally binding obligations for the Organization. In our view, this practice is inappropriate, since strictly speaking they do not possess juridical personality and legal capacities, including the capacity to contract, separate from that of the Organization. Accordingly, all such agreements should be executed in the name of the United Nations.

5. *Intra-organizational arrangements.* Subdivisions of the Secretariat and subsidiary organs of the Organization are not subjects of public international law. Therefore, arrangements which are executed among and between those bodies are governed by the internal law of the Organization. These instruments are not treaties within the meaning of the above-referenced Vienna Conventions and, consequently, do not require registration. In our view, these types of intra-organizational arrangements should be designated as a "Memorandum of Intent", rather than a "Memorandum of Understanding".

6. *Standard/model agreements.* As you know, a number of standard agreements have been elaborated, for example, for technical assistance and cooperation by UNDP, UNICEF and UNHCR. There is also a model status-of-forces agreement (SOFA) prepared pursuant to paragraph 11 of General Assembly resolution 44/49 of 8 December 1989. The standard conference agreement for United Nations meetings held outside established headquarters is contained in ST/AI/342 of 8 May 1987. In fact, there are two model agreements for this purpose, i.e., in the form of a treaty and an exchange of letters.

7. *Standard liability and financial clauses.* The UNDP Standard Basic Assistance Agreement, the UNICEF Basic Cooperation Agreement (BCA) and the model conference agreement contain provisions to protect the legal and financial interests of the Organization in the field of the activities covered by those instruments.

8. *Liability.* Article X, paragraph 2, of the UNDP Standard Basic Assistance Agreement, provides as follows:

"Assistance under this Agreement being provided for the benefit of the Government and people of _____, the Government shall bear all risks of operations arising under this Agreement. It shall be responsible for dealing with claims which may be brought by third parties against the UNDP or an Executing Agency, their officials or other persons performing services on their behalf, and shall hold them harmless in respect of claims or liabilities arising from operations under this Agreement. The foregoing provision shall not apply where the Parties and the Executing Agency are agreed that a claim or liability

arises from the gross negligence or wilful misconduct of the above-mentioned individuals."

9. Somewhat similar provisions are contained in the UNICEF Basic Cooperation Agreement. Article XXI, entitled "Claims against UNICEF", provides as follows:

"1. UNICEF cooperation in programmes under the present Agreement is provided for the benefit of the Government and people of the country and, therefore, the Government shall bear all the risks of the operations under the present Agreement.

"2. The Government shall, in particular, be responsible for dealing with all claims arising from or directly attributable to the operations under the present Agreement that may be brought by third parties against UNICEF, UNICEF officials, experts on mission and persons performing services on behalf of UNICEF and shall, in respect of such claims, indemnify and hold them harmless, except where the Government and UNICEF agree that the particular claim or liability was caused by gross negligence or wilful misconduct."

10. Hold-harmless provisions appear in article X of the model conference agreement, which provides as follows:

"The Government shall be responsible for dealing with any action, claim or other demand against the United Nations or its officials and arising out of:

(*a*) Injury to persons, or loss of or damage to property caused by, or incurred in using, the transport services referred to in article VI that are provided by or under the control of the Government;

(*b*) The employment for the Conference of the personnel provided by the Government under article VIII.

"2. The Government shall indemnify and hold harmless the United Nations and its personnel in respect of any such action, claim or other demand."

11. *Financial arrangements.* Model provisions on financial arrangements are contained in articles III, V, VI and VIII of the UNDP Standard Basic Assistance Agreement; in articles II, VI, VII and VIII of the UNICEF Basic Cooperation Agreement; article IX of the model conference agreement; and article V of the status-of-forces agreement.

12. *Clearance requirements.* As you will recall, according to ST/AI/52 of 25 June 1948, which is still in force, "all draft international instruments (conventions, agreements, treaties etc.) concluded by, or under the auspices of, the United Nations shall be submitted to the Legal Department for study and comment before final action is taken on them". These requirements have been further developed in ST/AI/342. According to paragraph 10: "It is the responsibility of the substantive organizational unit to ensure that all drafts of host country agreements that are to be concluded by or under the auspices of the United Nations are submitted simultaneously to the Office of Legal Affairs, the Department of Conference Services and the Office of Financial Services, for review, before negotiations with [the] host Government are undertaken ... Prior to the presentation of the agreement for signature by representatives of the Government, the final text of the agreement should be submitted simultaneously to the Office of Legal Affairs, the Department of Conference Services and the Office of Financial Services for final clearance."

5 April 1999

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

[No legal opinions of secretariats of intergovernmental organizations to be reported for 1999.]

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NOTES

[1] It is explained in paragraph 2 of the 3 April 1998 "Information Note to the Committee on Contracts" enclosed with your memorandum that "budget and work plans for EMEP are prepared by an intergovernmental Steering Body on the basis of budget requirement sheets submitted by the centres, and are approved at the annual meetings of the Executive Body for the Convention".

[2] Subject to the so-called "20 per cent rule".

[3] The remaining articles of the instruments relate to ownership of, and responsibility for loss or damage to, non-expendable property acquired with project funds, reservation of the privileges and immunities of the United Nations, and entry into force of the implementing instrument.

[4] The Organization may have to bear certain financial liability and risks which may need to be considered; for example, costs related to office space, supervision of interns, transportation within the country and any other facilities which peacekeeping operations make normally available to their personnel. In addition, costs related to any emergency situations (e.g. repatriation, medical services) would have to be advanced by the Organization even if, subsequently, they are reimbursed by the University.

[5] In this connection, while noting that the Board of Inquiry on one soldier's death completed its report in October 1997, we point out that under the implementation procedures for the new system adopted by the General Assembly on 17 December 1997, the Board is to establish, and the Force Commander is to certify, that the death or injury was service-incurred (see A/52/369, para. 8).

