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

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

Chapter VI

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

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

1. REQUEST BY A MEMBER STATE THAT ITS NATIONAL FLAG BE FLOWN HALF-MAST AT UNITED NATIONS HEADQUARTERS FOR REASONS OF NATIONAL MOURNING — UNITED NATIONS FLAG CODE AND REGULATIONS

Note for the file

1. On 3 August 1987, the Protocol and Liaison Service was confronted with the following question: A Member State wished its national flag to be flown half-mast at United Nations Headquarters for reasons of national mourning. When the Service informed it that the United Nations Flag Regulations and protocol practice would not permit it to accede to that request, the representative of the Member State mentioned, in support of the request, the note appearing at the end of the United Nations Flag Code and Regulations.[1]

2. The note in question reads as follows: "In the event of any provision contained in this Code or in any regulation made under this Code being in conflict with the laws of any State governing the use of its national flag, said laws of any such State shall prevail."

3. The United Nations Flag Code and Regulations set forth the arrangements for the use of the flag at Headquarters, as well as for the use of the flag by Governments, organizations and individuals (see article 5 of the Code). Although in principle the flag is to be displayed everywhere in conformity with the Code, cases of conflict may arise where the laws and customs of the country require modifications in the display of the flag. In such cases, the laws of the country prevail. At United Nations Headquarters, it is the prerogative of the Secretary-General to proclaim official mourning within the United Nations, the provisions as contained in section V of the Regulations being then strictly adhered to. United Nations practice discloses no exception from these rules.

7 August 1987

2. CORPORATE SPONSORSHIP OF A GLOBAL PUBLIC-INFORMATION AND FUND-RAISING EVENT IN CONNECTION WITH THE UNITED NATIONS DECADE OF DISABLED PERSONS — PROPOSED DONATION BY A FIRM IN EXCHANGE FOR THE USE OF REPRESENTATIONS OF UNITED NATIONS HEADQUARTERS IN AN ADVERTISING CAMPAIGN — QUESTION OF THE USE OF THE UNITED NATIONS EMBLEM ON THE PRODUCTS OF SPONSORING COMPANIES — GENERAL ASSEMBLY RESOLUTION 92(*I*) — LONG-ESTABLISHED UNITED NATIONS POLICY TO PROHIBIT FIRMS CONTRACTING WITH THE ORGANIZATION FROM REFERRING TO THEIR SERVICES TO THE UNITED NATIONS FOR COMMERCIAL OR OTHER ADVERTISING PURPOSES

Memorandum to the Under-Secretary-General for Public Information

1. This responds to your memorandum of 11 November 1987 and your earlier note concerning a global information and fund-raising event in support of the United Nations Decade of Disabled Persons and the use by a firm of representations of United Nations Headquarters in an advertising campaign.

(a) *Arrangements with outside institutions in connection with the United Nations Decade of Disabled Persons — Global public-information and fund-raising event*

2. The project summary describes a proposed global public-information and fund-raising event in support of the Decade. One of the key objectives of the event is to raise a minimum of $50 million of extra resources for projects in the fields of prevention, rehabilitation and equalization. We understand that one of the main sources of income would be corporate sponsorship of the project. However, in exchange for their sponsorship of the project, the sponsors wish to have permission to use the United Nations emblem on their products and in their marketing campaigns. Indeed, paragraph 6 of the project summary indicates that:

> "In conclusion, this is primarily a marketing opportunity for companies to support a major global project backed by the United Nations. The key is the use of the United Nations logo 'on products' of acceptable sponsors and within well-defined parameters controlled by the United Nations."

3. In our opinion, any use of the name and emblem of the United Nations's for commercial purposes (e.g. in association with the products of a firm, or in a firm's advertising) is explicitly prohibited by General Assembly resolution 92(I) of 7 December 1946. Indeed, such use could create the erroneous impression of United Nations endorsement or sponsorship of those products, or of an official connection between the firm and the United Nations. Therefore, we consider that even the Secretary-General could not give permission to use the Organization's emblem for such a purpose, as this would be counter to both the letter and the spirit of the resolution.

4. On the other hand, we see no legal objection to the use by the sponsors of the emblem of the United Nations Decade of Disabled Persons.

(b) *Corporate sponsorship proposal for cooperation between the United Nations Visitor's Section and a firm*

5. The proposal dealing with this matter would not directly violate General Assembly resolution 92(I), since no use by the firm in question of the United Nations name and emblem is foreseen.

6. We understand that, under the present proposal, the firm, in exchange for the donation of free uniforms to United Nations tour guides, desires to use representations of United Nations Headquarters in an advertising campaign, to display the firm logo on United Nations premises with an acknowledgement and to issue statements of support for the United Nations in its extensive advertising. This proposal should be considered in the light of the following:

(*a*) It is long-established United Nations policy to prohibit firms contracting with the United Nations from referring to their services to the Organization for commercial or other advertising purposes. This policy has been reflected in the general conditions used in all United Nations contracts and purchase orders;

(*b*) On a few occasions, the donors of goods or services have received a discreet acknowledgement. For example, on 11 June 1987, a new limousine was accepted, with appropriate protocol but without any public advertising, by the United Nations for the exclusive use of the Secretary-General; the Office of Legal Affairs had cleared this procedure;

(*c*) Any advertising which might create the erroneous impression of United Nations endorsement of products or sponsorship, or of an official connection between a firm and the United Nations, has hitherto been prohibited.

7. To the extent that the proposals of the firm concerned extend beyond what has been accepted practice to date, the Secretary-General's approval would be required.

27 November 1987

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3. QUESTION WHETHER IT WOULD BE IN ACCORDANCE WITH UNITED NATIONS PROCEDURE FOR THE UNITED NATIONS ENVIRONMENT PROGRAMME TO ACCEDE IN ITS OWN NAME TO THE 1986 CONVENTION ON EARLY NOTIFICATION OF A NUCLEAR ACCIDENT AND TO THE 1986 CONVENTION ON ASSISTANCE IN THE CASE OF A NUCLEAR ACCIDENT OR RADIOLOGICAL EMERGENCY

Cable to the Chief of the Legal Section,
United Nations Environment Programme

This is in response to your recent cable and further to conversations with us concerning the 1986 Convention on Early Notification of a Nuclear Accident[2] and the 1986 Convention on Assistance in the Case of a Nuclear Accident or Radiological Emergency.[3]

1. The question that arose at the recent session of the Governing Council of the United Nations Environment Programme and on which you have requested the views of the Office of Legal Affairs is, as we understand it, whether it is in order under United Nations procedure for UNEP to accede in its own name to the two Conventions.

2. Article 12, paragraph 5, of the Convention on Notification and article 14, paragraph 5, of the Convention on Assistance are in identical terms as follows:

"(*a*) This Convention shall be open for accession, as provided for in this article, by international organizations and regional integration organizations constituted by sovereign States, which have competence in respect of the negotiation, conclusion and application of international agreements in matters covered by this Convention.

"(*b*) In matters within their competence such organizations shall, on their own behalf, exercise the rights and fulfil the obligations which this Convention attributes to States parties.

"(*c*) When depositing its instrument of accession, such an organization shall communicate to the depositary a declaration indicating the extent of its competence in respect of matters covered by this Convention.

"(*d*) Such an organization shall not hold any vote additional to those of its member States."

3. You have drawn attention to the fact that UNEP is party to several international agreements. We understand these to be either (*a*) agreements entered into under authority delegated by the Secretary-General to the Executive Director of UNEP or (*b*) agreements entered into under authority from the General Assembly.

4. The two IAEA Conventions are outside the present authority deriving from the Secretary-General and outside the present authority deriving from the General Assembly. Accordingly, it would not be in accordance with United Nations procedure for UNEP to simply accede to the two Conventions in its own name.

5. What is needed is additional authorization. The issuance of this authorization is not a matter which falls within the competence of the Secretary-General as chief administrative officer of the Organization or any other mandate given to him. The authorization would therefore have to be given by the General Assembly. If UNEP wishes the inscription of a corresponding item on the agenda of the forthcoming forty-second session of the General Assembly, then this would be possible only under rule 15 of the rules of procedure of the General Assembly as an additional item after 15 August and as a supplementary item up to 15 August. Should the Executive Director of UNEP wish the inscription into the agenda, he should contact the Secretary-General, which could be done by telegram. The possible financial implications would then, of course, have to be clarified in the Fifth Committee.

6. The next question which arises is for whom the authorization should be required. UNEP is a part of the Organization but, as follows from the registration of the Office of the United Nations Disaster Relief Coordinator (UNDRO) as the point of contact in addition to UNEP, there are other parts of the Organization which are also interested in the two Conventions. Also, the political significance

of United Nations accession is to be borne in mind. We are therefore of the opinion that, if authorization for signature is to be sought, it should be requested for the United Nations and not for UNEP. The necessary instruments would then be issued from the United Nations but they would of course encompass UNEP.

21 July 1987

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4. LEGAL REQUIREMENTS REGARDING THE ACCESSION BY THE UNITED NATIONS TO THE 1986 CONVENTION ON EARLY NOTIFICATION OF A NUCLEAR ACCIDENT AND THE 1986 CONVENTION ON ASSISTANCE IN THE CASE OF A NUCLEAR ACCIDENT OR RADIOLOGICAL EMERGENCY — REQUIREMENT OF THE SUBMISSION OF "DECLARATIONS OF COMPETENCE" BY INTERNATIONAL ORGANIZATIONS ACCEDING TO THE CONVENTIONS

Memorandum to the Director-General for Development and International Economic Cooperation

1. This is in reply to your memorandum of 23 November 1987 on the accession by the United Nations to the 1986 Convention on Early Notification of a Nuclear Accident[2] and the 1986 Convention on Assistance in the Case of a Nuclear Accident or Radiological Emergency.[3]

2. You have inquired as to whether the United Nations has in previous cases of accession to international conventions been required to provide "declarations of competence" similar to those envisaged by the two Conventions in the present case. The adherence of the Organization to multilateral conventions of this kind is novel. There have been no previous analogous agreements permitting adherence of the United Nations and, thus, there are no precedents.

3. As the matter of United Nations accession to the Conventions is now before the General Assembly it would, of course, be for delegations to decide whether it should be resolved at the current or at the next session of the Assembly. From the point of view of the Office of Legal Affairs there has never been a particular urgency in this matter; on the contrary, we had at first advocated postponing — and preparing — it for the forty-third session of the General Assembly. UNEP, however, attaches symbolic importance to a speedy United Nations adherence.

4. As to your request for an explanation of the legal requirements of subparagraphs 5(*c*) of articles 12 and 14 of the Conventions in question, we would note the following:

(*a*) Subparagraph 5(*a*) of articles 12 and 14 provides that an international organization may accede to the Convention if it has competence in respect of the negotiation, conclusion and application of international agreements in respect of matters covered by each Convention;

(*b*) Subparagraph 5(*b*) of articles 12 and 14 provides that in matters within their competence such organizations shall, on their own behalf, exercise the rights and fulfil the obligations which each Convention attributes to States parties;

(*c*) Subparagraph 5(*c*) of articles 12 and 14 requires that when acceding to the Conventions an international organization shall deposit a declaration indicating the extent of its competence in respect of the matters covered by each Convention;

(*d*) We understand such a declaration of competence as intended to make clear to the other parties to the Conventions which articles are of relevance to, and which matters are within the competence of, an international organization acceding to the Conventions;

(*e*) Thus, a declaration of competence on the part of the United Nations would refer to articles which concern matters with respect to which United Nations bodies consider they have competence.

The question of the competence of a particular United Nations body should, of course, be a matter for the particular body to determine and propose for inclusion in the declaration to be deposited by the United Nations.

5. As we see it, the following provisions of the Conventions may be of relevance to the question of the competence of United Nations bodies:

(*a*) *Convention on Early Notification:* article 4, paragraph (*a*); article 5, paragraph 1(*f*); article 7; and article 8;

(*b*) *Convention on Assistance:* article 2, paragraphs 1, 2 and 6; article 4; article 5, paragraph (*e*); article 6; article 7; and article 11.

25 November 1987

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5. Meaning of consensus in the practice of the United Nations

Letter to the Legal Counsel, World Health Organization

In reply to your memorandum of 4 August 1987 on the meaning of consensus in the practice of the United Nations, we would like to provide the following comments.

There is no established United Nations definition of consensus. However, in United Nations practice, consensus is generally understood to mean adoption of a decision without formal objections and vote; this being possible only when no delegation formally objects to a consensus being recorded, though some delegations may have reservations to the substantive matter at issue or to a part of it.

The fact that consensus is recorded does not necessarily mean that there is "unanimity", namely, complete agreement as to substance and a consequent absence of reservations. For example, there are numerous occasions where States make declarations or reservations to a matter at issue while not objecting to a decision being recorded as taken by consensus.

There are certain further aspects to which we should also draw attention.

(*a*) Consensus decisions can be expressed in various ways. In its weakest form, that term is sometimes used to characterize any decision adopted "without a vote", which may imply that while there is no formal objection to its being so adopted, the participating delegations do not consider themselves too closely associated with the adopted text. On the other hand, a decision may be expressly declared as having been adopted "by consensus", implying that the decision was

arrived at as a result of a collective effort to achieve a generally acceptable text and consequently the participating delegations are considered to be more closely associated with the decision. It is the latter kind of decision by consensus that generally reflects the current usage of the term;

(*b*) With respect to the binding nature of decisions adopted by consensus, it should be noted that the legal status of a decision is not affected by the manner in which it is reached. Once adopted, it has the status of a legally adopted decision and the fact that it has been adopted by consensus or by means of a vote does not add to or diminish the legal value or significance of the decision in question. In other words, if a decision is of a binding character, adoption on the basis of consensus as opposed to adoption by means of a vote does not make the decision more binding or less binding. Adopted decisions are equal in status regardless of the manner in which they are adopted;

(*c*) If a delegation announces that it is not participating in the decision-making but does not prevent the Chairman from stating that the decision has been adopted by consensus, the Chairman can make such an announcement and then, in effect, the situation would be viewed as if such a State was not present when the decision was taken. Those delegations which do not expressly indicate that they do not participate in a consensus must be deemed to have participated in it.

Finally, as you are aware, it has become common practice for many organs of the United Nations to operate on the basis of consensus. At the same time, except in those rare cases where decision-making is formally limited to consensus, it is understood that delegations are entitled to request a vote and cannot be deprived of this right merely because the body concerned has agreed to operate by consensus. There are delegations, however, which contest the constitutional validity of express provisions limiting decision-making exclusively to consensus.

21 September 1987

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6. Legal status of the decisions and recommendations of the Economic and Social Council when the General Assembly takes decisions on subjects on which the Council had already taken a decision (endorsement) — Dual capacity of the Committee for Programme and Coordination as a subsidiary organ of both the Economic and Social Council and the General Assembly

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

1. This is in reply to your memorandum of 15 December 1987 on the legal status of the decisions and recommendations of the Economic and Social Council when the General Assembly takes decisions on subjects on which the Economic and Social Council has already taken a decision (endorsement). By that memorandum, you forwarded various questions posed by the representatives of Member States in the course of negotiations in the Fifth Committee on the draft resolution on agenda item 116 (Programme planning).

2. The questions were submitted "within the context of the discussion and decision-making process by the General Assembly on the report of the Committee for Programme and Coordination (CPC) under agenda item 116". It should thus be recalled from the outset that CPC, according to its terms of reference, functions as the main subsidiary organ of both the Economic and Social Council and the General Assembly for planning, programming and co-ordination.[4]

3. This "dual" capacity of CPC is demonstrated by the fact that CPC regularly submits its reports to both the Economic and Social Council and the General Assembly. CPC's functions *vis-à-vis* the General Assembly have been highlighted recently by the Assembly in its resolution 41/213 of 19 December 1986, annex I to which states that CPC, for budget years, shall examine the proposed programme budget in accordance with its mandate and shall submit its conclusions and recommendations to the General Assembly, through the Fifth Committee, for the final approval of the programme budget. Furthermore, for off-budget years, CPC, acting as a subsidiary organ of the General Assembly, shall consider the outline of the programme budget and submit, through the Fifth Committee, to the General Assembly its conclusions and recommendations. However, there is no clear overall dividing line between when CPC functions exclusively as an Economic and Social Council subsidiary, when it functions exclusively as a General Assembly subsidiary or when it functions as both at the same time.

4. In relation to questions (*a*) and (*b*) (para. 2 of your memorandum), it must first be pointed out that from a legal point of view there are a few instances in which it is necessary for the Assembly to act on Economic and Social Council resolutions or decisions. This is the case when such action is required by the Charter of the United Nations (see Article 63, paragraph 1), when the General Assembly has addressed requests or recommendations to the Economic and Social Council which require that organ to respond or reply to the General Assembly, and when the Economic and Social Council has addressed, on its own initiative, requests or recommendations to the General Assembly.

5. Beyond that, it is also clear that the General Assembly is not legally required to endorse all Economic and Social Council resolutions. But the General Assembly may deem it advisable and desirable to endorse Economic and Social Council resolutions or decisions from a policy standpoint. Nothing prevents the General Assembly from so doing, in the light of Article 60 of the Charter which specifies that the powers set forth in Chapter X thereof are vested in the Economic and Social Council "under the authority of the General Assembly". In addition, the General Assembly naturally has a vested interest in the work of CPC, which is a subsidiary organ of the General Assembly, in relation to "programme planning". The General Assembly has addressed that item in a comprehensive manner involving virtually all programme aspects of the United Nations as a whole, including in the economic and social field. If the Economic and Social Council reaches what it considers to be a "final" decision, within the context under consideration, the General Assembly, none the less, on the basis of the above considerations, possesses the power to reach its own decisions which would then have to be considered the "final" General Assembly decision on the matter. In case of divergence, at least in dual areas such as programme planning, the position of the General Assembly, under Article 60 of the Charter of the United Nations, would then prevail.

6. As to questions (*c*) and (*d*) they appear to us to relate to the allocation of various Economic and Social Council resolutions or decisions to the Main

Committees of the General Assembly or indeed to the plenary itself. The question of the allocation of various chapters, portions thereof or resolutions or decisions included in the report of the Economic and Social Council submitted to the General Assembly is a matter for consideration and recommendation by the General Committee of the General Assembly. It is that Committee which recommends to the General Assembly the most appropriate allocation of the various portions of the report of the Economic and Social Council, either to certain Main Committees of the General Assembly in the light of the subject matters considered by them or to the plenary meetings of the General Assembly.

7. Finally, with regard to the question contained in paragraph 3 of your memorandum, we do not consider that the draft resolution attached to your memorandum necessarily contains redundant provisions. It follows from what has been stated above that the fact that the Economic and Social Council has endorsed a CPC report or recommendation does not detract from the General Assembly doing likewise. An endorsement by the General Assembly, as a co-parent of CPC, stands on its own merit and constitutes an endorsement from a different body which has, under Article 60 of the Charter of the United Nations, been vested with the responsibility for the discharge of the functions of the Organization set forth in Chapter IX of the Charter and under whose authority the Economic and Social Council functions under Chapter X. Furthermore, endorsing a CPC recommendation need not necessarily constitute the equivalent of endorsing an Economic and Social Council resolution. For example, in section IV of the draft resolution attached to your memorandum, the General Assembly would in paragraph 1 endorse CPC's recommendations and conclusions on a particular matter. In paragraph 2, the General Assembly would endorse Economic and Social Council resolution 1987/79 on the same matter. That Economic and Social Council resolution does not merely "endorse" the CPC conclusions or recommendations in question but rather represents the Economic and Social Council's own evaluation and assessment thereof. Thus, those paragraphs appear neither redundant nor incompatible.

17 December 1987

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7. POLICY OF THE ORGANIZATION WITH REGARD TO RIGHTS IN INVENTIONS THAT RESULT FROM PROJECTS FUNDED BY THE UNITED NATIONS DEVELOPMENT PROGRAMME — ARTICLE III, PARAGRAPH 8, OF THE UNITED NATIONS DEVELOPMENT PROGRAMME STANDARD BASIC ASSISTANCE AGREEMENT AND ARTICLE VIII OF THE BASIC AGREEMENT WITH EXECUTING AGENCIES — QUESTION WHETHER SUCH POLICY RESTRICTS THE PATENTING OF THE SUBJECT INVENTIONS BY GOVERNMENTS

Memorandum to the Director, Office for Projects Execution, United Nations Development Programme

1. This responds to your request of 6 August 1987 for advice on: (*a*) the policy of the Organization with regard to rights in inventions that result from projects funded by UNDP; and (*b*) whether such policy restricts the patenting of the subject inventions by the Government of (name of a Member State).