[6] LEAD = Leadership for Environment and Development.

[7] This provision implies that there exists a "parent" or "sister" organization: LEAD-International. If so, the Office of Legal Affairs has no readily available information about such entity, its purposes, activities or officials.

[8] This advice is based on a new version of the Staff Regulations amended by the General Assembly in its resolution 52/252 of 8 September 1998 and on corresponding Staff Rules promulgated by the Secretary-General.

[9] Document A/AC.243/1994/L.3 dated 4 April 1994 is a study prepared by the Ad Hoc Intergovernmental Working Group of Experts ("the Working Group"), established pursuant to General Assembly resolution 48/218 of 23 December 1993. By that resolution, the Assembly decided to study the possibility of establishing new jurisdictional and procedural mechanisms or extending mandates and improving the functioning of existing jurisdictional and procedural mechanisms.

Document A/49/418 is a report of the Working Group, dated 22 September 1994, and is entitled "Jurisdictional and procedural mechanism for the proper management of resources and funds of the United Nations". The report provides a summary of the work of the Working Group, together with its recommendations.

[10] See memorandum of 17 October 1969 from the Legal Counsel to the Chairman of the Property Survey Board, entitled "Procedure in vehicle accident cases", which is also quoted, in relevant parts, in the legal opinion of 6 October 1975, entitled "Question of the financial responsibility to the Organization of members of the staff for accidental damage caused to United Nations vehicles while driving such vehicles—Policy of the Organization in this respect" (*United Nations Juridical Yearbook 1975*, p. 186); a memorandum of 30 June 1981, entitled "'Gross negligence' on the part of a staff member, resulting in damage to United

Nations property—Criteria to be applied in determining whether gross negligence is involved", and a memorandum of 3 September 1981, entitled "Question whether United Nations officers should be charged for damage to vehicles arising out of ordinary negligence", from this Office to the Assistant Secretary-General, Office of Financial Services, respectively (*United Nations Juridical Yearbook 1981*, pp. 165 and 167); and a memorandum of 30 November 1995 from this Office to the Field and Logistics Division, Department of Peacekeeping Operations, entitled "Financial responsibility of United Nations staff members assigned to field missions for loss or damage to United Nations property".

[11] While those legal opinions concerned liability for damage to United Nations property, the principle set out therein would apply generally to other financial losses caused by staff members to the Organization.

[12] There is a proposal to revise ST/AI/371 in order to, inter alia, clarify certain provisions therein and also to clarify the role of the Office of Internal Oversight Services in the disciplinary proceedings. A working group has been established for that purpose, consisting of representatives from various offices, including this Office and OIOS.

[13] That advice essentially indicated that, under the established policy, United Nations civil awards must be created by the United Nations legislative bodies rather than by the Secretariat.

[14] In the past, this Office has advised that the Secretary-General had the power to issue only military medals without an express General Assembly resolution, in view of the substantial administrative and executive powers given to the Secretary-General in respect of the various United Nations peacekeeping missions.

[15] This award was initially established by the Director of the United Nations Office of the Disaster Relief Coordinator. It was, upon the advice of the Office of Legal Affairs, subsequently reported to the General Assembly (see A/51/172–E/1996/77), which approved the arrangement (resolution 51/194).

[16] We would advise that such a recommendation should contain, inter alia, as precise as possible a description of criteria for selecting awardees and of a mechanism of such selection.

[17] Promulgation of staff rules is the prerogative of the Secretary-General.

[18] Letter dated 11 March 1998 from the Legal Counsel, Under-Secretary-General of the United Nations for Legal Affairs, addressed to the Commission on the Limits of the Continental Shelf: Legal opinion on the application of the Convention on the Privileges and Immunities of the United Nations to the members of the Commission; United Nations document CLCS/5, para. 5.

[19] *Official Records of the Economic and Social Council, 1999, Supplement No. 9* (E/1999/29), chap. I.A, para. 2.

[20] The Office of Legal Affairs does not know whether other United Nations system organizations were given such an opportunity.

[21] The Office of Legal Affairs is not entirely sure, however, whether the General Counsel's statement means that United Nations agencies should participate in competitive bidding, or simply that the costs of the assistance provided by such agencies generally should be competitive with the market. However, the January 1997 version of the "Guidelines for Selection and Employment of Consultants by World Bank Borrowers" issued by the Bank, while not entirely clear, seems to be consistent with the more restrictive approach.

[22] See, e.g., General Assembly resolution 50/120 of 20 December 1995, sixth preambular para.; resolution 52/203 of 18 December 1997, fourth preambular para.; and resolution 53/192 of 15 December 1998, fifth preambular para.

[23] See note 22.

[24] By that decision, the General Assembly, on the recommendation of the Economic and Social Council as contained in its decision 1994/284 of 26 July 1994, "decided that the Office for Project Services should become a separate and identifiable entity in accordance with UNDP Executive Board decision 94/12 of 9 June 1994".

[25] See also article 10 of the final text of the set of 22 draft articles submitted to the General Assembly by the International Law Commission on the jurisdictional immunities of States and their property, which provides that a State cannot invoke immunity from the jurisdiction of a

court of another State, in a proceeding arising out of a commercial transaction with a foreign natural or juridical person, except if the commercial transaction is between States or if the parties to the commercial transaction have agreed otherwise (*Official Records of the General Assembly, Forty-sixth Session, Supplement No. 10* (A/46/10), p. 33).

[26] The Office of Legal Affairs has not attempted to conduct a survey and analysis of the application to the rest of the United Nations system organizations of the restrictive theory of sovereign immunity.