2. The policy of the Organization with regard to inventions resulting from work on projects funded by UNDP is set out in article III, paragraph 8, of the UNDP Standard Basic Assistance Agreement (SBAA) with Governments, as well as in article VIII of the Basic Agreement with Executing Agencies. The former states:

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

3. The State concerned has not yet signed the SBAA. The Special Fund Agreement, signed by the Government in question on 20 October 1959, which is still in force, merely provides, in article III, paragraph 5, that: "The parties shall consult each other regarding the publication as appropriate of any information relating to any project or to benefits derived therefrom." UNDP is, by virtue of General Assembly resolution 2029(XX) of 22 November 1965, the successor to the Expanded Programme for Technical Assistance (EPTA) and of the Special Fund, and is therefore a party to the Special Fund Agreement of 1959 with the State in question. In this case, therefore, and until the State signs the SBAA, it would seem that any question relating to the disposition of benefits, including discoveries from projects funded by UNDP, has to be resolved through consultations between UNDP and the Government. We consider that any decision reached through such consultations should be recorded in an agreement, which could be done through an exchange of letters.

4. The agreement to be concluded with the Government should be in accord with UNDP's general policy to act as guardian of the interests of all recipient countries in case of any discoveries resulting from projects funded by UNDP. Normally, UNDP discharges such responsibility by requiring all participants in the project to assign to UNDP, by agreement, the property rights in all discoveries. This policy enables UNDP to review each case on its merits before deciding on the appropriate action to be taken in order to make available such information for productive use.[5]

5. Once an assignment is obtained, publication of an invention can be achieved in several different forms. The most effective way is to execute a patent claim, in accordance with the applicable law, and thus secure the right to benefit from the invention, either directly or through granting licences to others. The patent provides legal protection to the inventor or his assignee against others who might otherwise use the invention once they have sufficient information about it.

6. A patent claim is made through submission of an application in the prescribed form and registration of the claim with a designated patent office. A patent is normally limited to the particular countries in which it is applied for and granted, though more general protection can be secured by registration in accordance with applicable international treaties on intellectual property (e.g., the Convention for the Protection of Industrial Property, 1883[6] or the Patent Cooperation Treaty,1970[7]).

7. In making a patent claim, the patentee in effect discloses the invention through the application, in exchange for legal protection against infringement. Thus, a decision to patent a new discovery has to be made in the light of the need

to obtain such protection, by weighing such considerations as: the nature of the invention; the benefits of the invention to the local industry; the need for such benefits to be shared by other recipient countries and the relative value of the invention as compared to the legal costs and other expenses involved in protecting it from infringement.

8. Another method of publishing information of a new discovery is to allow such information to be freely available, through dissemination in trade journals or other publications. In that way the discovery is said to enter the public domain and cannot then be claimed exclusively by anyone; in many countries it cannot then be protected by patent, either by the inventor or by anyone else. While this may sound attractive as a means of making such information available to as many countries as possible, in certain cases there may be drawbacks in this means of publishing patentable discoveries; in particular, this could result in benefits from projects financed by UNDP not being put to productive use, because private investors may be reluctant to risk capital in developing new products without patent protection.

9. National laws usually require that patents be registered in the name of the person who made the discovery. However, it may also be permitted that registration be in the name of an assignee, such as the inventor's employer, based on a contractual assignment of the property rights in the discovery by the employee. In respect of UNDP contractors, the assignment is incorporated in all UNDP contracts through the UNDP General Conditions (para. 16); in respect of staff and project personnel, such assignment is contained in rules 112.7 and 212.6 of the Staff Rules and Regulations.

10. The principal problem with UNDP deciding to patent discoveries itself is the lack of resources to do so on a regular basis, given the complexity of the requisite legal procedures and the considerable expense involved in the registration of patents, particularly if this is to be done in many countries; in addition, there may be costs in protecting patents from infringements that might deprive them of their value. Therefore, UNDP might wish to explore the possibility of authorizing Governments to patent inventions in the names of the inventor or the Government, provided the patent is limited to the country of the project and does not preclude other Governments from working the invention on a royalty-free basis.

11. However, at this stage, we can only provide general outlines of the form of agreements to be concluded with Governments. In general, UNDP's permitting the patent to be in the name of the Government or an entity nominated by it, or of the individual who made the discovery, should be subject to the patentee agreeing to grant UNDP a royalty-free, non-exclusive and unrestricted licence to work the invention, with an unrestricted right to sub-licence.

12. A copy of this memorandum is being sent to the Assistant Administrator and Director, Bureau for Programme Policy and Evaluation, UNDP, to whom we addressed a similar memorandum on this subject on 5 December 1984. It would seem, for the reasons given below, that more and more Governments will, in the future, be raising concerns similar to those of the State in question with regard to the restriction on obtaining patents on discoveries from UNDP-funded projects. At some suitable time, therefore, consideration should be given to revising the note of the Administrator of 7 April 1975, to provide more guidance on the procedures to be followed in patenting new discoveries. The

revised note could also provide more definite guidance on the areas where UNDP would want to patent in its own name and those areas where others may be permitted to patent in their names.

13. It is worth noting, in this respect, that the United States Government's policy on patents, which may have inspired that of the Organization, has undergone radical changes in the last decade. The United States policy, as provided in Executive Order 10096 of 23 January 1950, required the Government, subject only to limited exceptions, to retain "the entire right, title and interest in and to all inventions" made by Government employees, and by contractors in case of inventions resulting from a Government contract or from federally funded research and development efforts. However, Public Law 96-517 permitted small business firms and non-profit organizations to elect to take title to inventions made with federal funds, subject to certain conditions and restrictions. In 1983, a presidential directive extended this election to large entities, to the extent permitted by law.[8]

14. The consequence of the change in United States policy on Government patents is that the Organization may face increased pressure from United States contracting firms to be permitted to retain title to inventions resulting from UNDP-funded projects, particularly in the computer technology field. We should thus be prepared to make a meaningful response to any such requests from Governments or private contractors.

24 September 1987

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8. Designation of executing agencies for projects of the United Nations Development Programme — Historical background of the issue

Memorandum to the Assistant Administrator and Director, Bureau for Programme Policy and Evaluation, United Nations Development Programme

1. This responds to your memorandum of 26 May 1987 about the draft UNDP circular and annex on the designation of executing agencies of UNDP, and takes into account the subsequent discussions held with members of your office.

2. You will find attached a study prepared by this office on the historical background to the issue.

3. As you will note from the study, the granting of executing agency status had previously been the responsibility of deliberative bodies of the United Nations entrusted with functions in relation to UNDP, i.e., the General Assembly, the Economic and Social Council or the UNDP Governing Council. You will also note that, originally, executing agencies were limited to the United Nations and specialized agencies of the United Nations system and have only recently come to include Governments, governmental or intergovernmental organizations outside the United Nations system and UNDP itself.

4. However, the categories of entities which may be entrusted with the implementation of UNDP projects are now reflected in regulation 2.1(*h*) of the

Financial Regulations and Rules of UNDP (adopted by Governing Council decision 81/28 of 30 June 1981 and quoted in full in footnote 1 of the historical background annexed hereto) which entrusts the Administrator with the responsibility of designating executing agencies from among certain categories of entities specified therein. As regards organizations of the United Nations system, the regulation refers to:

> "(ii) Organizations of the United Nations system, i.e., the United Nations, the specialized agencies, the International Atomic Energy Agency and *other organizations that are or become part of the United Nations system. These organizations are referred to as participating and executing agencies*;" (emphasis added).

5. It would thus seem to us that organizations that are part of the United Nations system have either already been designated as executing agencies of UNDP by the General Assembly or the Economic and Social Council or, for those which later became part of the United Nations system, are recognized as such by the Governing Council under financial regulation 2.1(*h*). What the Financial Regulations and Rules of UNDP require is that, if they have not already done so, such organizations sign an agreement with UNDP to cover the terms and conditions which are to govern the execution of the UNDP projects for which they are selected (see regulation 8.10(*b*)). The selection of an executing agency for a particular project is regulated by rule 108.14. In the latter respect, regulation 8.10 provides, in paragraph (*d*), that in the selection of an executing agency first consideration shall normally be given to organizations of the United Nations system.

6. Regulation 8.10(*e*) authorizes the Administrator to "assign projects to a governmental, intergovernmental [institution] or organization not part of the United Nations system, or to UNDP itself" for execution, and to "*contract for the services* of other agencies, private firms or individual experts in the execution of projects . . ." (emphasis added). However, the latter function has been entrusted by the Governing Council of UNDP to the Office for Projects Execution.

7. We understand, therefore, that the circular referred to in paragraph 1 above is confined to the designation of entities covered by regulation 2.1(*h*) (iii) (or 8.10(*e*)), i.e., governmental or intergovernmental institutions or agencies not part of the United Nations system, and would not encompass Governments, organizations of the United Nations system, UNDP itself, or non-governmental entities or private firms. Since, unlike the category defined by regulation 2.1(*h*) (ii) (i.e., organizations of the United Nations system), this category refers to an indefinitely large class of miscellaneous entities, it is necessary for the Administrator to decide which of them may be designated as executing agencies, and the circular is designed to set out the procedures for reaching that decision.

8. With regard to the requirement that all executing agencies sign an executing agency agreement, regulation 8.10(*b*) states as follows:

> "(*b*) Agreements shall be entered into between UNDP and executing agencies which are organizations of the United Nations system . . ."

As regards organizations outside the United Nations system, rule 108.14 (*c*) provides that "all designations [of an executing agency] shall be conditioned upon the existence of a signed executing agency agreement or other agreed arrangement between UNDP and the entity concerned." It appears, therefore, that while there is a mandatory requirement that organizations of the United Nations system

sign an executing agency agreement before they are selected to execute projects, such requirement does not seem to extend to other entities which may be entrusted with the execution of UNDP projects.

9. You may wish to consider, therefore, whether it will be possible or even necessary, in practice, to negotiate agreements with all the organizations that are eligible to act as executing agencies, particularly where the entities concerned do not perform executing agency functions on a regular basis. As we understand it, the practice in the past has been to use less formal arrangements for those entities that are called upon only occasionally to execute projects, as indicated in paragraph 10 below. However, if it is decided by UNDP, as a matter of policy, that all organizations outside the United Nations system must also sign an executing agency agreement, we see no legal objection to such requirement being included in the proposed circular.

10. The institutions listed below have not signed the Standard Executing Agency Agreement but at one time or another have acted as executing agencies either on the basis of a standard annex I to a project document or through an exchange of letters incorporating the terms of the standard annex, as indicated below:

(*a*) Asian Development Bank (AsDB) — A standard annex I signed by AsDB and attached to each project document for AsDB's executed projects, in countries which have not signed the Standard Basic Assistance Agreement with UNDP;

(*b*) Arab Fund for Economic and Social Development (AFESD) — An exchange of letters between AFESD and UNDP whereby the former was designated as executing agency for a particular project (REM/74/011);

(*c*) United Nations Centre for Human Settlements (UNCHS) — An exchange of letters between UNCHS and UNDP providing that UNCHS agrees to be guided by the terms of the UNDP Standard Executing Agency Agreement.

8 October 1987

ANNEX

Historical background to the designation of executing agencies for UNDP projects

I. BEFORE THE ESTABLISHMENT OF UNDP

The United Nations Development Programme was established by General Assembly resolution 2029 (XX) of 22 November 1965 through a merger of the Expanded Programme of Technical Assistance (EPTA) and the Special Fund (SF).

Before the establishment of UNDP, the execution of technical assistance projects was carried out by participating organizations of EPTA. Paragraph 1 of the section on coordination of effort in annex I to Economic and Social Council resolution 222 A (IX) of 15 August 1949 reads as follows:

> "The projects falling within the competence of participating organizations should be carried out by them . . . "

Participating organization was defined under the resolution to mean the United Nations and the specialized agencies participating in EPTA. The original participating organizations were the United Nations, FAO, ICAO, ILO, UNESCO and WHO. Subsequently, the following specialized or related agencies participated in EPTA further to the explicit approval of the Economic and Social Council:

(*a*) IAEA[a] (Economic and Social Council resolution 704 (XXVI) of 23 October 1958);

(*b*) ITU[b] (Economic and Social Council resolution 400 (XIII) of 30 August 1951);

(*c*) WMO[b] (Economic and Social Council resolution 400 (XIII);

(*d*) UPU[c] (Economic and Social Council resolution 902 (XXXIV) of 2 August 1962);

(*e*) IMO[d] (Economic and Social Council resolution 1009 (XXXVII) of 21 July 1964);

(*f*) Other specialized agencies (annex I to Economic and Social Council resolution 222 A (II)).

II. After the establishment of UNDP

The following entities were subsequently designated as executing agencies for UNDP projects, by the methods indicated:

A. *By decision of the General Assembly*

(*a*) UNIDO[e] (General Assembly resolution 2152 (XXI) of 17 November 1966);

(*b*) UNCTAD[f] (General Assembly resolution 2401 (XXIII) of 13 December 1968);

(*c*) WTO[g] (General Assembly resolution 2529 (XXIV) of 5 December 1969);

(*d*) Governments[h] (General Assembly resolution 3405 (XXX) of 28 November 1975).

B. *By decision of the Economic and Social Council*

(*e*) Regional commissions (ESCAP, ESCWA, ECA, ECE and ECLAC)[i] (Economic and Social Council resolutions 1896 (LVII) of 1 August 1974 and 1952 (LIX) of 23 July 1975).

C. *By decision of the Governing Council, pursuant to a General Assembly mandate*

(*f*) The UNDP Office for Projects Execution (OPE) (decision taken by the Governing Council in 1973, at its sixteenth session (E/5365/Rev.1), and reaffirmed by the Council in its decision 84/6 of 29 June 1984[j]). OPE (originally called "Project Executions Division" (PED)) was established in 1973 as an integral part of the UNDP secretariat structure for direct execution of UNDP projects under subcontracting arrangements. The establishment of the Office was first provided for in the 1974 budget estimates which were examined by the Advisory Committee on Administrative and Budgetary Questions and adopted by the Governing Council at its sixteenth session without specific reference to the proposed establishment of OPE. In 1984 the Governing Council, after considering the report of the Joint Inspection Unit (JIU) on OPE (JIU/REP.83/9), reaffirmed its approval of the establishment of the Office for Projects Execution to enable UNDP to provide direct project services to Governments. With reference to the JIU report, where the mandate of OPE was questioned, the Administrator, in justifying the establishment of OPE, invoked paragraph 41 of the annex to General Assembly resolution 2688 (XXV)[k] and stated that, it "was found essential to establish within UNDP a small unit for direct execution of projects under subcontracting arrangements" for purposes of using non-governmental institutions and private firms in UNDP assistance programmes.

(*g*) Governmental and intergovernmental institutions which are not part of the United Nations system (Governing Council decision 81/28 of 30 June 1981). Through the adoption of the Financial Regulations and Rules of UNDP, the Governing Council has

authorized the Administrator, under regulations 2.1(*h*)[l] and 8.10(*e*),[m] to also assign the execution of UNDP projects to governmental or intergovernmental institutions which are not part of the United Nations system.

NOTES

[a]Paragraph 1 of Economic and Social Council resolution 704 (XXVI) reads as follows:

"*Decides* to amend its resolution 222(IX) of 14 and 15 August 1949 to enable the International Atomic Energy Agency to become a member of the Technical Assistance Board and to participate in the Expanded Programme of Technical Assistance on the same conditions as the other participating organizations."

[b]Paragraph 4 of Economic and Social Council resolution 400 (XIII) reads as follows:

"*Approves* the participation of the International Telecommunication Union and the World Meteorological Organization in the expanded programme of technical assistance."

[c]Paragraph 1 of Economic and Social Council resolution 902 (XXIV) reads as follows:

"*Approves* the participation of the Universal Postal Union in the Expanded Programme of Technical Assistance."

[d]Paragraph 1 of Economic and Social Council resolution 1009 (XXXVII) reads as follows:

"*Approves* the participation of the Intergovernmental Maritime Consultative Organization in the Expanded Programme of Technical Assistance."

[e]Paragraph 31 of General Assembly resolution 2152 (XXI) reads as follows:

"The Organization [UNIDO] shall be a participating agency in the United Nations Development Programme and there shall be close cooperation and coordination between the Organization and the United Nations Development Programme. The Executive Director shall be a member of the Inter-Agency Consultative Board of the United Nations Development Programme."

[f]Paragraph 2 of General Assembly resolution 2401 (XXIII) reads as follows:

"*Decides* that the United Nations Conference on Trade and Development shall be a participating organization of the United Nations Development Programme in conformity with General Assembly resolution 2029 (XX) of 22 November 1965."

[g]Paragraph 5(*b*) of General Assembly resolution 2529 (XXIV) reads as follows:

"The Union should function as an executing agency of the United Nations Development Programme and participate in the activities of the Programme in order to assist in the preparation and implementation of technical assistance and pre-investment projects in the field of tourism, financed by the Programme, and consideration should be given to enabling the Union to function as a participating and executing agency of the Programme."

[h]Paragraph *e* (vii) of the annex to General Assembly resolution 3405 (XXX) reads as follows:

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

[i]Paragraphs 5 and 6 of Economic and Social Council resolution 1896 (LVII) read as follows:

"*Requests* the Secretary-General, in consultation with the Administrator of the United Nations Development Programme, to make the necessary arrangements allowing for the delegation of the appropriate functions of an executing agency to the regional economic commissions for regional, subregional and interregional projects, financed by the Programme, in cases where such delegation is requested by the countries concerned and recommended by the Administrator of the Programme;

"*Requests* the regional economic commissions to extend their cooperation to the United Nations Development Programme by participating in the planning and, as appropriate, the implementation of relevant regional, subregional and interregional

projects, and by ensuring the coordination with the Programme of their own activities and, in particular, the activities of the United Nations Development Advisory Teams."

Paragraphs 4, 5 and 6 of Economic and Social Council resolution 1952 (LIX) read as follows:

"*Further requests* the regional commissions at their intergovernmental sessions to pay increasing attention, in preparing their programmes of activities, to the inclusion of interregional projects which will directly assist their members in strengthening their development efforts and to take at these sessions greater initiatives, in consultation with the United Nations Development Programme and the countries concerned, in order to identify projects for which the regional commissions would be given the function of executing agencies by the United Nations Development Programme;

"*Calls upon* the Secretary-General and the Administrator of the United Nations Development Programme to expedite in this connection the conclusion of the necessary arrangements, in order that the regional commissions may function as executing agencies for regional, subregional and interregional projects financed by the Programme;

"*Requests* the Administrator of the United Nations Development Programme to utilize the services of the regional commissions at the request of the countries concerned for the purpose of making contributions to the forthcoming programme cycle, in particular to inter-country programming."

[j]Paragraphs 4 and 5 of Governing Council decision 84/6 read as follows:

"*Reaffirms* that the Office for Projects Execution has been established with the full approval of the Governing Council in recognition of the need of the Administrator to have at his disposal an appropriate instrument for providing direct project services to Governments;

"*Approves* the continued use of the Office for Projects Execution as an agent for the implementation of projects where the Administrator decides in consultation with the Government and the executing agencies concerned that the expertise or services required are such that the delivery of service through the Office will best serve the interests of the country concerned."

[k]Paragraph 41 of the annex to General Assembly resolution 2688 (XXV) reads as follows:

"When necessary to ensure the maximum effectiveness of Programme assistance or to increase its capacity, and with due regard to the cost factor, increased use may appropriately be made of suitable services obtained from governmental and non-governmental institutions and firms, in agreement with the recipient Government concerned and in accordance with the principle of international competitive bidding. Maximum use should be made of national institutions and firms, if available, within the recipient countries."

[l]Regulation 2.1(*h*) reads as follows:

"(*h*) 'executing agency' shall mean an entity to which the Administrator has entrusted the implementation of UNDP assistance to a project and shall include the following:

" (i) A recipient Government or Governments;

" (ii) Organizations of the United Nations system, i.e., the United Nations, the specialized agencies, the International Atomic Energy Agency and other organizations that are or become part of the United Nations system. These organizations are referred to as participating and executing agencies;

"(iii) A governmental or intergovernmental institution or agency not part of the United Nations system;

"(iv) UNDP itself."

[m]Regulation 8.10 (*e*) reads as follows:

"(*e*) Under conditions established by the Governing Council, the Administrator is also authorized, subject to the agreement of the requesting Government or Governments,. . . to assign projects to a governmental or intergovernmental institution or agency not part of the United Nations system . . . "

9. POLICIES GOVERNING THE ATTRIBUTION OF AUTHORSHIP IN UNITED NATIONS PUBLICATIONS, DOCUMENTS AND OTHER OFFICIAL PAPERS

Memorandum to the Under-Secretary-General for Conference Services and Special Assignments

1. We are forwarding you herewith the attached paper on the attribution of authorship in United Nations publications, documents and other official papers.

2. It is hoped that the attached paper will be helpful in the preparation by the Publications Board of the guidelines for granting exceptions to the rule of anonymity.

3. It should be noted that the attached paper is not concerned with the issue of outside publications.

21 December 1987

Attribution of authorship in United Nations publications, documents and other official papers

1. Article 97 of the Charter of the United Nations, in outlining the composition of the Secretariat as one of the principal organs of the United Nations, makes reference to the Secretary-General and to the staff. This could give the impression that the staff has received independent recognition, were it not stated in the same Article that the Secretary-General "shall be the chief administrative officer of the Organization." Appointed by the General Assembly, he is, under the Charter (Article 98), responsible for the Secretariat *vis à vis* the organs of the United Nations and the Member States. Acting as chief administrator, he performs such functions as are entrusted to him by the Charter and by the organs of the Organization. In his capacity as chief administrator, the Secretary-General is given the authority by the Charter to appoint, in accordance with regulations established by the General Assembly, such staff as may be required for the Organization (Articles 97 and 101).

2. In the light of these provisions of the Charter, it is essential that the Secretary-General should have complete control over the work done by the Secretariat, including all publications, documents and other papers produced by the Secretariat in servicing the Organization. Therefore, it is not only essential but mandatory that these publications, documents and other papers be attributed to the Secretary-General. Thus the attribution of authorship to the Secretary-General is the logical consequence of his bearing full responsibility for the work of the Secretariat.

3. This is not to say that part of the Secretary-General's responsibility cannot be delegated by him or by the General Assembly to senior Secretariat officials appointed by the General Assembly (such as the heads of United Nations bodies like UNDP, UNICEF, UNEP, etc.) and to Under-Secretaries-General. It is understood that the officials in question continue to act under the control of the Secretary-General as chief administrator of the Organization and that he can

always overrule any of their decisions.

4. Individuals who choose to work in the service of the United Nations Secretariat voluntarily accept the conditions and limitations such service implies, including the condition, consequential upon the above provisions of the Charter, that what they say or do in the exercise of their official functions is attributable to the Secretary-General.

The Staff Regulations of the United Nations are clear in this regard. Under regulation 1.2,

> "Staff members are subject to the authority of the Secretary-General and to assignment by him to any of the activities or offices of the United Nations. They are responsible to him in the exercise of their functions. The whole time of staff members shall be at the disposal of the Secretary-General. The Secretary-General shall establish a normal working week."

5. Among the relevant provisions of the Staff Rules of the United Nations, one may quote the following:

> *"Rule 101.6*
> *"Outside activities and interests*
>
> "(*e*) Staff members shall not, except in the normal course of official duties or with the prior approval of the Secretary-General, perform any one of the following acts, if such act relates to the purpose, activities or interests of the United Nations:
>
> ". . .
>
> (iv) Submit articles, books or other material for publication."

and

> *"Rule 112.7*
> *"Proprietary rights*
>
> "All rights, including title, copyright and patent rights, in any work performed by a staff member as part of his or her official duties shall be vested in the United Nations."

6. It should also be mentioned that under the Standard Basic Assistance Agreements concluded by the United Nations on behalf of UNDP with more than ninety Governments, ". . . patent rights, copyrights and other similar rights to any discoveries of work resulting from UNDP assistance, under this Agreement shall belong to UNDP" (article III, paragraph 8).

7. This explains why from the very beginning of the Organization's existence (the earliest reference available in the records is to a 1949 instruction) the policy has been to attribute to the Secretary-General all publications, documents and other papers emanating from the Secretariat and otherwise keeping them anonymous. As a consequence, direct or indirect attribution of authorship to individual staff members, has, as a rule, not been permitted.

8. The two most recent administrative instructions on the subject provide as follows. Under administrative instruction ST/AI/189/Add.6 of 14 June 1972, entitled "Attribution of authorship in United Nations publications, documents and other papers",

"3. The general principle to be applied is that publications are issued in the name of the Organization, while documents emanating from the Secretariat are attributed to the Secretary-General. The major organizational unit mainly involved in producing a publication or document may be indicated in the front matter or introduction; however, attribution, either direct or indirect, to individual members of the Secretariat is not permitted."

and under administrative instruction ST/AI/189/Add.6/Rev.2 of 14 October 1982, also entitled "Attribution of authorship in United Nations documents, publications and other official papers",

"3. The general principle to be applied is that publications are issued in the name of the United Nations, while documents emanating from the Secretariat are attributed to the Secretary-General or to the Secretariat.

"4. Attribution, either direct or indirect, to individual members of the Secretariat is not permitted in documents, publications or other official papers, nor may such attribution be made in a preface, foreword or introduction."

9. Both instructions admit departure from the rule of anonymity in very exceptional instances and contain similar language to this effect. The 1982 instruction provides as follows:

"K. *Departure from the rules*"

"22. Departure from these rules may be made only with the personal written permission of the Secretary-General or of the Chairman of the Publications Board."

10. The above provision could be interpreted as implying a delegation of authority by the Secretary-General similar to those mentioned in paragraph 3 above, but granted on a case by case basis in very exceptional situations.

11. The available information indicates that the issue of attribution of authorship in the United Nations has arisen throughout the years in the following terms:

(*a*) Could a paper prepared by a staff member as part of his official duties and appearing in a United Nations publication be attributed to the staff member otherwise than on an exceptional basis?

(*b*) Would a staff member who prepared an article outside working hours and had it published under the imprint of the United Nations be considered as having performed official duties and enjoy the corresponding immunities?

(*c*) Could United Nations publications, documents and other papers issued under the name of the Secretary-General give credit to individual staff members for their substantial assistance to the Secretary-General in the preparation of such papers?

12. The issue is in effect whether, instead of being exceptional, the attribution of authorship to staff members performing their official duties should be permitted on the basis of certain guidelines and criteria, i.e., whether, when the relevant guidelines or criteria are met, a paper prepared by a staff member should be automatically published under the name of its author without exceptional permis-

sion being required from the Secretary-General. In such a case, since official responsibility rests with the Secretary-General and the staff member is acting in his official capacity, he will have immunity for the work done.

13. In 1970, the Publications Board, with the approval of the Secretary-General, developed, on an experimental basis, some criteria and procedures which would have allowed for the attribution of authorship to staff members acting in the exercise of their official duties. These criteria and procedures were as follows:

"(*a*) The heads of the Department of Economic and Social Affairs, the secretariats of the regional economic commissions, UNCTAD and UNIDO should be invited to inform the Publications Board which of their periodicals and which of their publications in established series consistently contain material which could be considered as purely scientific or technical, not dealing with questions upon which any United Nations organ or body has taken policy decisions or questions upon which the Governments of Member States adopt policy positions;

"(*b*) The Publications Board will review the information thus provided and establish a list of periodicals and series in which attribution of authorship to staff members could be approved by the heads of the office concerned under the procedure set out in (*c*) below, as exceptions to the general rule permitted under paragraph 3 of administrative instruction ST/AI/167;

"(*c*) The heads of the offices would establish 'reading committees' — an arrangement in force in UNESCO — to review articles or studies contributed for inclusion in the publications in the approved list, both as to their substance and as to the propriety of attributing authorship when the material is the work of a staff member. The head of the office will make the final decision on attribution to staff members based on the advice of these committees."

14. In reviewing this experimental policy, the Publications Board in 1978 found it was unsatisfactory for the following reasons:

"13. A review of the articles for which attribution had been sanctioned revealed that most of them had not met the specifications laid down in the arrangement approved by the Publications Board. Some of them were admittedly based, not on independent research or original work, but rather on studies carried out by units of the Secretariat and on internal documents. Few, if any, met the criterion that they should contain 'material that could be considered as purely scientific or technical, not dealing with questions upon which any United Nations organ or body had taken policy decisions or questions upon which the Governments of Member States had adopted policy positions.' Most of them related clearly to subjects dealt with by legislative bodies of the United Nations.

"14. There was no evidence that the procedure for substantive clearance by the head of the division, editorial clearance by the editorial unit concerned and policy clearance by the head of the department or office had been followed.

"15. In the opinion of the Special Adviser, the experiment had not substantiated the arguments advanced in favour of attributing authorship to staff members (PB/77/GEN/11, annex I). There was no evidence that

relaxation of the rule of anonymity had attracted articles of superior worth. There was no evidence that it had enabled the United Nations to recruit high-level experts who would not otherwise have accepted posts. The claim that experts had to become professionally dormant while working at the United Nations had already been refuted; staff members might, in accordance with the established procedure (ST/AI/190), publish in their own name in outside journals provided that their work was based on original thought and effort."

15. In 1987 the matter was raised again by the Department of International Economic and Social Affairs, which suggested a new set of criteria for attribution of authorship. It seems that this suggestion could serve as a basis for further consideration. The solution might be sought along the following lines:

— To identify United Nations periodicals created by resolutions permitting publication therein of papers otherwise than in the name of the Secretary-General;

— To establish criteria which the contents of the manuscript should meet:

(*a*) The manuscript must be based on independent work and not contain material forming part of United Nations reports and documents;

(*b*) The manuscript should contain information which is publicly available and should not use information received by the United Nations on a privileged basis;

(*c*) The manuscript should meet the criteria of impartiality mandatory for all United Nations publications;

— To set up a procedure for the clearance of such papers for publication. Such procedure should probably envisage that the authorization by the head of the relevant department should be required and that the Publications Board should be informed about such decisions in order to have a chance to review the implementation of policy at the time required.

16. As regards the question raised in subparagraph (*b*) of paragraph 11 above, it appears that if a staff member prepared a paper on his personal time, then he would not be considered as having acted in the exercise of his official duties. Although the paper would be published under the imprint of the United Nations, the staff member would not be immune with regard to its content because article V, section 18 (*a*) of the Convention on the Privileges and Immunities of the United Nations[9] would not be applicable in such a case. The inclusion of a disclaimer indicating that the views expressed in the a paper are those of the staff member and not those of the United Nations would further confirm that the paper had not been prepared in the exercise of the staff member's official duties.

17. Therefore the reply to the question raised by the Publications Board at its meeting on 20 October 1987 and addressed to the Office of Legal Affairs is that a staff member publishing an article in a United Nations periodical as his personal endeavour would not be protected under the Convention on the Privileges and Immunities of the United Nations and would be liable for that writing while the United Nations would be immune.

18. As for the question referred to in subparagraph (*c*) of paragraph 11 above, what is involved is not attribution of authorship *stricto sensu*, but giving credit to those involved in a work attributed to the Secretary-General. To some extent the present rules already permit crediting departments. Paragraph 6 of the aforementioned 1982 administrative instruction states the following in this regard:

> "The cover and title-page of publications may bear the name of the department, regional commission, major conference or other United Nations body in which the publication originated. Attribution may not normally be made to any unit of the Secretariat smaller than a department, office or regional commission."

19. The purpose of this clause is to cover situations where it may be useful for financial or other reasons to let Member States know what part of the Secretariat has been involved in the drafting of the paper. It is argued that the same regime could be made applicable to individual staff members in order to raise the morale of the Secretariat and that the Secretary-General's reports could indicate the names of the staff members who substantially contributed to their preparation.

20. Such approach, however attractive it may seem at first glance, could have undesirable consequences. The present regime already may result in arguments as to the appropriateness of involving particular departments in doing a specific study. The problem would be compounded if the authors of the study were identified by name and outside interference in the assignment of specific projects to individual staff members would become a risk.

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10. Legal questions concerning the functioning of the Staff Association of the United Nations Environment Programme

Memorandum to the Under-Secretary-General for Administration and Management

1. This is in response to a memorandum from UNEP of 1 October on the UNEP Staff Committee as well as to other communications on the subject.

The legal questions arising from those communications are as follows:

(*a*) Whether a section of the UNEP staff has a right to withdraw from the Staff Association of UNEP and to form a separate staff association and, if it does have such a right, what is the status of such other association;

(*b*) Whether, in the light of the resignation of a large number of staff members from the Staff Association, it should still be recognized as the sole and exclusive staff representative body in terms of rule 108.1(c) of the Staff Rules;

(*c*) At what time does a resignation from the Staff Committee take effect if no nomination of a candidate for election to the vacancy is received.

Question (a)

2. Rule 108.1(*e*) of the Staff Rules recognizes that, in accordance with the principle of freedom of association, staff members may form and join associations. It also provides that contacts and communications between the Administration and the staff on issues relating to staff welfare shall be conducted solely and exclusively through the single "staff representative body" established pursuant to regulation 8.1(*a*) to (*c*) of the Staff Regulations. The reasons for this provision are the difficulties which the Administration would face if it had to deal with several staff representative bodies, which may have divergent views, and the desirability of decisions made by the Administration with the agreement of a staff representative body applying to the entirety of the staff. Article 4.1 of the statute of the Staff Association, which provides that "all members of the staff of UNEP are members of the Staff Association", was evidently drafted in the light of these considerations. However, apart from these considerations, the Staff Rules and the statute of the Staff Association cannot negate the right of staff members to refuse to become, or to withdraw from, the sole staff representative body provided for in rule 108.1(*e*). Besides, the right to freedom of association recognized by the rule itself, the Universal Declaration of Human Rights (to which the United Nations is solemnly pledged — *Robinson*, Judgment No. 15 of the United Nations Administrative Tribunal), states that "no one may be compelled to belong to an association" (article 20, paragraph 2). Accordingly, the staff members who have resigned from the Staff Association should no longer be regarded as members of that body, and they are also entitled to form a separate staff association.

3. Assuming the Staff Association were to continue to be recognized as the sole and exclusive staff representative body in terms of rule 108.1(*e*) (see question (*b*)), the Executive Director should not have formal contacts and communications with any other staff association on issues relating to staff welfare. However, informal consultations with such other staff associations would be permissible, if the Executive Director so desires, and it would also be open to those associations to submit proposals to the Executive Director which he may consider (though he is not obliged to do so).

Question (b)

4. In requiring that all formal contacts and communications on issues relating to staff welfare must be through a single staff representative body, rule 108.1(*e*) assumes that, as required by regulation 8.1(*b*), that body is organized in such a way as to afford equitable representation to all staff members. From a letter sent on behalf of a UNEP staff Subcommittee investigating the statutes of staff associations within the United Nations system, it appears that the principal complaint of the staff members who have resigned from the Staff Association is that article 17.1 of the Association's statute is so drafted that Professional staff do not obtain equitable representation in the Staff Committee, which is the principal executive organ of the Staff Association. Since, under that article, all staff are entitled to vote for the representatives of all electoral units of the Staff Committee (including the two units consisting of the professional staff), and since the General Service staff heavily outnumber the Professionals, the former can in fact determine which candidates will represent the latter in the Staff Committee.

5. Regulation 8.1(*b*) requires electoral regulations drawn up by a staff representative body to be agreed to by the Secretary-General. It would appear, however, that the statute of the Staff Association, including its electoral regulations, was never agreed to by the Executive Director (who has delegated authority from the Secretary-General to agree to it). However, the practice has been to permit the use of unapproved electoral regulations as long as the Secretary-General or his delegate does not explicitly object. Indeed, no objection would normally be forthcoming if the election procedures worked satisfactorily.

6. In the light of the current situation, however, we believe it would be justifiable for the Executive Director to indicate to the Staff Association that he can no longer recognize it as the sole and exclusive representative body envisaged in rule 108.1(*e*), for the reason that it is not organized in such a way as to afford equitable representation to all staff members. It could, of course, continue to function as a staff association representing its members, and the Executive Director would consult with it, and entertain proposals made by it. However, the funds earmarked for it as the sole and exclusive representative body envisaged in rule 108.1(*e*) need not be released to it — and probably should at most be released in proportion to the staff it does represent. A relationship involving informal consultation may also be established with any newly formed staff association. Since, clearly, it is to the advantage of all concerned that the staff be once more represented by a single staff association, efforts should be made to agree on a set of electoral regulations which are equitable and acceptable to both factions.

Question (c)

7. Article 18.4 of the statute of the Staff Association provides that "a resignation shall take effect on the date on which the vacancy has been filled". In the present case, the vacancies created by the letters dated 29 April and 4 May 1987 could not be filled because no nominations were forthcoming as required by articles 16.3, 16.4 and 16.5 of the Staff Association statute. The purpose of article 18.4 appears to be to permit the Staff Committee's proceedings to be conducted uninterruptedly despite the resignation (e.g., to prevent an inability to hold meetings owing to the lack of a quorum). However, a secondary effect of this provision is to prevent a resignation from taking effect, in spite of the express wishes of the incumbent, until a successor takes office — a matter over which the incumbent has no control and which may, as in the present case, take indefinitely long. If the position of staff representative is considered as essentially an assignment to a Secretariat organ (and staff associations are that), then it might be argued that an incumbent cannot resign except subject to the conditions specified — i.e. those in article 18.4. However, because of the special nature of staff associations, they are subject to the basic rule of freedom of association discussed in paragraph 2 above — and if a staff member cannot be required to participate in a staff association, a fortiori he cannot be required to retain an office in it indefinitely. But even aside from this, we consider that the article should be read subject to the qualification that a resignation must in any event be permitted to take effect at the expiration of a period reasonably sufficient for the completion of the procedures necessary for filling the vacancy.

17 November 1987

11. QUESTION OF THE ACCEPTANCE BY A STAFF MEMBER OF A NOMINATION BY THE GOVERNMENT OF A MEMBER STATE AS "CHEVALIER DE LA LÉGION D'HONNEUR" — REGULATION 1.6 OF THE STAFF REGULATIONS OF THE UNITED NATIONS — ARTICLE 100, PARAGRAPH 2, OF THE CHARTER OF THE UNITED NATIONS

Memorandum to the Chef de Cabinet, Under-Secretary-General, Executive Office of the Secretary-General

1. You have asked for my advice concerning the acceptance by a staff member of his nomination by the Government of (name of a Member State) as "Chevalier de la Légion d'Honneur" for his previous service with the Government.

2. This matter is regulated by regulation 1.6 of the Staff Regulations of the United Nations, which reads as follows:

> "No staff member shall accept any honour, decoration, favour, gift or remuneration from any Government excepting for war service; nor shall a staff member accept any honour, decoration, favour, gift or remuneration from any source external to the Organization, without first obtaining the approval of the Secretary-General. Approval shall be granted only in exceptional cases and where such acceptance is not incompatible with the terms of regulation 1.2 of the Staff Regulations and with the individual's status as an international civil servant."

The first clause of the regulation, which is applicable here, lays down a categorical injunction against acceptance by a staff member of any honour, decoration, favour, gift or remuneration *accorded by a Government*. It leaves absolutely no discretion to the Secretary-General for approval of such acceptance. This is emphasized by the fact that as regards honour, decoration, favour, gift or remuneration from non-governmental sources, the Secretary-General is given strictly circumscribed discretion to approve acceptance.

3. The basis for this regulation lies in Article 100, paragraph 2 of the Charter of the United Nations, which reads:

> "Each Member of the United Nations undertakes to respect the exclusively international character of the responsibilities of the Secretary-General and the staff and not to seek to influence them in the discharge of their responsibilities."

4. The categorical injunction laid down by the first clause of regulation 1.6 has been strictly and consistently enforced in practice.

5. In conclusion, the nomination of "Chevalier de la Légion d'Honneur" can only be accepted by the staff member after leaving the Organization.

25 November 1987

12. Termination of a permanent or fixed-term appointment for absence on sick leave — Relevant provisions of the Staff Regulations and Rules of the United Nations

Memorandum to the Medical Director, United Nations Headquarters and to the Director, Office of the Under-Secretary-General for Administration and Management

This is with reference to the question of what can be done about staff members who constantly have certified illnesses, to the point of exhausting or even exceeding their authorized sick leave. The following text is based on the preliminary thoughts we had prepared for a meeting on this subject, taking into account the points discussed.

1. *Challenging certification*

Under rule 106.2(*a*) (viii) of the Staff Regulations and Rules of the United Nations, the Secretary-General (i.e., the Medical Director) can in effect challenge a staff member's claim to sick leave, even if certified by the latter's physician. Any resulting dispute must be submitted to a mutually agreed independent practitioner or medical board — which is rarely done. Though the relevant rule does not indicate whether or not such a determination is final, the answer probably is that, though the Secretary-General is not bound, he is unlikely to prevail in the United Nations Administrative Tribunal if he should disregard such a determination without an excellent reason.

2. *Disciplinary dismissal*

If it is found that a certification was forged or procured fraudulently, or that sick leave is abused for outside work, then appropriate disciplinary action — probably summary or other disciplinary dismissal — can be taken. Some disciplinary action can also be taken if a staff member on sick leave leaves the area of the duty station without permission, in violation of rule 106.2(*a*) (ix).

3. *Termination for reasons of health*

Regulation 9.1(*a*) permits the termination of a permanent appointment (and regulation 9.1(*b*) of a fixed-term appointment) if the staff member "is, for reasons of health, incapacitated for further service." This raises several questions:

(*a*) Can a person be considered incapacitated for further service merely because of frequent, extensive absences, if between such absences he can actually perform work? At least in certain positions, it could be held that reasonably consistent and reliable presence is of the essence, and that someone who must be irregular for reasons of health therefore cannot hold such posts; if, then, such a person is not qualified for any other post, termination under regulation 9.1(*a*) would be appropriate.

(*b*) Would an official terminated under regulation 9.1(*a*) necessarily be entitled to a disability benefit under article 33 of the United Nations Joint Staff Pension Fund Regulations — which would merely shift to the Pension Fund

(UNJSPF) a burden otherwise borne by the Organization? The standard established by paragraph (*a*) of that article is "incapacitated for further service in a member organization reasonably compatible with his abilities, due to injuries or illness constituting an impairment to health which is likely to be permanent or of long duration." Although a prediction of duration is not explicitly required by regulation 9.1(*a*), it might be considered implied — i.e., if an official with a bad sick leave record can show that in the future he will no longer have such problems (e.g., as a result of an operation or a cure), termination would be inappropriate. Nevertheless, it might be possible to terminate someone under this regulation without also awarding a disability benefit; in this respect it might help that the respective decisions are taken by different bodies, though the Administrative Tribunal is likely to examine critically any apparently inconsistent decisions on termination and disability benefits. The situation is not essentially different if the health problem is service-incurred, except that the person would then also be entitled to some payment under article 11.1(*c*) of appendix D to the Staff Rules (subject to article 4.1).

(*c*) What procedure would be used to implement a termination for reasons of health? The Staff Rules are silent on this, since the relevant function of the Appointment and Promotion Board is limited to the termination of appointments for unsatisfactory service (see rule 104.14(*f*) (ii) (*c*), and para. 4 below). Though this would suggest that a health-related termination could be carried out without following any special procedures and without any review by a joint body, this would be an unsatisfactory approach. It might therefore be best to amend the cited rule slightly to provide for the competence of the Appointment and Promotion Board in those cases, or to assume that the Board already has such competence.

4. *Termination for unsatisfactory service*

Regulation 9.1(*a*) also provides for termination "if the services of the individual concerned prove unsatisfactory". The question therefore is whether excessive absences for reasons of health might, by themselves, constitute unsatisfactory service?

(*a*) In favour of that proposition, it might be argued that staff are entitled to generous sick leave (staff rule 106.2); therefore, any absence beyond that must be first by annual leave and, on the exhaustion of the latter, by special leave (with full, partial or no pay) under staff rule 105.2(*a*); as such special leave need not be granted, i.e. it is a matter of grace, it would not be unreasonable to deny such leave and, if the staff member remains absent, there could be termination for unsatisfactory service or for abandonment of post.

(*b*) However, against this proposition it could be argued that in the cited regulation the provision concerning unsatisfactory service is followed immediately by that for separation for reasons of health (see para. 3 above), so that if the service is unsatisfactory only for reasons of health, then that latter provision should be relied on.

(*c*) Although there may be instances in which a staff member who has excessive health-related absences, serves perfectly satisfactorily when present, it is likely that in most instances this is not so. Consequently, if a staff member's

service, taken as a whole, with due account of the health-related absences, is not satisfactory, this should be reflected in the performance evaluation reports, and termination or non-renewal action be taken accordingly.

5. *Agreed termination*

If a staff member cannot be terminated for unsatisfactory service (see para. 4 above), and separation for reasons of health is considered too expensive for the Organization and/or the Pension Fund (see subpara. 3(*b*) above), termination under the final paragraph of regulation 9.1(*a*) can be considered. This requires the payment of a termination indemnity (which for long-serving staff (over 15 years) amounts to a year's pay), plus payment in lieu of notice under rule 109.3(*c*) of the Staff Rules (usually three months), plus possibly, under regulation 9.3(*b*), termination indemnity up to 50 per cent higher than that which would otherwise be payable — for a total equivalent to some 21 months' salary. In this connection it should be noted:

(*a*) Such payments should not be agreed to if the remaining period of service (to normal retirement or to expiration of a fixed-term contract) would not justify it.

(*b*) No matter how much is offered (within the permissible parameters stated above), the staff member need not accept, and may insist on a more favourable termination for reasons of health (see para. 3 above).

(*c*) If the staff member is mentally badly disturbed, "agreed" termination may not be an option, for the staff member may no longer have the capacity to consent — and thereby in effect waive his rights to a disability benefit.

6. *Extension of fixed-term appointments until exhaustion of sick leave*

It is the policy of the Organization that if a staff member is on sick leave at the time his fixed-term appointment expires, such appointment is extended until the sick leave is exhausted.[11]

7. *Retirement during sick leave*

Although some time ago the UNJSPF Secretary took the position that an official on sick leave could not take regular, early or deferred retirement benefit, but had to take a disability benefit, which precluded the receipt of a partial lump sum withdrawal, in view of the *Zanartu* case[12] that position is no longer maintained. Consequently, officials on sick leave can opt for regular retirement benefit.

11 August 1987

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13. Assessment of damage to United Nations vehicles and United Nations-owned equipment attributable to gross negligence on the part of personnel of a United Nations peace-keeping mission — UNTSO administrative circular 7/79 — Rule 112.3 of the Staff Rules of the United Nations

Memorandum to the Director for Field Operational and External Support Activities, Department of Administration and Management

1. This is in response to your memorandum of 20 July on the assessment of damage to United Nations vehicles and United Nations-owned equipment attributable to gross negligence on the part of personnel of a United Nations peace-keeping mission. You state that difficulties have arisen in two areas regarding such assessment. You first indicate that:

> "Whenever the circumstances fit the definition precisely, the existing definition of gross negligence and the situations under which a charge for damage may be assessed are causing little difficulty at the missions. However, there are two principal areas where additional clarification is called for, namely:
>
> — Where United Nations-owned vehicles are being used for 'off-duty' purposes, or for 'liberty travel' for which a mileage charge is being assessed, and
>
> — Whether a distinction needs to be made in respect of military personnel between United Nations military observers (UNMOs) in an observer mission and soldiers in a national contingent in a peace-keeping force."

In this regard, you mention that the Property Survey Board of the United Nations Truce Supervision Organization (UNTSO) operates on the basis of UNTSO administrative circular 7/79, and point out that thereunder "the driver, whether he is a military observer or a United Nations civilian staff member, can be held financially responsible for up to 100 per cent of the actual cost of repairs/loss incurred by the Organization, in cases where damage results from his negligence, whether gross or not, while the vehicle is being used for 'liberty travel'".

2. Regarding your request for "some additional guidance on the application of the gross negligence provisions as a basis for assessing damage sustained by United Nations vehicles and other items of United Nations-owned equipment in a peace-keeping operation", we would refer you to advice on this general subject that has been previously provided in the following documentation:

(*a*) Memorandum dated 17 October 1969 from the Assistant Secretary-General, Office of General Services, and the Legal Counsel, to the Chairman of the Headquarters Property Survey Board entitled "Procedure in vehicle accident cases";

(*b*) Legal opinion of 20 August 1975, entitled "Advice on the procedure to be followed to collect compensation for damage caused to UNEF property by members of military contingents";[13]

(*c*) 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";[14]

(*d*) Memorandum dated 8 March 1976 from the Director of the General Legal Division, Office of Legal Affairs, to the Chairman of the Headquarters Property Survey Board, entitled "Financial responsibility of staff members for non-fault vehicle accidents";

(*e*) Letter dated 2 March 1979 from the Acting Director of the General Legal Division, in charge of the Office of Legal Affairs, to the Legal Adviser, Office of the Chief Coordinator of United Nations Peace-keeping Missions in the Middle East.

3. With respect to this documentation, we would particularly point out that the referenced UNTSO administrative circular, which appears to apply only to civilian staff members and military observers, comports with the advice presented in the above-cited legal opinion of 6 October 1975 as well as rule 112.3 of the Staff Rules of the United Nations. This legal opinion, in citing the following part of the above-referenced Legal Counsel's memorandum of 17 October 1969, indicates that the circumstances under which a driver of a United Nations vehicle should be considered financially accountable to the Organization for damage caused to the vehicle depend in part on whether it was being used for official or non-official purposes:

> "Section VII of the draft [text of the Property Survey Board to establish assessment policy guidelines] would, as we understand it, make a driver of a United Nations vehicle financially accountable, subject to certain limitations, for damage caused to the vehicle if it is damaged (*a*) while being used on official business as a result of gross negligence on the part of the driver, (*b*) while being used on official business as a result of negligence, but not gross negligence, on the part of the driver, and (*c*) while being used for a recreational purpose (a permissible use in certain missions) as a result of negligence, whether gross or not, on the part of the driver.
>
> "A case of gross negligence in our opinion would be one involving an element of recklessness such as driving a vehicle at an obviously excessive speed or while intoxicated or in obvious breach of the rules of the road.
>
> "To require a driver to be financially accountable in cases of the type referred to in (*a*) and (*c*) above would not appear to be unreasonable. It does not seem reasonable to us, however, that a United Nations driver should be made financially accountable in the type of case referred in (*b*) ...."[15]

We would mention that insofar as this opinion, in addressing the issue of assessment of staff members and military observers, maintains that a driver of a United Nations vehicle should be held financially accountable for damage caused to the vehicles as a result of gross negligence on his/her part while driving for official purposes, and for damage resulting from negligence, whether gross or not, on his/her part while driving for recreational/non-official purposes, the position expressed is consistent with the principle of financial responsibility of staff presented in rule 112.3 of the Staff Rules. Under that rule, it is permissible to require a staff member "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."

17 September 1987

14. REQUEST FOR AN *EX-GRATIA* PAYMENT ON BEHALF OF A FORMER MEMBER OF A NATIONAL CONTINGENT IN THE UNITED NATIONS EMERGENCY FORCE IN THE SINAI DESERT — CONDITIONS TO BE MET FOR AN *EX-GRATIA* PAYMENT TO BE APPROPRIATE — RULE 110.13(*a*) OF THE FINANCIAL REGULATIONS AND RULES OF THE UNITED NATIONS — UNITED NATIONS PRACTICE REGARDING REIMBURSEMENT OF COMPENSATION AWARDS MADE BY TROOP-CONTRIBUTING COUNTRIES TO CONTINGENT MEMBERS

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

1. This is in response to your routing slip of 3 February seeking our comments on the letter from solicitors to the United Nations Secretariat of 19 January 1987, concerning their request for an *ex-gratia* payment on behalf of a former member of the contingent of a Member State in the United Nations Emergency Force in the Sinai Desert II in 1974. The solicitors are requesting that the United Nations make this payment to their client, on the basis that the latter has allegedly been suffering from insomnia, stress, anxiety and depression which his medical advisor has intimated stems from his tour of duty with those forces.

A determination regarding an award of an ex-gratia *payment cannot be made on the basis of the claims as presented*

2. While it would be for the Office of the Under-Secretary-General for Administration and Management to decide whether an *ex-gratia* payment would be appropriate in this case, rule 110.13(*a*) of the Financial Regulations and Rules of the United Nations specifies that an award of an *ex-gratia* payment may be considered only after there has been an initial determination by our Office that no legal liability exists on the part of the Organization. We are unable to make such a determination at this stage for the following two reasons:

(*a*) Based on established United Nations procedures for dealing with compensation claims from members or former members of various United Nations peace-keeping operations, all claims of this nature must be forwarded officially to the United Nations by the respective claimant's national Government, through its permanent mission to the United Nations, and not by the individual claimant directly. It has been the practice of the United Nations to reimburse a troop-contributing State for compensation paid on behalf of one of its nationals for death, injury or illness incurred while performing official duties with a United Nations peace-keeping force, provided that such payment has been made in accordance with the national legislation applicable to service in the armed forces of that State and that the State's claim for reimbursement has been duly certified by its Auditor-General (or an official of similar rank) as based on payment properly made pursuant to specific provisions of national legislation.

(*b*) There is insufficient evidence available upon which to make an assessment regarding legal liability as no substantiating documentation (i.e., factual, medical or legal certification) has been submitted with respect to this claim.

Establishment of the United Nations practice regarding reimbursement of compensation awards made by troop-contributing countries to contingent members

3. The aforementioned United Nations practice regarding reimbursement of compensation awards is referred to by the Secretary-General in paragraph 21 of his report on the "Financing of the United Nations Emergency Force and of the United Nations Disengagement Observer Force", dated 30 October 1974[16] which states:

> ". . . The Secretary-General has continued the practice whereby a troop contributor [to a United Nations peace-keeping force] makes such payments [i.e., death and disability awards] to beneficiaries as are prescribed under the national legislation of its country and reimbursement is then claimed from the United Nations for such amounts."

4. The principle that compensation payments for service-incurred death or disability must be made in the first instance by the troop-contributing State concerned was embodied explicitly in the regulations respectively governing UNEF I and UNFICYP. Article 40 of the Regulations for the United Nations Emergency Force, dated 20 February 1957,[17] provides:

> *"Service-incurred death, injury or illness.* In the event of death, injury or illness of a member of the Force attributable to service with the Force, the respective State from whose military services the member has come will be responsible for such benefits or compensation awards as may be payable under the laws and regulations applicable to service in the armed forces of the State . . ."

Article 39 of the Regulations for the United Nations Peace-keeping Force in Cyprus, dated 25 April 1964,[18] incorporates the exact wording of article 40 of the UNEF I Regulations.

5. While no comparable set of regulations was issued with respect to UNEF II, provisions were similarly made in the budgets for the Force for reimbursement of death and disability awards made by troop-contributing States. For example, the cost estimates for UNEF for the period from 25 October 1973 to 24 April 1974 included US$ 200,000 for reimbursement of "extra and extraordinary costs to Governments — death and disability awards to members of contingents".[19] With reference to the combined cost estimates for UNEF and UNDOF for the period from 25 October 1978 to 24 October 1979, the report of the Secretary-General on "Financing of the United Nations peace-keeping forces in the Middle East — United Nations Emergency Force and United Nations Disengagement Observer Force", dated 15 November 1978,[20] explained, in annex II, paragraph 75, as follows, that the specific cost estimates for "death and disability awards" were based on a formula of reimbursement:

> "These estimates provide for the reimbursement of troop-contributing Governments for payments made by them based upon national legislation and/or regulations for death, injury, disability or illness of members of the Forces attributable to service with UNEF and UNDOF."

3 April 1987

15. Question of reservations to the 1953 Convention on the Political Rights of Women — Comments on suggestions to bring article VII of the Convention into conformity with the provisions on the legal effect of reservations contained in article 21 of the 1969 Vienna Convention on the Law of Treaties

Letter to the Secretary for External Affairs, Ministry of External Affairs of a Member State

This is in response to your letter dated 4 August 1987 on the question of reservations to the 1953 Convention on the Political Rights of Women.[21]

The last paragraph of article VII of the Convention, providing that the Convention shall not enter into force between a State making a reservation and any State objecting to it, has from the very beginning been a matter of dispute between the parties to the Convention. The reservation submitted by Democratic Yemen to article VII of the Convention on 9 February 1987 and referred to in your letter is similar to those made to this article by some other countries, i.e.: Albania, Bulgaria, Byelorussian SSR, Czechoslovakia, German Democratic Republic, Hungary, Indonesia, Poland, Romania, Ukrainian SSR and the Union of the Soviet Socialist Republics. They have been objected to by Canada, Denmark, the Dominican Republic, Ethiopia, Israel, Norway, Pakistan and the Philippines.

In your letter it is suggested that the text of article VII of the aforementioned Convention should be changed and brought into conformity with the provisions on the legal effect of reservations contained in article 21 of the 1969 Vienna Convention on the Law of Treaties.[22] Two alternatives are suggested on how to proceed with these changes.

The first one envisages that the Secretary-General should prepare an amendment to article VII of the 1953 Convention, in effect bringing it into line with the 1969 Convention, and present it to the parties to the former on a 90-day, no-objection basis. With regard to this suggestion, we would like to draw your attention to the fact that the Secretary-General, as Depositary, does not have the competence under either the 1953 Convention or the 1969 Convention to propose amendments to the former, nor could an amendment take effect on a no-objection basis; indeed such an amendment could not, pursuant to article 40, paragraph 4, of the 1969 Convention, enter into force for any prior party to the 1953 Convention that does not explicitly accept the amendment.

The second alternative would be to include this question as a new item in the agenda of the forty-second session of the General Assembly to be taken up by the Sixth Committee, with a view to having the Assembly sanction the proposed amendments. In this connection it should be noted that international treaties can be amended only by the parties thereto. Consequently, the General Assembly does not have the competence to propose amendments to the 1953 Convention, though it could of course recommend to the contracting parties to consider negotiating an amendment to the 1953 Convention in order to align its article VII with the provisions of article 21 of the 1969 Vienna Convention. To initiate such a recommendation, a proposal might be submitted to the General Assembly for the inclusion of an additional item in the agenda of its current session in accordance

with the requirements of rule 15 of its rules of procedure. At the same time, it should be kept in mind that such an approach might meet with strong opposition on the part of those parties to the 1953 Convention reluctant to discuss the proposal of an amendment at a forum where States other than the parties to the Convention will be represented.

22 September 1987

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16. UNITED NATIONS PROCEDURES FOR THE INSTITUTION AND ENFORCEMENT OF FINANCIAL CLAIMS ARISING OUT OF CONTRACTS — IMMUNITY OF THE UNITED NATIONS FROM LEGAL PROCESS — ARTICLE 105 OF THE CHARTER OF THE UNITED NATIONS AND FINAL ARTICLE, SECTIONS 32 AND 34, OF THE 1946 CONVENTION ON THE PRIVILEGES AND IMMUNITIES OF THE UNITED NATIONS — SETTLEMENT OF DISPUTES ARISING OUT OF CONTRACTS OR OTHER DISPUTES OF A PRIVATE LAW CHARACTER

Letter to a professor

1. Your letter addressed to the Office of the Secretary-General was referred to the Office of Legal Affairs for a reply.

2. As we understand from the questions raised in your letter, you inquired whether the United Nations has established procedures for the institution and enforcement of financial claims. For ease of reference, your questions are addressed below in the order in which they are presented. Please also be advised that a legal opinion prepared by this Office in 1976[23] provides more detailed information on the questions you raised.

Presentation of claims

3. Private claims against the United Nations arising out of contracts or other disputes of a private law character are generally handled outside any national judicial machinery because the Organization, by virtue of its privileges and immunities, is immune from legal process.

4. Article 105 of the Charter of the United Nations provides in paragraph 1 that: "The Organization shall enjoy in the territories of each of its Members such privileges and immunities as are necessary for the fulfilment of its purposes." Paragraph 3 of the same Article authorizes the General Assembly to make recommendations with a view to determining the details of the application of the privileges and immunities provided in paragraph 1 and to propose "conventions to Members of the United Nations for this purpose."

5. On 13 February 1946, the General Assembly adopted the Convention on the Privileges and Immunities of the United Nations.[24] Final article, section 32, of the Convention states that the Convention shall become effective as regards each Member of the United Nations on the date of deposit of the instrument of accession. According to section 34 of the same article, upon such accession the Member is required to give effect under its own law to the terms of the Convention.

6. Article II, section 2, of the Convention provides:

> "The United Nations, its property and assets wherever located and by whomsoever held, shall enjoy immunity from every form of legal process except in so far as in any particular case it has expressly waived its immunity. It is, however, understood that no waiver of immunity shall extend to any measure of execution."

Although the United States only became a party to the Convention in 1970, it had already provided for the jurisdictional immunity of the United Nations (and of other intergovernmental organizations of which the United States is a member) by section 2(*b*) of the 1945 United States International Organizations Immunities Act.[25]

7. On the settlement of disputes, article VIII, section 29, of the Convention states:

> "The United Nations shall make provisions for appropriate modes of settlement of:
>
> "(*a*) Disputes arising out of contracts or other disputes of a private law character to which the United Nations is a party;
>
> "(*b*) Disputes involving any official of the United Nations who by reason of his official position enjoys immunity, if immunity has not been waived by the Secretary-General."

8. As stated in paragraph 3 above, in view of the immunity from suit enjoyed by the Organization under its constitutional and other instruments, steps have been taken to ensure that procedures are established by contract, between the Organization and private parties, for resolution of disputes. In this respect and in compliance with the Financial Regulations and Rules of the United Nations, all contracts with private parties are normally concluded in writing and are accompanied by an appropriate version of the United Nations Standard General Conditions.

9. The United Nations Standard General Conditions, which are generally attached to contracts and purchase orders, contain a provision for the settlement of disputes through arbitration. The arbitration clause currently included in purchase orders reads:

> "Any controversy or claim arising out of or in connection with this contract, or any breach thereof, shall, unless it is settled by direct negotiation, be settled in accordance with the UNCITRAL Arbitration Rules as at present in force. The parties shall be bound by any arbitration award rendered as a result of such arbitration after the final adjudication of any such controversy or claim."

10. As provided in that clause, the initial method used by the United Nations to settle disputes is through negotiations. Normally, the aggrieved party will be required to state the nature of its claim in a written submission to the substantive department administering the contract which would, in turn, refer the claim to this Office for review and advice. This Office then determines whether the claim is valid or not. If it is determined that the claim is valid and a negotiated settlement appears possible, we will normally suggest the available options for settlement of the claim. In our experience, the majority of claims are settled in this

manner. In the unlikely event of the dispute remaining unsettled, the aggrieved party is requested to submit the claim to arbitration in accordance with the UNCITRAL Arbitration Rules.

11. The UNCITRAL Arbitration Rules, unlike the American Arbitration Association (AAA) or the International Chamber of Commerce (ICC) arbitration rules, are not administered by any single arbitral body. They have, therefore, the unique advantage of being applied by many of the arbitration associations or organizations worldwide, which suits the worldwide operations of the United Nations. In some cases, however, the United Nations may agree with the contractor in advance to use the facilities of a commercial arbitral organization, such as the AAA, ICC or the London Chamber of Commerce, particularly in respect of real property transactions. In such cases a phrase, "under the auspices of . . .", would be added after the first sentence of the clause reproduced in paragraph 9 above.

Administrative procedures

12. There are no administrative procedures for initiation and resolution of financial or commercial disputes, except as stated above.

Administrative Tribunal

13. The United Nations Administrative Tribunal has jurisdiction only in cases within its competence as provided in article 2 of its statute and regulation 48 of the Regulations and Rules of the United Nations Joint Staff Pension Fund. Article 2, paragraph 1, of the statute of the Tribunal provides:

> "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."

14. The Tribunal has in the past asserted jurisdiction in claims by individuals who are employed on a contractual basis but are not accorded the status of staff members, and in respect of whom no mode of settlement of disputes was provided for in their contract of employment. However, this was only done once in the unusual case of *Teixeira v. the Secretary-General of the United Nations*, case No. 214, Judgements Nos. 233 and 255 rendered on 13 October 1978 and 24 April 1980 respectively,[26] and is unlikely to recur, since most contracts of employment by the Organization now automatically include an arbitration clause.

27 December 1987

17. NOTICE FROM A QUASI-JUDICIAL BODY OF A CHARGE OF DISCRIMINATION MADE BY A FORMER SHORT-TERM STAFF MEMBER AGAINST THE GENERAL ASSEMBLY OF THE UNITED NATIONS AND TWO UNITED NATIONS OFFICIALS — BASIS OF THE UNITED NATIONS' IMMUNITY FROM LEGAL PROCESS AND FROM THE JURISDICTION OF QUASI-JUDICIAL BODIES — CASES IN WHICH THE IMMUNITIES OF THE UNITED NATIONS AND OTHER INTERNATIONAL ORGANIZATIONS FROM ALL FORMS OF LEGAL PROCESS WERE UPHELD BY COURTS OF THE UNITED STATES

Letter to the United States Equal Employment Opportunity Commission

The notice dated 29 January 1987 from the Equal Employment Opportunity Commission (EEOC) to the United Nations General Assembly of a charge of discrimination has been referred to this Office for reply. We observe that the said notice results from the complaint of discrimination annexed to the notice made by a former short-term staff member to the New York City Commission on Human Rights (NYCCHR), and sent to EEOC for dual filing purposes. We have also noted that the complaint to NYCCHR names as respondents, in addition to the United Nations General Assembly, the Director of Recruitment, and the Director of the Publishing Division, Department of Conference Services. We wish to state that both these individuals are officials of the United Nations. However, no notice addressed to them has been received. Nevertheless, we are taking this opportunity to reply on behalf of all the respondents.

As you are no doubt aware, the United Nations is a public international organization established by a treaty, the Charter of the United Nations, to which 159 States, including the United States, are parties. Under Article 7 of the Charter, the General Assembly is a principal organ of the United Nations. The status, privileges and immunities of the United Nations are laid down in Articles 104 and 105 of the Charter and in the 1946 Convention on the Privileges and Immunities of the United Nations,[27] to which the United States became a party.

Article II, section 2, of the Convention states:

> "The United Nations, its property and assets wherever located and by whomsoever held, shall enjoy immunity from every form of legal process except in so far as in any particular case it has expressly waived its immunity . . ."

Article V, section 18, provides:

"Officials of the United Nations shall:

"(*a*) Be immune from legal process in respect of words spoken or written and all acts performed by them in their official capacity; . . ."

The status of the premises of the United Nations is also provided for in the Agreement between the United Nations and the United States of America regarding the Headquarters of the United Nations of 26 June 1947.[28] In the United States, the privileges and immunities of the United Nations are also provided for in the International Organizations Immunities Act.[29]

In view of the provisions of the above legislation and treaties, the United Nations, its organs or officials cannot be made subject to process of EEOC, nor can they be made party to its proceedings. The courts of the United States have upheld the immunities of the United Nations and other international organizations

from all forms of legal process. In *Tuck v. Pan American Health Organization*, it was held that an international organization was immune from suit by a non-employee who alleged tortious interference with his contract.[30] In *Broadbent v. Organization of American States*,[31] an action brought by members of the OAS staff alleging breach of their employment contract was dismissed on the ground that the organization was immune.[32] In *Kissi v. de Laroisiere*,[33] the court held that the Director of the International Monetary Fund was immune from a discrimination claim instituted by one of the Fund's employees.

The United Nations and other international organizations are equally immune from the jurisdiction of quasi-judicial bodies. In *Canteen Corporation, Restaurant Associations Industries, Inc.* and *Commercial Services of the United Nations*[34] before the National Labor Relations Board, Region 2, of New York, the Regional Director held, on 31 July 1986, that a service of the United Nations is immune from an action instituted by an employee of a contractor, Canteen Corporation, alleging violation of section *a* (1), (3) and (5) of the National Labor Relations Board Act. The Regional Director stated in paragraph 3 of the Ruling:

> "With regard to the contention that the Commercial Management Service of the United Nations violated the Act, further proceedings are not warranted inasmuch as this Organization is exempted from the Board's jurisdiction under the Public International Organization Act, 22 U.S.C. 288, which sets forth the privileges and immunities of the United Nations. You contend that the Headquarters Agreement between the United Nations and the United States in effect constitutes consent to the application of United States law to the United Nations. I note, however, that the United Nations does not interpret the Headquarters Agreement in this manner and contests an assertion of jurisdiction by the National Labor Relations Board in this case. Moreover the Agreement seems to refer to the application of United States Law to the premises of the United Nations but not to the application of such law over the United Nations as an entity. Thus, in the absence of any clear consent by the United Nations to the jurisdiction of the National Labor Relations Board, I conclude that the Board is precluded from asserting jurisdiction over Commercial Management Services, a division of the United Nations."[35]

The Ruling of the Regional Director was upheld by the General Counsel, National Labor Relations Board, on 28 August 1986. The General Counsel stated:

> "The appeal is denied substantially for the reasons set forth in the Regional Director's letter of 31 July 1986. Contrary to your contention on appeal, the United Nations has taken a position before the Regional Office that it is not subject to the jurisdiction of this Agency, and the Board in the past has refused to assert jurisdiction over similar international entities."[36]

Consequently, the Commission is requested to dismiss the totality of the complaint in question against the United Nations and its above-mentioned officials. We should mention that, in regard to complaint No. 11126514-EP made to NYCCHR, we have submitted in a letter dated 2 March 1987 to the Intake Supervisor that NYCCHR, for the reasons set out above, has no jurisdiction to hear the complaint in question, and requested that the totality of that complaint be dismissed.

We should add that employment by the United Nations is subject to the Staff Regulations and Rules of the United Nations. The complainant served as a Clerk-Labourer on a short-term appointment during the thirty-sixth session of the General Assembly (1981) and again on short-term appointments in March and

May 1982 during the Conference on the Law of the Sea. He sought further employment with the United Nations after the expiration of his last short-term appointment on 31 May 1982. His application, together with those of the many others seeking employment, was duly considered, but it was not found possible to give him further employment. In this connection, we bring to your attention rule 304.4 of the Staff Rules of the United Nations, which provides that "a short-term appointment does not carry any expectancy of renewal or of conversion to any other type of appointment."

We also wish to mention that the Staff Regulations and Rules of the United Nations provide both administrative and judicial recourse procedures to which employees and ex-employees who believe that they have been affected by unlawful personnel action, including discriminatory action, might resort. The complainant did not seek to avail himself of these procedures.

3 March 1987

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18. STATUS OF UNITED NATIONS CORRESPONDENCE DISPATCHED IN BAGS — OBLIGATIONS OF MEMBER STATES TO GRANT PRIVILEGES AND IMMUNITIES TO SUCH CORRESPONDENCE UNDER THE 1946 CONVENTION ON THE PRIVILEGES AND IMMUNITIES OF THE UNITED NATIONS AND THE 1961 VIENNA CONVENTION ON DIPLOMATIC RELATIONS

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

The Legal Counsel has the honour to refer to the status of the United Nations correspondence dispatched in bags.

The Legal Counsel's attention has recently been drawn to the fact that United Nations pouches, being clearly marked and denoted as such by a seal, were forcibly opened and examined by the authorities of (name of a Member State) when they arrived on 1 September and 19 October 1987 at their destination. Such acts give rise to serious concern on the part of the United Nations as they violate the legal status of the United Nations bags and contradict the relevant obligations of (name of the Member State) under existing international conventions.

In this connection it should be recalled that pursuant to article III, section 10, of the Convention on the Privileges and Immunities of the United Nations of 13 February 1946[37] to which (name of the Member State) is a party, the Organization has the right, *inter alia*, to dispatch and receive its correspondence in bags, which shall have the same immunities and privileges as diplomatic bags. The detailed provisions on the privileges and immunities of diplomatic bags are set out in the 1961 Vienna Convention on Diplomatic Relations,[38] to which (name of the Member State) also is a party. Article 27, paragraph 2, of the Vienna Convention unequivocally provides that the diplomatic bag shall not be opened or detained. Furthermore, paragraph 1 of the same article requires that the packages constituting the diplomatic bag must bear visible external marks of their character.

The Legal Counsel trusts that the incidents involving United Nations pouches will not recur and that the competent authorities will strictly respect their relevant obligations under the aforementioned international conventions.

17 November 1987

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19. REQUIREMENT UNDER THE LAW OF A MEMBER STATE THAT LOCALLY RECRUITED UNITED NATIONS OFFICIALS OBTAIN A WORK PERMIT FROM LOCAL AUTHORITIES — ARTICLES 100 AND 101 OF THE CHARTER OF THE UNITED NATIONS — ARTICLE V, SECTION 17, OF THE CONVENTION ON THE PRIVILEGES AND IMMUNITIES OF THE UNITED NATIONS — MEANING OF THE TERM "OFFICIALS" FOR THE PURPOSES OF ARTICLE V, SECTION 17, OF THE CONVENTION IN THE LIGHT OF GENERAL ASSEMBLY RESOLUTION 76(I)

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

The Legal Counsel of the United Nations presents his compliments to the Permanent Representative of (name of a Member State) to the United Nations and has the honour to refer to the question of work permits for locally recruited United Nations officials.

The Legal Counsel has been informed by the United Nations offices in your country that, pursuant to a recently promulgated law, all locally recruited officials are required to obtain work permits from the municipal authorities and that such a permit is a legal requirement for all nationals of (name of the Member State) working for foreign diplomatic and international organization missions.

In this connection, the Legal Counsel wishes to draw the attention of the competent authorities to the following. The recruitment and appointment of United Nations officials are governed by Articles 100 and 101 of the Charter of the United Nations to which (name of the Member State) is a party. According to Article 101, the staff shall be appointed by the Secretary-General, who is the chief administrative officer of the Organization. In so far as the issuance of work permits may impede the exercise of the Secretary-General's exclusive authority to appoint his staff under Article 101 of the Charter of the United Nations, the Legal Counsel is, therefore, obliged to point out that the law in question would not be in conformity with the obligations of the State concerned under the Charter.

On the other hand, in accordance with article V, section 17 of the Convention on the Privileges and Immunities of the United Nations,[39] to which (name of the Member State) is also a party, the Secretary-General is required to communicate to the Governments of Member States the names of officials of the United Nations. Since, by its resolution 76(I) of 7 December 1946, the General Assembly decided that all staff members of the United Nations, with the exception of those who are both recruited locally and assigned to hourly rates, are to be considered "officials" for the purposes of article V, section 17, of the Convention, the names to be communicated to the Government of (name of the Member State) would necessarily include all locally recruited staff members as referred to above.

The Legal Counsel is convinced that the requirement for locally recruited international civil servants of the nationality of (name of the Member State) to obtain work permits has occurred as a result of an oversight or misinterpretation of the relevant obligations of the said State. The Legal Counsel therefore hopes that in the light of the foregoing explanations, the competent authorities will take the necessary measures with a view to clarifying the scope of application of the work permit law and thus will not impede the exercise of the Secretary-General's authority to recruit and appoint his staff.

19 January 1987

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20. CONSCRIPTION OF UNITED NATIONS STAFF MEMBERS INTO THE ARMED FORCES OF A MEMBER STATE — QUESTION WHETHER THE PROVISIONS OF THE 1946 CONVENTION ON THE PRIVILEGES AND IMMUNITIES OF THE UNITED NATIONS CAN BE CONSIDERED APPLICABLE TO ALL STAFF MEMBERS OF THE UNITED NATIONS SYSTEM

Letter to the Resident Representative of the United Nations Development Programme in a Member State

Your letter of 2 September 1987 in which you raised the question of the conscription of United Nations staff members into the armed forces of (name of a Member State) has been referred to this Office for advice.

In your letter, after referring to the cases of two FAO staff members whose fixed-term contracts expire on 31 December 1987 and who have been conscripted into the armed forces, you note that while you are aware that the Government of the State in question has not signed the Convention on the Privileges and Immunities of the Specialized Agencies you would nevertheless wish to adopt a position *vis-à-vis* the Government whereby the Convention on the Privileges and Immunities of the United Nations would apply to all staff members of the United Nations system, including the specialized agencies.

From a strictly legal point of view, the Convention on the Privileges and Immunities of the United Nations only applies to United Nations officials. However desirable it may be to adopt a uniform position for all staff members of the United Nations system, as a matter of legal obligation the Government of the State in question is not obliged to grant an exemption from national service for staff members of the specialized agencies. Accordingly, the only position that it is possible to take *vis-à-vis* the staff members of the specialized agencies is to request the Government to defer or exempt staff members, not as a matter of legal obligation but merely by reason of their employment with the agency concerned. The argument that United Nations staff members are exempted may be used in support of this request. If the Government declines to grant the exemption, the arrangements for military service which are normally applicable would be to place the staff member on special leave without pay for the duration of the

required military service. Special leave without pay is normally provided only to staff members who have completed one year of satisfactory probationary service or who hold permanent or regular appointments.

17 September 1987

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21. CONSCRIPTION IN A MEMBER STATE OF ONE OF ITS NATIONALS HOLDING A FIXED-TERM APPOINTMENT IN THE SECRETARIAT OF THE ECONOMIC AND SOCIAL COMMISSION FOR WESTERN ASIA — ANALYSIS OF THE DIFFERING PROVISIONS ON MILITARY SERVICE CONTAINED IN THE 1979 AGREEMENT RELATING TO THE HEADQUARTERS OF THE UNITED NATIONS ECONOMIC COMMISSION FOR WESTERN ASIA AND IN THE 1946 CONVENTION ON THE PRIVILEGES AND IMMUNITIES OF THE UNITED NATIONS

Memorandum to the Assistant Secretary-General, Office of Human Resources Management

1. This is in reference to a cable from the Economic and Social Commission for Western Asia received on 6 October, requesting our advice on the question of the conscription in a host State of a national of that State, who is a Security Officer holding a fixed-term appointment at ESCWA.

2. The status of members of the staff of ESCWA *vis-à-vis* the host Government is governed by the Agreement relating to the headquarters of the United Nations Economic Commission for Western Asia of 13 June 1979.[40] Article 8, paragraph 1(*d*), provides that the officials of ESCWA are exempted from any national service obligations, but "with due regard to the provisions of paragraph 2 of this article". That paragraph provides that officials of the Commission who are nationals of the host State shall not be exempt from the military service obligations or any other obligatory service in the State in question. However, those who, by virtue of their functions, are put on a nominal list drawn up by the Executive Secretary and approved by the competent authorities of the host State shall, in the event of mobilization, be given special assignments in accordance with the national legislation. Also such authorities shall grant, upon the request of the Commission and in the event of other officials of the Commission, nationals of the host State, being called up for national service, the waivers which might be necessary to avoid the interruption of a basic service. The person in question does not fall under either category of exemption and is therefore required to obey the call to military service by the authorities of the host State.

3. The question of the immunity of officials of the United Nations in respect of military service is also addressed in the Convention on the Privileges and Immunities of the United Nations of 13 February 1946,[41] to which the host State acceded without reservations. Article V, section 18(*c*), of that Convention provides that officials of the United Nations are "immune from national service obligations". There is no exception permitting officials to be drafted by their own Governments.

4. In attempting to reconcile the differing military service provisions of the ESCWA headquarters Agreement and of the Convention we looked for possible

guidelines in the two instruments as to how to interpret them in relation to each other. The Convention is silent on that point. However, the ESCWA headquarters Agreement contains several relevant provisions:

(*a*) The third paragraph of the preamble states that "the Convention on the Privileges and Immunities of the United Nations . . . to which (the host State) is a party, applies by definition to the United Nations Economic Commission for Western Asia";

(*b*) The fourth paragraph of the preamble states that the Agreement supplements "the Convention on Privileges and Immunities of the United Nations in order to regulate matters not covered therein . . .";

(*c*) Article 13, paragraph 2, provides as follows:

> "The provisions of this Agreement shall be considered supplementary to the provisions of the Convention on the Privileges and Immunities of the United Nations. When a provision of this Agreement and a provision of the Convention deal with the same subject, *both provisions shall be considered complementary* whenever possible; both of them shall be applied and neither shall restrict the force of the other." (emphasis added)

In respect of the present problem it might be argued that as the basic provisions on conscription in the Convention and in the ESCWA headquarters Agreement are substantially equivalent, but as the Headquarters Agreement contains an exception in respect of nationals of the host State, that exception, which is *lex specialis* and was negotiated later than the Convention, should prevail over the earlier and more general provision of the Convention. Though this would clearly be a conclusive argument if the Convention is treated primarily as equivalent to a series of bilateral agreements between the Organization and each member State party to the Convention, the fact that the Convention is a multilateral instrument casts some doubt on this interpretation. Nevertheless, it could still be viewed as the best possible interpretation, and consequently there would appear to be no legal ground to oppose against the proposed conscription.

B. *Status of a drafted staff member in relation to the United Nations*

5. The second question raised in the above-mentioned cable concerns the legal status of the person in question *vis-à-vis* ESCWA from the date of his conscription until the expiration of his fixed-term contract on 8 August 1988, if the Administration decides not to raise the question of the exemption with the authorities of the host State and lets the staff member respond to the call for military service.

6. Unless the staff member resigns voluntarily, the last sentence of paragraph (*c*) of appendix C to the Staff Rules is applicable, which requires that the staff member be separated from the Secretariat according to the terms of his appointment. Unfortunately, that provision is not too useful in the present case, for the staff member's appointment will only expire in August 1988, and there does not appear to be any special termination provision in his letter of appointment, nor do any of the normal grounds for termination listed in regulation 9.1(*b*) appear applicable. It would therefore appear necessary to apply by analogy the provision of the first sentence of paragraph (*c*) of appendix C (which applies to officials on permanent or regular appointment), *i.e., to place him on special leave without pay for the duration of the military service or until the expiration date of*

the fixed-term contract, whichever comes first. There would, however, then be some uncertainty about whether paragraph (*d*) then guarantees his re-employment even after the expiration of his appointment, but the sounder interpretation would appear to be that it would not (since that provision, like the first sentence of paragraph (*c*), assumes a permanent or regular appointment).

16 October 1987

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22. QUESTION OF THE EXEMPTION OF THE UNITED NATIONS FROM A PROPOSED HARBOUR MAINTENANCE FEE IN A HOST COUNTRY — CHARACTER OF THE FEE IN QUESTION — ARTICLE II, SECTION 7, OF THE 1946 CONVENTION ON THE PRIVILEGES AND IMMUNITIES OF THE UNITED NATIONS

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

The Legal Counsel of the United Nations has the honour to refer to the question of a proposed harbour maintenance fee contained in the interim regulations issued by the Customs Service of (name of a Member State) as well as in the relevant amendment to the Customs Regulations.

The interim regulations amend, on a provisional basis, the Customs Regulations to implement provisions of the Water Resources Development Act of 1986 which authorizes the Customs Service to assess a harbour maintenance fee of 0.04 per cent on the value of commercial cargo loaded on or unloaded from a commercial vessel at the ports of (name of the Member State). The harbour maintenance fee is to be applied to passengers as well as merchandise. Before adopting the interim regulations as a final rule, the Customs Service has requested all those interested to submit comments to the Regulations Control Branch, Customs Service Headquarters.

Neither the proposed final version of part 24 of the Customs Regulations nor the provisions of the interim regulations exempt the United Nations from the harbour maintenance fee. In accordance with article II, section 7, of the Convention on the Privileges and Immunities of the United Nations,[42] to which (name of the Member State) is a party, the United Nations is exempt from all direct taxes, customs duties, prohibitions and restrictions on imports and exports in respect of articles imported or exported for its official use or in respect of its publications. The United Nations, however, is not entitled to "claim exemption from taxes which are, in fact, no more than charges for public utility services". The harbour maintenance fee, as stated in the summary of the interim regulations published in the Federal Register on 30 March 1987, is collected by Customs for, *inter alia*, "the improvement and maintenance of . . . ports and harbours" and its character as a revenue provision is clearly demonstrated by virtue of the fact that it is contained in the Harbor Maintenance Revenue Act of 1986.

In the opinion of the Legal Counsel, this fee is clearly not a charge for "public utility services" and if applied to the Organization would constitute a direct tax from which the United Nations is exempt by virtue of the relevant provisions of the cited Convention.

The cost to the United Nations of the harbour maintenance fee would exceed $40,000 per annum, not including the administrative expense of collecting the required paperwork, maintaining records and processing the payments to the Customs Service.

In the interest of the financial and administrative efficiency of the United Nations, the Legal Counsel believes that it is incumbent upon all Member States to strictly observe those provisions of the Convention on the Privileges and Immunities of the United Nations which have a direct bearing on expenditures and administrative costs and, therefore, requests the Permanent Mission to the United Nations to forward to the relevant authorities the above comments regarding the harbour maintenance fee with a view to exempting the Organization from the fee in question.

1 May 1987

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23. ADVICE ON NEW BANKING AND CUSTOMS REGULATIONS IN A MEMBER STATE — QUESTIONS CONCERNING THE HOLDING OF LOCAL CURRENCY ACCOUNTS; RENT PAYMENTS IN FOREIGN CURRENCY; CHARGES FOR PUBLIC UTILITY SERVICES AND TELECOMMUNICATIONS; AND IMPORTATION OF VEHICLES AND HOUSEHOLD APPLIANCES — PROVISIONS OF THE 1946 CONVENTION ON THE PRIVILEGES AND IMMUNITIES OF THE UNITED NATIONS

Memorandum to the Chief of the Treasury Section, United Nations Development Programme

The preliminary views of the Office of Legal Affairs on the press reports concerning the new banking and customs regulations in (name of a Member State) are as follows:

(i) *Holding of local currency accounts*

(*a*) If the new banking regulations are applicable to international organizations as well as diplomatic missions, the ban on local currency accounts would run counter to the 1946 Convention on the Privileges and Immunities of the United Nations,[43] to which the State concerned succeeded without reservation, and which provides in article II, section 5, as follows:

"Without being restricted by financial controls, regulations or moratoria of any kind,

(*a*) The United Nations may hold funds, gold or currency of any kind and operate accounts in any currency;

(*b*) The United Nations shall be free to transfer its funds, gold or currency from one country to another or within any country and to convert any currency held by it into any other currency."

It should be noted, however, that section 6 of the article provides that:

"In exercising its rights under section 5 above, the United Nations shall pay due regard to any representations made by the Government of any

Member in so far as it is considered that effect can be given to such representations without detriment to the interests of the United Nations."

Consequently, if the Government wishes to make representations in this regard, the United Nations in good faith must consider the impact of the regulations on the interests of the United Nations. If it can be shown that the regulations can be implemented without detriment to the interest of the United Nations, the United Nations may accede to the Government's request.

(*b*) The foregoing is applicable to the official accounts of the Organization. Individual accounts held by staff members are accorded no particular privilege under the Convention on the Privileges and Immunities of the United Nations other than the right to the same privileges in respect of *exchange facilities* as are accorded to diplomatic personnel (article V, section 18 (*e*), of the Convention).

(ii) *Rent payments in foreign currency*

The Convention on the Privileges and Immunities of the United Nations contains no provisions of relevance to rental payments whether for official or private premises. United Nations practice in this regard has normally been to align itself with the procedures applicable to the diplomatic community.

(iii) *Charges for public utility services and telecommunications*

The currency of payments for public utility services and telecommunications is not provided for in the Convention on the Privileges and Immunities of the United Nations and the Organization would normally abide by the local law in such matters. In so doing, however, it should be kept in mind that the United Nations enjoys in the territory of each Member State treatment not less favourable than that accorded to diplomatic missions in the matter, *inter alia*, of rates and taxes (article III, section 9, of the Convention).

(iv) *Importation of vehicles and household appliances*

United Nations officials have the right to import free of duty their furniture and effects, which includes an automobile, at the time of first taking up their post in the country in question (article V, section 18 (*g*), of the Convention on the Privileges and Immunities of the United Nations). The Convention, however, does not specify the number of vehicles and appliances which may be so imported. This is a matter for local law and regulations. The restrictions imposed by the new customs regulations of the State concerned would not, therefore, run counter to its obligations under the Convention.

11 March 1987

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24. Question whether locally recruited staff of the United Nations Peace-keeping Force in Cyprus are exempt from taxation on their salaries and emoluments — Paragraphs 24 and 37 of the 1964 Agreement between the United Nations and Cyprus concerning the status of the United Nations Peace-keeping Force in Cyprus

Memorandum to the Administrative Officer, Personnel Processing Unit, Field Operation Division, Office of Field Operational and External Support Activities

This is in reply to your memorandum of 16 January 1987 concerning exemption from taxation of locally recruited staff of the United Nations Peace-keeping Force in Cyprus.

The basis of the claim by certain locally recruited staff that they should be exempted from taxation on their salaries and emoluments is paragraph 24 of the Agreement concerning the Status of the United Nations Peace-keeping Force in Cyprus, concluded between the United Nations and the Government of the Republic of Cyprus on 31 March 1964,[44] which provides, *inter alia,* that, with respect to "the locally recruited personnel of the Force . . . who are not members of the Secretariat, the United Nations will assert its right . . . [concerning] exemption from taxation . . . provided in sections 18 . . . (*b*) . . . of the Convention on the Privileges and Immunities of the United Nations". It should be noted that the essential character of this "locally recruited personnel" is defined in paragraph 37 of the Agreement which is quoted below:

> "The Force may recruit locally such personnel as required. The terms and conditions of employment for locally recruited personnel shall be prescribed by the Commander and shall generally, to the extent practicable, follow the practice prevailing in the locality."

From the language of this provision, it appears that the locally recruited staff to whom the provisions of paragraph 24 would apply are those directly recruited and administered by the United Nations.

It is understood that the locally recruited staff in the present case, however, are employed by the Civilian Establishment and Pay Office (CEPO) of the British Force in Cyprus and are under a labour contract which is subject to CEPO's regulations and conditions of employment. The arrangement whereby CEPO provides locally employed civilians to UNFICYP is part of the United Kingdom logistic support to the Force established by the provisions of paragraph 4 of (and paragraph 11 of the annex to) the Memorandum of Understanding signed by the United Nations and the Government of the United Kingdom on 11 December 1974. All administrative costs, including salaries, incurred by CEPO in providing this personnel (except for the costs shared by the United Kingdom) are charged to UNFICYP by the Government through the regular logistic support billings. In these circumstances, there appears to be no employer-employee relationship between UNFICYP and the civilian personnel provided by CEPO. The fact that certain personnel are engaged by CEPO to serve in UNFICYP does not create an employment relationship between the latter and the individuals concerned, since CEPO acts, in this connection, more as an independent contractor than as an agent of UNFICYP.

Considering that the character of the locally recruited civilian staff administered by CEPO is significantly different from that of the personnel referred to in

paragraph 37 of the Status Agreement, it appears doubtful that the provisions of paragraph 24 of the Agreement could be invoked to claim the exemption status of the personnel concerned.

30 January 1987

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25. LEGAL BASES FOR THE EXEMPTION OF NON-AMERICAN UNITED NATIONS OFFICIALS FROM UNITED STATES SOCIAL SECURITY COVERAGE

Letter to a Counsellor in the Permanent Mission of a Member State to the United Nations

This is in response to your telephone call concerning the legal bases for the exemption of United Nations officials from American social security coverage.

1. *The 1945 United States International Organizations Immunities Act*[45]

Sections 4(*c*) and (*d*) and 5 amend the Federal Insurance Contributions Act, the Federal Unemployment Tax Act and the Social Security Act to exempt international organizations (as employers) and their officials (as employees) from the provisions of these Acts.

2. *The 1947 Headquarters Agreement between the United Nations and the United States and Headquarters regulation No. 1*

The 1947 Agreement between the United Nations and the United States of America regarding the Headquarters of the United Nations[46] provides in article III, sections 7(*b*) and 8 that federal, state and local law apply within the Headquarters district, except to the extent superseded by "Headquarters regulations" adopted by the United Nations. By resolution 604(VI) of 1 February 1952, the General Assembly confirmed Headquarters regulation No. 1 of 26 February 1951, establishing the "United Nations Social Security System" as the sole provisions covering persons in the service of the United Nations *vis-à-vis* the Organization.

3. *1960 Social Security Act Amendment*

As of 1960 the United States Federal Social Security Act was amended[47] to provide for the compulsory social security coverage of Unitcd States citizens working for an international organization within the United States.[48] As the United States of America could of course not tax international organizations for the employer's share of the cost of such coverage, international officials would have to be considered and taxed as if they were self-employed. An arrangement was later worked out, approved by the United States Mission and the Fifth Committee,[49] whereby the affected American officials would be reimbursed (as part of the tax reimbursement scheme) for the difference between the payments they had to make as self-employed and those they would have had to make if regularly employed.

4. *Convention on the Privileges and Immunities of the United Nations*

The 1946 Convention on the Privileges and Immunities of the United Nations,[50] to which the United States became a party in 1970 (with a reservation allowing it, *inter alia*, to tax United States citizens and permanent residents on their international salaries), provides in article II, section 7(*a*), that the United Nations is not to be subject to any direct taxes, and in article V, section 18(*b*), that officials (except American citizens to which the reservation applies) are not to be taxed on their official emoluments. These two exceptions in effect also preclude the coverage of non-American officials by any compulsory social insurance.

11 March 1987

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26. QUESTION WHETHER THE STATUS OF A PERMANENT MISSION IS AFFECTED BY THE FACT THAT IT IS TEMPORARILY WITHOUT EITHER A PERMANENT REPRESENTATIVE OR A CHARGÉ D'AFFAIRES — PRACTICE OF THE ORGANIZATION IN THIS RESPECT

Memorandum to the Chief of Protocol

1. This is with reference to your memorandum dated 7 October 1987 requesting our comments on the current status of the Mission of (name of a Member State) as a result of the fact that the Mission, as you informed us, is temporarily without either a permanent representative or a chargé d'affaires.

2. The existing rules and norms of the codified diplomatic law of international organizations in general, and specifically the 1946 Convention on the Privileges and Immunities of the United Nations[51] as well as the 1947 Agreement between the United Nations and the United States of America regarding the Headquarters of the United Nations,[52] do not explicitly cover the issue of the designation of the head of a mission to the United Nations. Nor do they unequivocally regulate the procedures for the appointment of an acting head of mission when the latter is absent or unable to perform his functions or the post of head of mission is vacant.

3. However, from the practice of this Organization, it has become customary for a mission to be headed by a permanent representative who is officially designated in this capacity by a sending State. Accordingly, in case of his absence, a chargé d'affaires or an acting head of mission is usually appointed in due course (to this end, both terms are used by missions).

4. It should be noted furthermore that these customary rules were reflected to a certain extent in the Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character[53] which was adopted in 1975 but is not yet in force. While the provisions of the Vienna Convention do not directly require the accreditation or appointment of a head of mission, such an understanding derives from the sense of several articles of the Convention, particularly article 10 which stipulates that "the credentials of

the head of mission shall be issued by the Head of State, by the Head of Government, by the Minister for Foreign Affairs . . . and shall be transmitted to the Organization".

5. The 1975 Vienna Convention further provides in article 16 that if the post of head of mission is vacant, or if the head of mission is unable to perform his functions, the sending State *may* appoint an acting head of mission whose name shall be notified to the Organization and by it to the host State (emphasis added). Thus, even if the 1975 Convention had entered into force, it should not, in our opinion, necessarily be interpreted as imposing a mandatory obligation to appoint an acting head of mission.

6. The issue of accreditation of a head of mission is indirectly addressed in article V, section 15, of the Agreement between the United Nations and the United States of America concerning the Headquarters of the United Nations which provides for a distinction as between categories of members of the mission in the context of the privileges and immunities to be accorded to them. Section 15 provides for the following categories:

— Principal resident representative to the United Nations;

— Resident representative with the rank of ambassador or minister plenipotentiary;

— Resident members of their staff.

As a general conclusion it might be assumed that the categories provided by this Agreement could be interpreted as constituting a framework for a mission staff hierarchy with the senior representative at the top of it.

7. In your memorandum it is mentioned that the credentials of the Member State in question could be questioned in United Nations bodies if it did not have a properly designated head of mission. In this connection, we would like to remind you that in accordance with rule 27 of the rules of procedure of the General Assembly, the members of the Organization are required to submit to the Secretary-General credentials for their respective delegations to the sessions of the General Assembly and its organs. It is further understood that the delegations may consist of not more than five representatives and five alternative representatives and as many advisers, technical advisers, experts and persons of similar status as may be required by the delegation.

8. Accordingly, the credentials of the representatives of the State in question to the forty-second session of the General Assembly should be considered in the light of the credentials which were issued by the Foreign Minister of that State.

9. As far as the question of credentials in the Security Council is concerned, we would like to refer to rule 14 of the provisional rules of procedure of the Security Council. That rule, *inter alia,* provides that any country not a member of the Security Council, if invited to participate in its meetings, is obliged to submit credentials for the representatives appointed by it for that purpose. Such credentials are to be examined by the Secretary-General, who shall submit a report to the Security Council for approval.

10. For the foregoing reasons, the status of the Permanent Mission per se is not affected by the failure to appoint a permanent representative or chargé

d'affaires. However, for practical reasons, in case it becomes necessary to contact the Mission of the State concerned, correspondence could be addressed either to the Mission in general or to one of its senior officers.

19 October 1987

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27. ESTABLISHMENT OF OBSERVER MISSIONS BY STATES NOT MEMBERS OF THE UNITED NATIONS — PRIVILEGES AND IMMUNITIES ENJOYED BY PERMANENT OBSERVERS — FINANCIAL CONTRIBUTION OF NON-MEMBER STATES TO THE ACTIVITIES OF THE UNITED NATIONS — ADMISSIBILITY OF RESTRICTIONS PLACED BY STATES ON THE USE OF THEIR CONTRIBUTIONS

Cable to the Assistant Director-General for Public Relations and Information, United Nations Educational, Scientific and Cultural Organization

This is in response to your telegram concerning non-member States with observer status at the United Nations.

(*a*) The establishment of observer missions by States not Members of the United Nations is based entirely on precedent and is not explicitly dealt with in decisions adopted by the General Assembly, the Charter of the United Nations, the 1947 Agreement between the United Nations and the United States of America regarding the Headquarters of the United Nations or any other applicable legal instrument.

In practice, permanent observer missions have been established by non-member States on the basis of decisions made by the States concerned and subsequently communicated to the Secretary-General. In each case, the Secretary-General has merely taken note of the decision and accorded such missions assistance and facilities relating to their attendance at public meetings of United Nations organs (assigning seats, providing documentation and passes, and the like). In the past, problems arose in some instances because of the lack of a general consensus on recognition. There are no such problems at present.

Permanent observers enjoy purely functional privileges and immunities and are not entitled to the diplomatic privileges and immunities accorded under the Headquarters Agreement. Diplomatic privileges and additional facilities provided by the authorities of the host State are accorded under bilateral arrangements to which the United Nations is not a party.

With regard to the financial contribution of non-member States to the activities of the United Nations, the establishment of a permanent observer mission does not in itself entail an obligation to contribute to the expenses of the United Nations. In accordance with the Financial Regulations and Rules of the United Nations, however, non-member States who participate (by virtue of an official invitation) as full members (with the right to vote) in United Nations organs and conferences (such as UNDP) are required to contribute to such activities at rates to be determined by the General Assembly.

(*b*) The United Nations position on restrictions placed by States on the use of their contributions is this: (*a*) in the case of assessed contributions, restrictions

imposed by States will not be honoured; (*b*) in the case of voluntary contributions for which the use is specified by the donor, the Secretary-General may accept the contributions in accordance with regulation 7.2 of the Financial Regulations and Rules of the United Nations provided that the purposes for which the contributions are made are consistent with the policies, aims and activities of the Organization, and provided that the acceptance of such contributions which directly or indirectly involve additional financial liability for the Organization shall require the consent of the appropriate authority. Therefore, if the contribution is acceptable, the restrictions placed by the donor on the use of its contribution will be honoured.

5 June 1987

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28. DIPLOMATIC PRIVILEGES AND IMMUNITIES OF MEMBERS OF THE STAFF OF PERMANENT MISSIONS TO THE UNITED NATIONS — DETERMINATION OF THE SCOPE OF THE PRIVILEGES AND IMMUNITIES TO BE PROVIDED TO A GIVEN CATEGORY OF MEMBERS OF THE STAFF OF THE MISSION — CRITERIA SET FORTH BY THE HOST COUNTRY FOR ENTITLEMENT TO DIPLOMATIC PRIVILEGES AND IMMUNITIES FOR DIPLOMATIC OFFICERS OF PERMANENT MISSIONS TO THE UNITED NATIONS — RELEVANT PROVISIONS OF THE 1946 CONVENTION ON THE PRIVILEGES AND IMMUNITIES OF THE UNITED NATIONS AND THE 1961 VIENNA CONVENTION ON DIPLOMATIC RELATIONS — ROLE OF THE SECRETARY-GENERAL OF THE UNITED NATIONS IN SUCH MATTERS IN THE LIGHT OF ARTICLE V, SECTION 15(2), OF THE 1947 HEADQUARTERS AGREEMENT

Memorandum to the Chief of Protocol

1. This is with reference to our telephone conversation of 2 December 1987 and your subsequent memorandum of 3 December requesting further clarification on diplomatic privileges and immunities of members of the staff of permanent missions in the context of a request by the Permanent Mission of a Member State for diplomatic privileges and immunities for a chauffeur and clerk in that Mission.

2. The relevant definitions and distinctions between categories of members of staff of the mission can be found in the 1961 Vienna Convention on Diplomatic Relations.[54] Pursuant to article 1(*d*) of the said Convention, members of the staff of the mission having diplomatic rank are to be considered " . . . members of the diplomatic staff". For their part, members of the staff of the mission employed in the administrative and technical service of the mission fall within the category entitled " . . . members of the administrative and technical staff" (article 1(*f*)).

3. In order to determine the scope of the privileges and immunities to be provided to a given category of mission personnel, consideration must be given to whether the particular individual possesses a diplomatic rank and to the kind of functions the individual performs in the mission concerned. The diplomatic

rank of a member of a mission is determined by the sending State and expressed by the function attributed to him or her. Neither the United Nations nor the host country can overrule the sending State's decision to accord diplomatic rank and functions to its personnel. On the other hand, there is nothing in the Convention that empowers the sending State to attribute diplomatic rank to the members of its mission's staff performing principally and solely administrative or technical functions.

4. International law provides for a restriction in granting privileges and immunities to a diplomatic agent who is a national of or permanently resident in the receiving State. In particular, article 38, paragraph 1, of the Vienna Convention prescribes that such a person could " . . . enjoy only immunity from jurisdiction, and inviolability, in respect of official acts performed in the exercise of his functions." Furthermore, pursuant to article IV, section 15, of the 1946 Convention on the Privileges and Immunities of the United Nations,[55] the provisions of that Convention outlining the privileges and immunities accorded to the representatives of Members do not apply " . . . as between a representative and the authorities of the State of which he is a national or of which he is or has been the representative."

5. We would also remind you that on 16 January 1978 the Mission of the host country circulated a note verbale concerning the applicable criteria for entitlement to diplomatic privileges and immunities for diplomatic officers of permanent missions to the United Nations. In the note, the host country set forth the following criteria which, as far as we are aware, were not objected to by any mission:

> "The criteria are as follows: Each diplomatic officer must (1) perform diplomatic duties for the Mission on an essentially full-time basis; (2) possess a valid diplomatic passport if diplomatic passports are issued by his or her Government, or the Mission should by diplomatic note explain its absence in particular cases; (3) possess a recognized diplomatic title; (4) possess appropriate United States non-immigrant status; and (5) reside in the New York area."

6. According to the information contained in our files, the host country has, on several occasions, denied diplomatic status to certain members of the missions' staff on the ground that they were engaged primarily in non-diplomatic administrative and technical functions. For example, in 1984, there was an extensive correspondence between the host country and a mission regarding 17 members of the mission whose status as diplomats was questioned by the host country. The host country thus exercised a right, namely the enforcement of a distinction between different classes of mission members referred to in the 1961 Convention, which any host country has but which is often not exercised. The former Director of the General Legal Division in charge of the Office of Legal Affairs, in a memorandum to the Secretary-General dated 14 May 1984, advised that " . . . article V, section 15(2), of the 1947 Agreement between the United Nations and the United States of America regarding the Headquarters of the United Nations[56] seems to assign some role to the Secretary-General in determining which mission members shall be entitled to diplomatic status, by providing that this determination be made in agreement between the Secretary-General, the Government of the United States and the Government of the Member concerned". The Director recognized, however, that in practice the role of the Secretary-General in such matters " . . . has

been essentially that of an intermediary between the sending and the host States". In our view, this conclusion is still applicable and should be taken into consideration in connection, *inter alia*, with the case in question.

10 December 1987

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29. LAW GOVERNING THE PROTECTION OF PERMANENT MISSIONS TO THE UNITED NATIONS — ARTICLE 22 OF THE 1961 VIENNA CONVENTION ON DIPLOMATIC RELATIONS — ACT FOR THE PROTECTION OF FOREIGN OFFICIALS AND OFFICIAL GUESTS OF THE HOST COUNTRY

Letter to the Ministry of Foreign Affairs of a Member State

I wish to refer to our recent conversation in which you requested information regarding the law governing the protection of permanent missions to the United Nations, particularly as regards demonstrations outside or within the vicinity of such missions.

The obligation of the host country to provide police protection and prevent any disturbance of the peace of missions derives from article 22 of the Vienna Convention on Diplomatic Relations of 1961.[57]

In the United States, the only federal statute regulating this question is the Act for the Protection of Foreign Officials and Official Guests of the United States.[58] Section 301 of that Act amends section 112 of title 18 of the United States Code to read as follows:

> "(*c*) Whoever within the United States but outside the District of Columbia and within one hundred feet of any building or premises belonging to or used or occupied by a foreign Government or by a foreign official for diplomatic or consular purposes, or as a mission to an international organization, or as a residence of a foreign official, or belonging to or used or occupied by an international organization for official business or residential purposes, publicly:
>
> (1) Parades, pickets, displays, any flag, banner, sign, placard or device, or utters any word, phrase, sound or noise, for the purpose of intimidating, coercing, threatening or harassing any foreign official or obstructing him in the performance of his duties, or
>
> (2) Congregates with two or more other persons with the intent to perform any of the aforesaid acts or to violate subsection (*a*) or (*b*) of this section,
>
> shall be fined not more than $500, or imprisoned not more than six months, or both."

We are informed by the New York City Commission for the United Nations that the New York City Police Department does not systematically apply the 100 feet rule, which it regards as poorly drafted and which contains no enforcement mechanism. The Police Department applies its own standard of reasonableness. A permit is required, however, if the demonstrators utilize sound equipment or march.

While there is no New York City or State law or ordinance governing such matters, the District of Columbia has adopted an ordinance prohibiting demonstrations within 500 feet of diplomatic missions. This ordinance has been held constitutional by the Supreme Court.

In summary, federal law lays down a 100 feet rule which is not strictly applied in New York City. Local ordinances can apparently establish different limits. As far as can be determined, the only city to have established its own limits is Washington, D.C., where a 500 feet rule is applied.

8 October 1987

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30. QUESTION WHETHER THE PREMISES OCCUPIED BY PERMANENT MISSIONS TO THE UNITED NATIONS ARE EXEMPT FROM REAL ESTATE TAXES IMPOSED ON THE OWNER OF THE PREMISES — PROVISIONS OF ARTICLE V, SECTION 15, OF THE 1947 AGREEMENT BETWEEN THE UNITED NATIONS AND THE UNITED STATES OF AMERICA REGARDING THE HEADQUARTERS OF THE UNITED NATIONS IN CONNECTION WITH ARTICLE 23 OF THE 1961 VIENNA CONVENTION ON DIPLOMATIC RELATIONS

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

This is further to your letter dated 27 January 1987, and our telephone conversation of 11 February 1987, concerning the question of the payment of real property taxes on the office premises occupied by the Permanent Mission of your country.

We understand from your letter that the office premises are occupied by the Permanent Mission under a lease; that the real property taxes are imposed on the lessor; and that the lessor seeks to recover the amount of such taxes from the Permanent Mission under the terms of the lease. Thus, as we understand it, there are no taxes imposed on the Permanent Mission, the taxes being imposed on the lessor of the premises.

The privileges and immunities accorded to permanent missions accredited to the United Nations derive from the 1947 Agreement between the United Nations and the United States of America regarding the Headquarters of the United Nations.[59] Under article V, section 15, of that Agreement, permanent missions to the United Nations are entitled to the same privileges and immunities in the territory of the United States, subject to corresponding conditions and obligations, as are accorded to diplomatic envoys accredited to the United States. Such privileges and immunities are set out in the 1961 Vienna Convention on Diplomatic Relations,[60] to which the United States became party on 13 December 1972.

Article 23 of the Vienna Convention on Diplomatic Relations reads as follows:

> "1. The sending State and the head of the mission shall be exempt from all national, regional or municipal dues and taxes in respect of the premises of the mission, whether owned or leased, other than such as represent payment for specific services rendered.

2. The exemption from taxation referred to in this article shall not apply to such dues and taxes payable under the law of the receiving State by persons contracting with the sending State or the head of the mission."

We should like, in this connection, to draw attention to the related commentary of the International Law Commission on paragraph 1 of the article, which, at the time of drafting, was its sole provision:

"The provision does not apply to the case where the owner of leased premises specifies in the lease that such taxes are to be defrayed by the mission. This liability becomes part of the consideration given for the use of the premises and usually involves, in effect, not the payment of taxes as such, but an increase in the rental payable."[61]

The question was considered further at the Vienna Conference in 1961 and, as a result, a second paragraph, as quoted above, was included in the article.

We should also draw attention to paragraph 2 of article 24 of the 1975 Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character,[62] whose provisions are identical. Though the Convention is not yet in force and has not been signed by the United States, it is pertinent to note that the provisions of the 1961 and 1975 Conventions are consistent on the particular point.

Thus, as you will see, it is difficult to conclude that the premises occupied by the Permanent Mission of your country are exempt from real property taxes imposed on the lessor of the premises.

The position with respect to real property taxes on leased premises occupied by the United Nations is similar.

12 February 1987

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

1. INTERNATIONAL LABOUR ORGANIZATION

Memoranda prepared by the International Labour Office in reply to requests for clarification concerning instruments adopted by the International Labour Conference

(*a*) Memorandum on the Labour Administration Convention, 1978 (No. 150), drawn up at the request of the Government of Canada.[63]

1. By letter of 5 November 1984, the Government of Canada asked the International Labour Office for an opinion on the interpretation of the Labour Administration Convention, 1978 (No. 150), regarding the following points:

(1) *Article 5 of the Convention*

— What is the nature and extent of the process of "consultation, cooperation and negotiation" between public authorities and employers' and workers' organisations called for in this article?

— Specifically, is the requirement of "negotiation" in the article to be interpreted to mean a process whereby changes may result from consultation, or a process leading to a binding arrangement between the State and one of the social partners?

(2) *Effect of exclusions from labour legislation on compliance with Convention No. 150*

Is it correct to conclude that the exclusion of agricultural, domestic and self-employed workers from the coverage of labour legislation would not prevent compliance, since the focus of Convention No. 150 is on the establishment of the basic elements of a system of labour administration and not on the scope of labour legislation generally?

2. Point (1) of the query relates to article 5 of the Convention, which reads as follows:

"Article 5

"1. Each member which ratifies this Convention shall make arrangements appropriate to national conditions to secure, within the system of labour administration, consultation, cooperation and negotiation between the public authorities and the most representative organizations of employers and workers, or — where appropriate — employers' and workers' representatives.

"2. To the extent compatible with national laws and regulations and national practice, such arrangements shall be made at the national, regional and local levels as well as at the level of the different sectors of economic activity."

3. The first question raised by the Government in respect of article 5 concerns the nature and extent of the "consultation, cooperation and negotiation" provided for therein.

4. The terms "consultation, cooperation and negotiation" were first included in point 35(1) of the Conclusions of the 1975 Meeting of Experts on Labour Administration,[63] which subsequently became point 15(1) of the Questionnaire on the proposed instruments.[64]

5. Reference was made there to "arrangements of an institutional character" to secure such consultation, cooperation and negotiation. Examples of "institutional" arrangements given in the preparatory report include more particularly economic and social councils, national labour advisory councils or sectoral councils of various types as may be found in the national practice of countries.[65]

6. The words of "of an institutional character" were subsequently deleted, "taking into account the views expressed (by Governments) and the general plea for flexibility with a view to avoiding difficulties of a technical nature for eventual ratification".[66] It follows that institutional arrangements of the types described are not compulsory for the purposes of article 5.

7. It may further be noted that point 35(2) of the Conclusions (referred to above) of the Meeting of Experts states that "such consultation and cooperation

should aim, in particular, at ensuring that the competent public authorities seek the views, advice and assistance of employers and workers in an appropriate manner" in respect of such matters as enumerated in that point of the Conclusions, including the preparation and implementation of relevant laws and regulations and of economic and social development plans, the establishment and functioning of national bodies in various social and labour fields. Those matters were not taken up, however, in question 15(1) of the Questionnaire, presumably owing to the concern for flexibility, as stated above.

8. Against this background, it appears appropriate to recall the following statement made by the Government member of Japan at the time of the second discussion of the proposed Convention, as recorded in the report of the Committee on Labour Administration of the Conference:

> "54. The Government member of Japan made a statement to the effect that, in the absence of further proposals concerning Article 5, there was a point of clarification which should be placed on record, concerning his country. The Government of Japan considered it necessary to secure, within the system of labour administration, the participation of the most representative organisations of employers and workers, but the form of participation which could be effective varied from country to country according to the nature of the problems. For the Proposed Convention to be adaptable to actual conditions in a greater number of countries, yet without impairing the substance of article 5, member States should appropriately be allowed to select the forms that such participation should take. The concepts as well as the modes conveyed by the words "consultation, cooperation and negotiation" were not clear enough and they differ from country to country. The Government of Japan thus understood that it would be left to each country to decide in accordance with national practice what should be the subject, the level and the form in each case.[67]

9. The above statement was included without objection or disagreement in the report of the Committee on Labour Administration and may be thus considered as a generally accepted understanding of the bearing of article 5, namely that "it would be left to each country to decide in accordance with national practice what should be the subject, the level and the form" of consultation, cooperation and negotiation in each case. It may further be noted that article 5 requires only "arrangements appropriate to national conditions". In the light of all the above considerations, it may be said, as regards the first question put by the Government of Canada, that the nature and extent of the process called for in Article 5 may be decided by each country in accordance with national conditions and practice.

10. The Government of Canada also puts a specific question as to whether the requirement of "negotiation" in article 5 should be interpreted to mean a process whereby changes may result from consultation, or a process leading to a binding arrangement betwen the State and one of the social partners.

11. To take first the dictionary meaning of the term, "negotiation" is defined in Webster's *New College Dictionary* as "conferring, discussing or bargaining to reach agareement". The *Concise Oxford Dictionary* defines "negotiate" as "confer with a view to compromise or agreement", the word "agreement" comprising as one of its meanings, according to ths same dictionary, that of "mutual understanding".

12. In the context of article 5 of the Convention, doubt was in fact expressed by three Governments (Canada, Japan and the United States) in their replies to point 15(1) of the Office Questionnaire, as to the use of the word "negotiation".[68] The statement by the Government member of Japan (see paras. 8 and 9 above) provided an understanding as to the type, level and form of such negotiation. The specific question put by the Government of Canada is concerned with the purpose and result of the negotiation envisaged under article 5.

13. In this respect, there is nothing in the background and context of this article of the Convention, as recalled above, to show that any particular meaning of the word "negotiation" has been intended, other than the current dictionary acceptation of the word, that is to confer, discuss with a view to compromise or agreement. It may therefore be said, in reply to the specific question of the Government of Canada, that the process of negotiation referred to in article 5 does not necessarily imply "a process leading to a binding arrangement between the State and one of the social partners".

14. It may be appropriate, in the light of the above, to recall that in the usage of the Governing Body Committee on Freedom of Association recourse to this concept, or to similar ones, is found in contexts emphasizing the principle that the parties "should bargain in good faith making every effort to come to an agreement" or that "satisfactory labour relations depend primarily on the attitudes of the parties towards each other and on their mutual confidence".[69] Indeed good faith and a disposition, in the attitudes of the parties, to confer or bargain towards a mutual understanding seems to be inherent to the concept of "negotiation" in labour law in general.

15. In point (2) of its query, the Government of Canada requests confirmation that the exclusion of agricultural, domestic and self-employed workers from the coverage of labour legislation would not prevent compliance with the Convention.

16. On this point it may be observed, firstly, that, as the Government rightly remarks, the focus of Convention No. 150 is on the establishment of a system of labour administration and not on the scope of labour legislation. Article 4 of the convention lays down the obligation for a ratifying State to "ensure the organisation and effective operation . . . of a system of labour administration".

17. From the definitions given in article 1(*a*) and (*b*) of the Convention, this obligation involves the organization and operation of all public administration bodies responsible for and/or engaged in public administration activities in the field of national labour policy.

18. The nature and scope of such "activities in the field of national labour policy" are not defined by the Convention. However, certain elements are given, in particular, by its article 6.

19. *Article 6, paragraph 1, of the Convention provides, as follows:*

> "1. The competent bodies within the system of labour administration shall, as appropriate, be responsible for or contribute to the preparation, administration, coordination, checking and review of national labour policy, and be the instrument within the ambit of public administration for the preparation and implementation of laws and regulations giving effect thereto."

20. Article 6, paragraph 2, refers more specifically to employment policy (subparagraph (*a*), conditions of work and working life and terms of employment, defects and abuses in these conditions and terms, and proposals on means to overcome them, taking into account national laws and regulations and national practice (subparagraph (*b*)); services and technical advice to employers and workers and their organizations (subparagraphs (*c*) and (*d*)).

21. As can be seen from the provisions of article 6, labour administration activities include, but are not limited to, the preparation and implementation of relevant legislation. The system of labour administration must have the capacity to carry out all these activities such as specified by article 6, in respect of categories of persons coming within the scope of the Convention.

22. In respect of the categories of workers referred to by the Government of Canada, namely, agricultural, domestic and self-employed workers, it may be noted that article 7 of the Convention provides for the progressive extension of the functions of the system of labour administration, when national conditions so require, to certain "categories of workers who are not, in law, employed persons". Workers to whom coverage of the Convention may be so extended include tenants and sharecroppers and self-employed workers in the informal sector, as defined in subparagraphs (*a*) and (*b*) of article 7. On the other hand, agricultural workers (e.g. wage earners in agriculture) in general, and domestic workers all come within the *initial* scope of the Convention, and must be covered by the activities of the system of labour administration referred to above.

23. To conclude, in reply to point 2 of the query of the Government of Canada, it may be said that the exclusion of agricultural, domestic and self-employed workers from the coverage of labour legislation would not prevent compliance with the Convention, which does not include a specific obligation to have legislation covering those workers, as a condition for ratification. The Convention would require however that the system of labour administration should have the capacity and competence for identifying the need for legislation covering these workers (bearing in mind the provisions of article 7 concerning tenants and sharecroppers and self-employed persons) and for introducing and implementing such legislation, if necessary, as well as the capacity for carrying out all the other activities contemplated by the Convention in respect of the workers concerned.

(*b*) Memorandum on the Asbestos Convention, 1987 (No. 162), drawn up at the request of the Government of Canada[70]

1. By a letter dated 22 January 1987, the Government of Canada requested the Director-General of the International Labour Office to provide clarifications as to the meaning of article 17 of the Asbestos Convention, 1986 (No. 162). The article reads as follows:

> "1. Demolition of plants or structures containing friable asbestos insulation materials, and removal of asbestos from buildings or structures in which asbestos is liable to become airborne, shall be undertaken only by employers or contractors who are recognized by the competent authority as qualified to carry out such work in accordance with the provisions of this Convention and who have been empowered to undertake such work.

"2. The employer or contractor shall be required before starting demolition work to draw up a workplan specifying the measures to be taken, including measures to —

(*a*) provide all necessary protection to the workers;

(*b*) limit the release of asbestos dust into the air; and

(*c*) provide for the disposal of waste containing asbestos in accordance with Article 19 of this Convention.

"3. The workers or their representatives shall be consulted on the workplan referred to in paragraph 2 of this article."

2. The request of the Government of Canada is in the following terms:

"We have a question about the terms . . . by employers or contractors which are recognized by the competent authority as qualified to carry out such work . . . and empowered to undertake such work. Concerns were expressed that this provision might be interpreted as imposing some form of special certification or accreditation of all employers or contractors *who are or might become* involved in demolition or removal work involving asbestos. As can be readily appreciated, such requirement could translate into a very heavy, cumbersome and costly administrative burden which would be difficult or even impossible to implement, particularly in smaller jurisdictions or member States. For example, as regards demolition works, it is often not possible to determine and assess the presence of asbestos in every existing building or structure throughout a given jurisdiction or country; in many instances, the presence of asbestos may not be known until demolition would require certification or accreditation of every single employer or contractor in the jurisdiction which, as already mentioned above, raises very real practical problems of implementation.

"Article 17, as we see it, aims at (*a*) underlining the specific risks to the workers' health and safety created by airborne asbestos dust in demolition or removal works (as distinct from and equal to the risks associated with mining and processing of asbestos in the manufacture of asbestos products) and (*b*) ensuring that proper procedures are taken by the employers and contractors involved to protect the workers against these risks at every stage of the work.

"In this context, it seems to us that if, in a given jurisdiction, the following measures obtain:

(*a*) The competent authority has (through legislation, regulations or enforceable guidelines, codes of practice, requirements or procedures) provided for specific health and safety measures to be implemented in demolition or removal work involving asbestos;

(*b*) These measures or requirements apply to all employers and contractors within the jurisdiction;

(*c*) These measures are in accordance with the requirements of article 17(2)(*a*), (*b*), (*c*) and 17(3);

(*d*) The competent authority has a monitoring system aimed at gathering information, to the extent possible, on planned or proposed demolition, repair or removal works involving asbestos within its

jurisdiction, with a view to ensuring that the proper procedures are put in place from the very start of the work;

(*e*) The monitoring activities are accompanied by a system of on-site inspections either at the initiative of the competent authority or in reaction to allegations of non-compliance or in response to requests by the employer or contractor or a combination of all three;

(*f*) The competent authority has a programme of information designed to (i) sensitize employers and workers and their associations (as well as the general public) to the dangers of work involving asbestos; (ii) to inform them of the prescribed health and safety measures; and (iii) to assist them in the effective implementation of these measures;

(*g*) Employers or contractors who fail to comply with the prescribed measures are guilty of an offence and liable to sanction, which may involve a fine or a term of imprisonment or both;

the requirements of article 17(1) are met. The prescribed measures, followed up by on-site inspections, will dictate how the demolition or removal work is to be conducted. Any employer, or contractor, is required to follow the prescribed measures and that employer or contractor therefore becomes qualified by the competent authority. Any employer, or contractor, who fails to comply with the prescribed measures is liable to sanctions.

"Our view that article 17 does not necessarily require pre-authorisation through a system of accreditation or certification would seem to be corroborated by the amendment submitted jointly by the Employers' and Workers' groups, and adopted by the June 1986 Conference, to delete the terms 'subject to authorization' which appeared in the original version of article 17 in the text submitted to the Conference for approval."

3. This request raises two questions. The first question is whether article 17 applies to all employers or contractors who are or might become involved in demolition work involving asbestos. The second question is whether article 17 requires pre-authorization of employers or contractors through a system of accreditation or certification.

4. On the first question, it is clear from the wording of article 17, and in particular of paragraph 2, which requires that plans of work be drawn up "before starting demolition work", that it only applies to demolition and removal work when asbestos is known in advance to be present.

5. To answer the second question, it is necessary to go back to the preparatory work leading to the adoption of the Convention.

6. Article 17 was introduced through an amendment submitted by the Workers' members in the Asbestos Committee during the first discussion of the draft Convention. A counter-amendment submitted by the Government member of Luxembourg to the effect that:

"the employer or contractor, undertaking the demolition of plants or structures containing asbestos insulation materials and removal of asbestos from buildings or structures in which asbestos is liable to become airborne, should be qualified to carry out such work in accordance with the provisions of this Convention"

was rejected.[71] The text adopted by the Conference after the first discussion — which became Article 15 of the proposed Convention — reads as follows:

"1. Demolition of plants or structures containing asbestos insulation materials, and removal of asbestos from buildings or structures in which asbestos is liable to become airborne, shall be subject to authorization, which shall be granted only to employers or contractors who are recognized by the competent authority as qualified to carry out such work in accordance with the provisions of this Convention.

"2. The employer or contractor shall be required before starting demolition work to draw up a workplan specifying the measures to be taken before the commencement of the work, including measures to:

(*a*) Provide all necessary protection to the workers;

(*b*) Limit the release of asbestos dust into the air;

(*c*) Provide for the disposal of waste containing asbestos in accordance with article 17 of this Convention."[72]

7. This text remained unchanged right through to the plenary in the second discussion. An amendment, introduced in the Asbestos Committee, to replace paragraph 1 by a provision requiring that demolition and removal work should be subject to specific regulations issued by the competent authority received equal votes for and against and thus was not adopted.[73] A request to reconsider this provision when the Committee adopted its report was strongly opposed and was withdrawn.[74]

8. The present wording of article 17 is the result of an amendment introduced in plenary. As explained by the Workers' Vice-Chariman of the Asbestos Committee, "this amendment is of a clarifying nature and has been drafted to improve the wording of the text so as to avoid ambiguity. There is no conceptual change".[75]

9. The ambiguity which the amendment was designed to eliminate was that the wording adapted by the Asebestos Committee, article 17, paragraph 1, could be read as requiring a two-stage procedure: firstly, the employer or contractor must be recognized as competent and, secondly, there must be an individual authorization for each demolition. This was not the intention. The intention was to ensure that demolition or removal work involving asbestos is undertaken only by employers or contractors qualified to do so. In its final wording, article 17, paragraph 1, leaves it to the competent authority in each country to decide the most appropriate way in which employers or contractors are recognized as qualified to carry out demolition and removal work and are empowered to do so. It may be through a system of pre-authorization of recognized contractors, limiting demolition work where asbestos is known to be present to a restricted number of licensed specialized firms, or through a system under which, for each demolition or removal project known to involve asbestos, the competent authority empowers the contractor concerned, provided it recognizes him as qualified, to undertake the job.

10. In the Office's opinion, the procedure described in the Government's request could be considered as satisfying the requirements of article 17(1), if the following conditions are met: (*a*) the competent authority is informed of all demolition or removal work known to involve asbestos; (*b*) the competent authority satisfies itself, before the work starts, that the contractor has made arrangements for the work to be done in accordance with the provisions of the

Convention; (*c*) it is empowered to prohibit the contractor from undertaking the work should it not be so satisfied. In this way the competent authority can be considered as having recognized the contractor as qualified to carry out the work and as empowering him to do so.

11. The above opinion is given with the usual understanding that any decision as to the conformity of a country's legislation and practice with a particular convention must rest, in the first instance, with the Government of the country concerned subject, in case of ratification of the convention, to the procedure established by the International Labour Organization for the examination of reports supplied by member States in pursuance of article 22 of the ILO Constitution.

2. United Nations Industrial Development Organization

(*a*) Offer from a member State of services in lieu of cash as payment of assessed contributions

Memorandum to the Deputy Director-General, Department of External Relations, Public Information, Language and Documentation Services

1. I wish to refer to your request of 9 March 1987 for my view on the offer, contained in a note verbale dated 5 March 1987 from the Permanent Representative of Cuba, of the services of a Cuban translation and interpretation company in lieu of payment of assessed contributions. The reason indicated for the offer is Cuba's lack of foreign exchange.

2. In this connection you are no doubt aware of the applicable provision in article 15, paragraph 1, of the Constitution of UNIDO, which provides:

> "Regular budget expenditures shall be borne by the members, as apportioned in accordance with a scale of assessment established by the Conference by a two-thirds majority of the members present and voting, upon the recommendation of the Board adopted by a two-thirds majority of the members present and voting, on the basis of a draft prepared by the Programme and Budget Committee."

In view of the above provision and taking into account that the scale of assessment adopted by the General Conference does not contemplate any other method of payment of assessed contributions than the usual payment of cash in the convertible currency (or currencies) indicated, there is at present no legal basis on which the Director-General could accept the Cuban offer.

3. The foregoing conclusion is, of course, without prejudice to the possibility of contractual arrangements being made between the secretariat and Cuba for the performance of translation services. However, the award of any such contract necessarily must be made in accordance with the Financial Regulations and Rules and, as required, upon the advice of the Committee on Contracts.

16 March 1987

(*b*) Legal consequences of withdrawal of a member State from UNIDO

Memorandum to the Director-General

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

2. According to article 6, paragraph 1 of the Constitution, a member may withdraw "by depositing an instrument of denunciation of this Constitution with the depositary". The depositary being the Secretary-General of the United Nations, the instrument must be deposited with him. According to article 6, paragraph 2, of the Constitution, "withdrawal shall take effect on the last day of the fiscal year, following that during which such instrument was deposited." This means — on the assumption that the expression "fiscal year" equals 12 months — that if for example a member State should deposit its instrument of denunciation between today and the end of 1987, the withdrawal would take effect on 31 December 1988, and membership rights and obligations would continue until that date.

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

4. The above conclusion is compatible with the use of "fiscal year" in the Arabic, Chinese, English and Russian versions of article 5, paragraph 2 of the Constitution, which defines the amount of arrears necessary before a member may lose its right to vote. Article 5, paragraph 2, provides that the arrears shall equal or exceed the assessed contributions due "for the preceding two fiscal years". Although the French and Spanish versions also in article 5, paragraph 2, use the expressions "exercice financier" and "ejercicio económico", the divergence between the authentic texts can be conciliated in the same manner as discussed above for article 6, paragraph 2.

5. Article 14, paragraph 1, of the Constitution concerns the preparation of the budget and the programme of work and in this connection all the authentic versions employ the same expression, namely "fiscal period", "exercice financier", and "ejercicio económico" in English, French and Spanish, respectively. The Constitution does not itself define the length of the fiscal period but a definition is contained in the draft Financial Regulations, namely regulation II.1,

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

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

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

8. With respect to the Working Capital Fund, the withdrawing member's obligation to make advances continues until its membership has lapsed. Since in accordance with draft financial regulation 5.4(*b*) advances "shall be made in the proportion of the scale of assessments established by the Conference for the contributions of members to the regular budget", the obligation for the last year of membership should be adjusted in the same manner as the contribution to the regular budget for that year is adjusted in accordance with article 6, paragraph 3, of the Constitution.

21 September 1987

(*c*) Delays in purchases of equipment — clearance by Government

Memorandum to the Director-General

1. I wish to refer to your request for a legal opinion on the legal aspects of the problem "that several Governments in countires where UNIDO is implementing projects are delaying the purchase of equipment by requesting that these purchases be made only after the Government has given its clearance". In this connection, you also asked my opinion on the possibility of UNIDO submitting to the Governments concerned a set of possibilities for purchases accompanied by a deadline (for instance one month) indicating that in case no reply is received within the deadline, UNIDO would proceed with the purchase option of its choice.

2. From a legal viewpoint, a requirement that the recipient Government must first give its clearance before equipment can be purchased or a contract awarded by UNIDO would not be compatible with the relevant Financial Regulations and Rules applicable to UNIDO. As you know, UNIDO, in accordance with article 26, paragraph 2, of its Constitution, continues to apply the United Nations Financial Regulations and Rules. In respect of contracts and purchases, regulation 10.5 provides:

"Tenders for equipment, supplies and other requirements shall be invited by advertisement, except where the Secretary-General deems that, in the interests of the Organization, a departure from the rules is desirable."

"Rule 110.18

"Calling for bids or proposals

"Except as provided in rule 110.19, contracts for the purchase or rental of services, supplies, equipment and other requirements shall be let after competitive bidding or calling for proposals. Tenders shall be invited by advertising through publication or distribution of formal invitations to bid; provided that in cases when the nature of the work involved precludes invitation of tenders and where proposals are called, a comparative analysis of such proposals shall be kept on record."

"Rule 110.21

"Awarding of contracts

"Contracts shall be awarded to the lowest acceptable bidder, due consideration being given to the utilization of currencies available to the Organization and which require special management, provided that where the interests of the Organization so require, all bids may be rejected. In the latter instance, the Assistant Secretary-General for General Services or such other official authorized under rule 110.16 shall record in writing the reasons for rejection of the bids and determine whether to invite new competitive tenders or enter into a negotiated contract."

3. It is a long-standing practice of the United Nations and of UNIDO for technical cooperation projects to let contracts and to award purchase orders upon the calling of costed proposals. Invitations to submit such proposals are distributed internationally to qualified companies with the technical specifications prepared by or under the responsibility of UNIDO's substantive backstopping staff. To the extent possible the technical specifications are kept neutral so as not to prejudge the eventual choice of a company, and they are finalized in the context of the relevant project document and budget, taking fully into account the wishes and requirements of the recipient Government. Upon receipt of the costed proposals they are examined and their technical acceptability is evaluated by the competent substantive backstopping officer. Thereafter, the costs of the technically acceptable proposals are computed on a comparable basis by the Purchasing and Contract Service and upon the advice and recommendation of the interdepartmental Committee on Contracts, the contract or purchase order is placed in accordance with rule 110.21, with the company that submitted the least costly, technically acceptable, proposal.

4. From the foregoing, it is clear that the applicable regulations and rules do not permit UNIDO to accept a requirement of prior Government clearance before selecting the company or equipment in question since UNIDO necessarily

must choose the lowest technically acceptable proposal. If, therefore, the Government should not give its clearance or point to another source, UNIDO would not be able to act in accordance with the applicable rules.

5. The foregoing procedure does not exclude close cooperation between UNIDO and the competent authorities of the recipient Government, whether at the stage of formulating the project, establishing the technical specifications prior to inviting proposals or even in the course of the technical evaluation of the costed proposals. In the context of such cooperation there would, of course, not be any legal obstacle to arranging for a procedure that would set deadlines for when the recipient Government's views and requests should be transmitted to UNIDO.

22 October 1987

NOTES

[1]ST/SGB/132.

[2]IAEA document INFCIRC/335.

[3]IAEA document INFCIRC/336.

[4]Economic and Social Council resolution 2008(LX) of 14 May 1976, and General Assembly resolution 31/93 of 14 December 1976.

[5]See note by the Administrator (DP/107 of 7 April 1975).

[6]Revised text: United Nations, *Treaty Series*, vol. 828, p. 305.

[7]*International Legal Materials*, vol. 9, p. 978.

[8]48 CFR 27.300.

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

[10]General Assembly resolution 217 A(III).

[11]See PD/4/77, paras. 18-20.

[12]United Nations, Administrative Tribunal Judgement No. 252. In: *Judgements of the United Nations Administrative Tribunal, Numbers 231 to 300, 1978-1982* (United Nations publication, Sales No. E.83.X.1).

[13]*Juridical Yearbook, 1975*, p.161.

[14]Ibid., p. 186.

[15]We would incidentally note that it was clearly stated in the above-cited memorandum of 2 March 1979 that the "memorandum [of the Legal Counsel of 17 October 1969], of course, is relevant only to the question of assessment of staff members and military observers". With respect to collection by the United Nations of compensation for damage to property caused by military members of national contingents of peace-keeping forces, it was indicated, as follows, that settlement is made through the Government involved and that claims are normally presented only in cases of gross negligence:

> "Concerning claims against Governments contributing military contingents, it seems the United Nations policy is correctly stated in the *Reference Guide for Peace-keeping Forces*, paras. 5.7.6 on page A.24 . . . Normally, gross negligence would be required in order for the Office of Financial Services to be in a position to present an effective claim . . . "

The procedures for collection of compensation for damage caused to United Nations property by military members of national contingents are discussed in the above-cited legal opinion of 20 August 1975.

[16]A/9822, para. 21.

[17]ST/SGB/UNEF/1.

[18]ST/SGB/UNFICYP/1.

[19]A/9285, annex I.

[20]A/33/373.

[21]United Nations, *Treaty Series*, vol. 193, p. 135.

[22]*Ibid.*, vol. 1155, p. 331; also reproduced in *Juridical Yearbook, 1969*, p. 140.

[23]*Juridical Yearbook, 1976*, p. 159.

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

[25]Public Law 79-291.

[26]See *Judgements of the United Nations Administrative Tribunal, Numbers 231 to 300, 1978-1982* (United Nations publication, Sales No. E.83.X.1).

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

[28]Ibid., vol. 11, p. 11.

[29]Public Law 79-291; 22 U.S.C. Sec 288.

[30]668 F.2d 547 (D.C. Cir. 1981).

[31]628 F.2d 27, 35 (D.C. Cir. 1980).

[32]See also *Mendaro v. World Bank*, 717 F.2d 610 (D.C. Cir. 1983).

[33]No. 82-1267 (D.D.C. June 23, 1983).

[34]Cases Nos. 2-CA-21648 and 2-CA-21664.

[35]In another Ruling of 17 November 1986, the Regional Director dismissed on the same grounds a similar application in *Restaurant Associates Industries, Inc.* and *Commercial Management Services for the United Nations*, Case No. 2-CA-21879.

[36]See *National Detective Agencies*. 237 NLRB 451, fn. No. 1. On 31 December 1986, the General Counsel upheld, on the same grounds, the Ruling of the Regional Director of 17 November 1986 dismissing Case No. 2-CA-21879, supra, note 9.

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

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

[39]Ibid., vol. 1, p. 15.

[40]Ibid., vol. 1144, p. 213.

[41]Ibid., vol. 1, p. 15.

[42]Ibid.

[43]Ibid.

[44]Ibid., vol. 492, p. 57.

[45]Public Law 79-291.

[46]Public Law 80-357; United Nations, *Treaty Series*, vol. 11, p. 11.

[47]Public Law 86-778.

[48]26 U.S.C. secs. 1402(c) (2) (C); 3121(b) (15).

[49]A/6491, sect. II; A/6605, para. 35(a).

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

[51]Ibid.

[52]Ibid., vol. 11, p. 11.

[53]*Juridical Yearbook, 1975*, p. 87.

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

[55]Ibid., vol. 1, p. 15.

[56]Ibid., vol. 11, p. 11.

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

[58]Public Law 92-539; 86 STAT. 1070.

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

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

[61]*Yearbook of the International Law Commission, 1958*, vol. II (United Nations publication, Sales No. 58.V.1, vol. II), p. 96.

[62]*Juridical Yearbook, 1975*, p. 87.

[63]Document G.B. 238/22/5; 238th session of the Governing Body, November 1987.

[63]International Labour Council, 61st Session, 1976; Report V(1), p.12.

[64]Ibid., p. 163.

[65]Ibid., pp. 94-97.

[66]Ibid., 63rd Session, 1977; Report V(2), p. 46.

[67]Ibid., 64th Session, *Record of Proceedings*, p. 22/6.

[68]Ibid., 63rd Session, 1977, Report V(2), pp. 44-45.

[69]See Freedom of Association, *Digest of Decisions of the Freedom of Association Committee of the Governing Body of the ILO*, 2nd edition, ILO, 1976, paras. 243, 244, 245 on p. 92.

[70]Document G.B. 238/22/5; 238th session of the Governing Body, November 1987.

[71]Paragraph 76 of the Committee's report (ILO, *Safety in the use of asbestos*, Report IV(1), International Labour Conference, 72nd Session, Geneva (Geneva, 1986), p. 20).

[72]Point 24 of the proposed Conclusions and article 15 of the proposed Convention, ibid., p. 41.

[73]International Labour Conference, *Record of Proceedings*, 72nd Session, Geneva (Geneva 1986), p. 29/12, para. 93.

[74]Ibid., p. 29/27-28, paras. 286-291.

[75]Ibid., p. 28/4.